Dedicated

to the Dear and Revered Memory of Quaid-e-Millat Liaquat Ali Khan Pakistan's First Prime Minister and a Diligent Crusader and Valiant Martyr in her Cause as an expression of heart-felt Gratitude for what he and his Example has been to me and to men of my Generation

FUNDAMENTAL LAW OF PAKISTAN

Being an exposition and a critical review of the juridical, political and ideological implications of the Constitution of the Islamic Republic of Pakistan in the light of the Basic Principles of Comparative Constitutional Jurisprudence

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By

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Publications

PREFACE

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-of critical faculties in the study of philosophy is equ ...
-ence to authority is not antithetical to intellectual honesty, independence and courage

Now, there are two ways of introducing to the beginner the basic principles and the subject matter of any branch of legal learning the first, which may be called the *method of exposition*, consists in the presentation of the statement of law attempted by the author in his own words, supported wherever possible by reference to authorities , and, the second, which may be termed as the *case method*, consists in the presentation of the basic principles of a given branch of legal study, by means of a properly edited and suitably arranged series of judicial decisions wherein these basic principles are seen enunciated and applied to the facts and circumstances of the actual cases that have gone up before courts for their adjudication The second method is by far the better of the two for its application to the difficult task of teaching law to the student, results in atleast one clear advantage, namely, that it *enables the student to have access to an authentic statement of law in the very words that have been*

used by the learned Judges themselves ; and what is more, the student is thereby helped to see, for himself, the judicial method actually at work and thus made at first hand to understand and appreciate the way in which the principles of law are applied in the determination of controversies that come up to the courts.

In our country, however, the Constitution, which was enacted only a year and a half ago, is yet to be judicially interpreted and, such a body of judicial decisions as we actually do have, cannot very well be regarded in any sense as being sufficient for serving as the material in the light of which the application of the teaching of law by the case-method could be effectively invoked. We must therefore perforce await the advent of that day when the future commentator on our country's Constitution should have the necessary material presented to him by decisions rendered by our superior courts in regard to the interpretation of our Constitution in its various spheres of application. And as any one can see, some time must necessarily elapse before such an authentic commentary, based on authoritative decisions of our courts, could at all be made available to us. In the meanwhile, we must fall back upon the conventional method of presenting a concise statement of the constitutional law of our country by the application of the method of exposition referred to above.

In the pages that follow, however, an attempt has been made by the author to combine the method of critical exposition of the subject of 'Constitutional Law' with that of case-method ; and the author has, with this end in view, liberally drawn upon the decisions rendered by the United States Supreme Court, the House of Lords, the Judicial Committee of the Privy Council, the High Court of Australia, the Supreme Courts of Canada, India and the Federal Courts of India and Pakistan in an endeavour to borrow such light as is possible under the circumstances for the purpose of rendering plain the 'first principles' of our constitutional law and jurisprudence. These decisions, be it noted, have been appealed to by him not so much in the sense in which they could be regarded as 'infallible oracles' that must, anyhow, be obeyed in the matter of interpreting and applying the provisions of the Constitution of Pakistan, but as merely furnishing to our *statesmen, administrators, lawyers and judges* not only an important source of inspiration but also a welcome aid and assistance in the interpretation of our Constitution. The framers of our Constitution have themselves drawn considerably upon the experience in this field of those who have, before them, framed and worked the Constitutions of their own countries. And the present writer would venture to submit that it would be worse than being pretentious for any one in this Country to claim that there is anything so very *unique* or *original* about any dominant trait of our Constitution which would not be referrable to some constitutional experiment or precedent upon that point or which would not bear examination in the light of the judicial decisions rendered by the superior courts of countries that have the system of law and jurisprudence that is akin to our own. The debt that we in this country owe to our precursors in this field is so enormous that it would amount to an act of unpardonable ingratitude if anyone of us felt that members of our Constituent Assembly evolved the Constitution as if from an 'eternal nowhere' or that they were not guided by the insights and intuitions of those who have before them been the pioneers in the matter of securing an overall institutional development of the Art and Science of establishing and maintaining Constitutional Governments.

A far more difficult question, however, with which the author was confronted when he set out to expound the principles of constitutional law, was to make up his mind as how best to tackle this task of interpreting the Articles of the Constitution—in particular, the problem for him was to decide, whether he should like to comment on the Constitution, Article by Article (as has been done by some of the well known commentators of the fame of Durga Das Basu, the renowned commentator of the Constitution of India, and the almost omniscient and indefatigable authors of the All India Reporter's commentaries) or to

adopt the method of setting forth the principles of constitutional law topicwise and to advert to the consideration of the several Articles of the Constitution only, as and when, a treatment of any of them became necessary in the context of a general discussion on the fundamental questions of constitutional law He felt, however, that the latter approach would be more helpful to the students who are seeking legal education in the Law Colleges of his country And as this was to be a book primarily for the uninitiated and not for the 'advanced' constitutional lawyer, the author had no option but to abjure the comparatively easier task of commenting on the Constitution, Article by Article, in favour of a somewhat difficult and laborious undertaking involved in having to deal with the problem of expounding the principles of constitutional law topicwise

Besides, in the writer's considered opinion, the problem of discussing the principles of constitutional law cannot be scientifically tackled if one were to comment upon the Constitution, Article by Article Arrangement of Articles in a written constitution, itself, is not always scientifically conceived by its authors and as is well known some of the important principles of the Constitutional Law have no direct, clear and unambiguous reference to the text of the written Constitution at all in fact, the subject varies as hopelessly from Article to Article as it does in any dictionary of thought which follows the method of dealing with a given subject matter in terms of the alphabetical order of its principal 'words' and 'phrases' The book before the reader thus is not a commentary on the Articles of our Constitution in the conventional sense of that term Nor is it merely a book of reference The treatment of the principles of Constitutional Law, as also the interpretation of the text of our Constitution, have been inwardly
that account, be read from beginni
The book reflects a *total* view of Co
rative Constitutional Jurisprudence The author has dealt with the *basic* principles of constitutional jurisprudence and has endeavoured to present them to the students of that subject from different co ordinates of forensic thought—in fact, he returns to them over and over again in diverse parts of his book in order to enable the students to appreciate the fullness of their significance in the total scheme of *Comparative Constitutional Jurisprudence*

It was largely due to the desire on the part of the author to place before the young students appropriate material to enable them to think correctly about legal problems, that he has quoted copiously in this study, wherever he has deemed it relevant so to do, important quotations and extracts from authoritative legal works and decisions The intention all along has been to make the student *think* about legal principles and not to overwhelm him with the weight of authority or opinion Several points of view on fundamental questions of law have been presented in the very words of some of the greatest of our judges and jurists, so that the student might have the opportunity to assess for himself the relative validity of these conflicting opinions on almost indentical legal problems The book may well, from this point of view, be regarded as an aid towards the performance by the student of a 'conducted tour' in the immense pasture of legal literature

The delineation of the basic principles of constitutional law no doubt forms the chief object of the present study, but since the author of the present work is profoundly convinced that the Constitution of a country, as Woodrow Wilson used to say, "is not a mere lawyer's document but is in fact the vehicle of a nation's life", an effort has been made by him to present, (whenever the context has so demanded) a statement, be it even so sketchily, concerning the political and ideological implications of the Constitution of his country The students of Politics, of Current Affairs, of Sociology and of Religion would, the author fervently hopes, find interspersed here and there in the pages of this book, some observations which would, having regard to their specialised approach to the study of constitutional problems, form the principal point of interest for them

All over the modern world, it is increasingly being realised that law is a social

science; and further, that it cannot be studied properly if it is viewed in isolation from the many dimensional activity that is going on within the Modern State. Law, in its abstraction, at the most, represents but only a cross-section of the total life of the State: the economico-political forces of our time have brought home to us the conviction that law is inextricably woven into the very warp and woof of the entire fabric of our national life and cannot therefore be adequately studied in 'splendid isolation'. A Constitution may be a book primarily for a lawyer, but it would be a mistake to regard it as though it were his exclusive preserve: it is as much needed by the statesman, by the administrator, by the journalist, by the historian—nay, even by the man-in-the-street who, thanks to the right of adult franchise which has been recognised by our Constitution, has become, in this democratic set-up of ours, the last court of appeal for deciding the political and economical questions.

Let the man in the street then be educated. How else shall he know the power that now lies in his hands? And when he will have been educated and informed of the rights that have been guaranteed to him under the Constitution and realise the extent to which his voice has to be reckoned with in the making and unmaking of Governments, he will have become a fuller man—and a better man in the bargain. The awareness of the power that is his, will give to him, not pride, but humility; not indifference to the problems affecting the governance of his country, but a keen sense of political responsibility. The only way to work the Constitution successfully, according to the present writer, is to take steps to teach the voter the value of his vote and give to him the information which it is so necessary for him to have in order that he might exercise his right of vote intelligently and in the interest of the country. It is equally necessary that all the wielders of 'constituted authority', like the legislators, the administrators and the judicial officers, be made fully aware of the *limits of their power*, so that they may, in the exercise of their authority act, not only within the letter of the law of the Constitution but also in accordance with the spirit thereof. For there is such a thing, says Mr. Walter Lippmann, that famous Publicist, Philosopher and Sage of America, as 'Lawless legality' and this is often, according to him, "to be found where men deny that in making or interpreting law they are bound by the spirit of the law" (*See his Good Society*, p. 331).

The author hopes that this book will serve to promote the general purposes for which constitutional governments are founded and will contribute to that much understanding of the mandates and exhortations of our Constitution without which we cannot for long hope to have those minimum standards of law and order that the free society of men of good-will all over the Globe requires, in order to grow, expand, and evolve and heroically live for the realisation of the values that count.

And with a view to advancing these purposes the author has laboured towards the end that the cause of constitutional government and democracy should triumph and the institutions through which these values are realized and maintained, endure for all time to come, in this sacred land of ours, that is Pakistan.

A. K. Brohi.

24th December, 1957
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Pakistan.

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PART IV

The Federation

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In democracies of the most extreme type, there has arisen a false idea of freedom which is contradictory to the true interests of the states. For two principles are characteristic of democracy, the government of the majority and freedom. Men think that what is just is equal; and that equality is the supremacy of the popular will, and that freedom means the doing of what a man likes. In such democracies every one lives as he pleases . . . . But this is all wrong; men should not think it slavery to live according to the rule of the Constitution; for it is their salvation.

Aristotle

If men were angels, no government would be necessary. If angels were to govern men, neither external, nor internal controls on government would be necessary. In framing a government which is to be administered by men, the great difficulty lies in this; you must first enable the government to control the governed and in the next place oblige it to control itself.

Alexander Hamilton

If there be a country which cannot stand any one of these tests—

a country whose knowledge cannot be diffused without perils of mob law and statute law;
where speech is not free;
where the post office is violated, mail bags opened, and letters tampered with;
where public debts and private debts outside of the state are repudiated;
where liberty is attacked in the primary institution of social life...
where the laborer is not secured in the earnings of his own hand;
where suffrage is not free or equal

—that country, is, in all these respects, not civil, but barbarous; and no advantage of soil, climate, or coast can resist these suicidal mischiefs.

Ralph Waldo Emerson

I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpation.

James Madison

CONSTITUTION AND THE LAW OF THE CONSTITUTION

1 The Concept of Constitutional Law—an attempt at provisional definition

What is meant by "Fundamental" or "Constitutional' law? How is this branch of law related to the *corpus juris* of a country? These and such other questions bring to the forefront the problem of determining the province of our study

If, following the Socratic method of working out a definition of the term that one is to employ in the course of an ar
which "Constitutional Law
that feature or quality whicl
from truth if we offered the following as a provisional definition Constitutional Law is that branch of Public Law which deals with questions relating to the legal character of the State, describes the power relations that subsist between the several organs of its sovereign power, and sets forth its morphology, its structural peculiarities and the principles of its inner dynamism growth and movement

The coercive power of the State reflects itself in the sanctions it provides for the re cognition and enforcement of certain class of claims and interests, and such of the claims and interests it recognises and enforces become, by reason of such recognition and en forcement alone ' rights It is another way of describing the same legal phenomenon when we following Dr Holland regard a right as a *capacity* residing in one man of controlling with the assent and assistance of the State the action of another Where these rights are enforceable by one citizen against another the net work of legal relations with reference to which this becomes possible could compendiously be characterised as the domain of private law And as opposed to this is the sphere of the public law, which consists of the rules with reference to which the *State* asserts certain rights against the citizens and permits them in turn to exercise certain rights against itself Public and Private law

The subject matter of constitutional law is thus practically indistinguishable from and may be regarded as in a significant sense, being practically co extensive with the total realm of law concerning (a) the institutional set up of the Government of a country, and (b) the relationships which the Constitution describes as subsisting between different component parts of the Government machinery

The power of the State, apart from the notional fiction that it is vested in a juristic personality called the 'State", can only be exercised by certain number of persons or certain group of persons *For the purposes of constitutional law, it is customary to refer* to these persons or group of persons that exert the power of the State, as being the agents or organs of the sovereign power All those who take part in the working of the State machinery in this sense, are found continually engaged ' in making or changing of the laws by which rights are created and protected, in the maintenance of order and settled rules of conduct within the community, in preserving its independence or representing it in its dealings with other communities" *The connection and relations of these persons form* the ' Constitution of a Country" (See Anson's Law and the Custom of the Constitution, Second Ed Vol I, page 3).

The *law* of the Constitution refers us to that body of rules *which courts of law recognise and enforce for the purpose of defining the relationship between the various organs of the sovereign power inter se, as also the relationship of State to the individual* Law and the Conventions of the Constitution

Over and above the *law* of the *Constitution*, is invariably to be found a set of rules,

rules which are habitually obeyed by those who are concerned in the administration of public affairs, and these are called the *conventions* of the Constitution or, what comes to the same thing, the political understandings—and they form the hard core of the ethics of constitutional behaviour or constitutional morality.

These conventions of the Constitution *germinate* and *grow* in response to the changing needs of the body-politic of a country and reflect the measure of advance which the 'practice' must make over 'theory' in the matter of working the political institutions of any country. The actual study of the constitutional processes that are found to be at work in the body politic of a country would exhibit this radical difference between *what is required by law to be done, on the one hand, and what actually is being done in obedience to some settled rules of practice, on the other.* For instance, in America, where there is in existence a *written* Constitution, the whole machinery of presidential election to be found in actual practice would appear to have departed substantially from what its methodology and technique should be as required under the constitutional document. The same could be said about the transformation of the official status of the Senate which started unostentatiously as a Council of Delegates whose duties were mainly executive but has now become a Chamber entrusted with important powers ; so that they "virtually act as critics and moderators of the action of the House of Representatives." The conventions of the English Constitution, (which is an unwritten constitution) have similarly brought about a considerable hiatus between the actual working of the machinery of English Government and what one would expect it to be in the strict theory of the English constitutional law. The most important office-holder under English constitutional set-up is the Prime Minister who is the Head of the Cabinet. But a student, who sets out to discover the constitutional basis of that office, would hardly come across any clear indication in any English statute or judicial decision as to how the Prime Minister has come to occupy the important position he does within the framework of English Constitution. The earliest mention of the word "Prime Minister" in any English Statute would be found in the one of the year 1917 when the Chequer's Trust was constituted, but there too, no information whatever is to be had about the role he plays in the scheme of English Constitutional Law.

Study of Constitution raises complicated questions.

Thus the study of the Constitution of a country involves an understanding, not only of the basic statutes, or legal decisions that have a bearing upon the mode in which, under the strict theory of the law, the sovereign power within the State is distributed and exercised, but it also demands a careful observation of and reflection upon, the actual course of conduct of the various organs and authorities of sovereign power in an attempt to be able to discover how, as a matter of fact, the business of running the administration of a country is being carried on. The task that confronts any one, who means to set forth systematically the essentials of constitutional law is, therefore, one of unusual difficulty—and indeed here, the difficulties to be encountered are far more than are involved in the study of the rules of ordinary law, in regard to which, in the lines ascribed to Tennyson, the poet would have us believe in

"The lawless science of our law
That codeless myriad of precedent
That wilderness of single instances."

2. Written Constitution and Constitutional law.

It is often uncritically assumed, however, that a writer on the subject of constitutional law is spared the necessity of expounding the true 'nature' and 'scope' of that law, if he be so fortunate as to deal with a '*written*' Constitution. It is said that such a one cannot justifiably complain, as did Professor A.V. Dicey, the celebrated English Constitutional Lawyer, in

his treatise on *Introduction to the Study of the Law of the Constitution*, of the legal intricacies involved in the unfolding of the proper scope of the Law of the Constitution of a country, like England, which does not possess a 'documentary' Constitution

"Whatever may be the advantages of a so called '*unwritten*' Constitution", says Professor Dicey, "its existence imposes special difficulties on teachers bound to expound its provisions Any one will see that this is so who compares for a moment the position of writers, such as Kent or Story, who commented on the Constitution of America, with the situation of any person who undertakes to give instruction in the Constitutional Law of England" (p 4)

And after commenting upon the comparative precision of the Fundamental Law of the Constitution, where written 'instruments' are involved, as in the case of the articles of the Constitution of the United States, he proceeds further to observe

"This Law (be it noted) is made and can only be altered or repealed in a way different *from the method by which other enactments are made or altered*, it *stands forth*, therefore, as a separate subject for study, it deals with legislature, the executive, and the judiciary, and, by its provisions for its own amendment, indirectly defines the body in which resides the legislative sovereignty of the United States Story and Kent therefore knew with precision the nature and limits of the department of law on which they intended to comment, they knew also what was the method required for the treatment of their topic Their task as commentators on the Constitution was in kind exactly similar to the task of commenting on any other branch of American Jurisprudence The American Lawyer has to ascertain the meaning of the articles of the Constitution in the same way in which he tries to elicit the meaning of any other enactment He must be guided by the rules of grammar, by his knowledge of the Common Law, by the light (occasionally) thrown on American Legislation by American history, and by the conclusions to be deduced from a careful study of judicial decisions The task, in short, which lay before the *great American commentators was the explanation of a definite legal document in accord*ance with the received canons of legal interpretation" (p 5)

And as contrasted from the relatively easy task that lies ahead of any commentator who sets out to expound the meaning of a written Constitution, Dicey describes the difficult predicament of the English Constitutional theorist as follows

"He may search the Statute Book from beginning to end, but he will find no enactment which purports to contain the articles of the Constitution, he will not possess any test by which to discriminate laws which are Constitutional or Fundamental from ordinary enactments, he will discover that the very term 'Constitutional Law', which is not (unless my memory deceives me) ever employed by Blackstone, is of comparatively modern origin, and in short, that before commenting on the Law of the Constitution he must make up his mind what is the nature and the extent of English Constitutional Law" (*cf Law of the Constitution p* 6)

3. The task of explaining the Articles of a written Constitution is by no means simple

… of the foregoing comment of Professor Dicey, concern … onal Law of a country … roblems which confront a student of a 'written' Constitution are by no means simple, and further that they do present difficulties that are peculiar to the logic of a written Constitution

The truth of this remark can best be appreciated if the constitutional developments of countries having a written Constitution (like the U S A , Canada, Australia, etc) are

rules which are habitually obeyed by those who are concerned in the administration of public affairs, and these are called the *conventions* of the Constitution or, what comes to the same thing, the political understandings—and they form the hard core of the ethics of constitutional behaviour or constitutional morality.

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titutional Law In the generally accepted use of the term it means the rules which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions These rules consist both of legal rules in the strict sense and of usages, commonly called conventions, which without being enacted are accepted as binding by all who are concerned in government" (p 2 of E S C Wade & G Godfrey Phillips '*Constitutional Law*'—*5th Ed*)

It is a noteworthy feature of this attempt at the definition of "Constitutional Law"

about the English Constitution since there is no available means of finding out what are the *Constitutional* and what are the *ordinary Laws* in England From the purely legal stand point, it is impossible to specify which Rules, Procedures, and Institutions are part of the Constitution and which are not, and a Constitutional Lawyer, reasoning merely from legal assumptions, *can never satisfactorily explain the nature of the constitution and its function* That is why a French writer de Tocqueville, has said that because of the legal supremacy of the Parliament—which is the corner stone of the political system of England—*there is in reality no constitution at all* (*Alexis de Tocqueville, Democracy in America, Part I, Chapt* 6, *p* 103 *Tr by Henry Reude, (New York* 7 & *H G Laughley*, 1841)

Some constitutional Enactments

Certain important enactments of Parliament are supposed to tell us at least a part of the story of what the Law of the Constitution in England is like of these principal Constitutional Statutes, mention may be made of the following

(a) *Magna Charta*, 1215, *(which marks the beginning of representative Government in England,)*
(b) *The Petition of Rights*, 1628, 3 *CAR* 1, *C I*,
(c) *The Bill of Rights*, 1689,
(d) *Act of Settlement*, 1701,
(e) *Colonial Laws Validity Act*, 1865,
(f) *Parliament Acts of* 1911, *and* 1949
(g) *Emergency Powers Act*, 1920,
(h) *Supreme Court of Judicature Act*, 1925
(i) *Statute of Westminster*, 1931,
(j) *Public Order Act*, 1936
(k) *Ministers of the Crown Act*, 1937,
(l) *The Crown Proceedings Act* 1947,
(m) *British Nationality Act*, 1948,
(n) *Representation of the People Act*, 1949

But even a close study of these Acts, however, would not give any clear idea as to the kind of Government which is in existence in England These statutes could be said to furnish an *important source of the Constitutional Law of England*—but why they must be characterised as important or principal Constitutional Statutes is a question which can never be answered satisfactorily in terms of any well defined principle

Views of Professor Maitland stated

Professor Maitland, in the course of his lectures on the *Constitutional History of England*, (*Cambridge University Press*, 1948), discusses the problem of the definition of Constitutional Law at the very end of his lectures only because it seemed to him that he could not profitably define a department of Law for his students until they knew a good deal of its contents "The phrase, Constitutional Law', he remarks, "is of course a very common phrase, but

it is not a technical phrase of English law. I am not aware that it has ever been used in the statute book or that any Judge has ever set himself to define it. If we had a code which called itself a code of constitutional law, then the definition might be a matter of authority, it would be thrust upon us by the legislature; but we have nothing of the sort, and are therefore free to consider what definition would be convenient and conformable to the ordinary usage of the term." (*p.* 527).

Difficulty of working out a satisfactory Definition of Constitutional Law—illustrations from Austin and Holland.

In order to demonstrate the utter impossibility of the formulation of a satisfactory definition of Constitutional Law, Professor Maitland took *two samples* by way of illustration from the writings of English Lawyers, and these were from *Austin* and Professor Holland: with regard to the views of the first writer on the nature and scope of constitutional law, he rightly complained that his definition of it was *too narrow* (for it excluded numerous legal rules and usages which, in the ordinary sense of that term, were covered by that concept); and with regard to the views of Professor Holland, he pointed out that instead of giving us a *definition* of Constitutional Law he had only *described some kinds of rules which, in that author's judgment, appropriately fell within the domain of constitutional law.*

Austin's Approach to the concept of Constitutional law.

Austin in his 'Outline of the Course of Lectures on *Jurisprudence* (*ed.* 1873, *Vol.* 1, *p.* 73), divides '*public law*' (which, according to him, deals with law of '*political conditions*'), into '*constitutional law*' and '*administrative law*'. '*Administrative law*', according to him, "determines the ends and modes to and in which the sovereign powers shall be exercised", and the object of the constitutional law, according to him, is to define the sovereign. *The constitutional law*, according to him, determines the persons or the classes of persons who shall bear the sovereign powers; it determines furthermore the mode wherein those persons shall share those powers. According to *Austin*, sovereignty in England is placed in the King, Lords and electors. He refused to acknowledge the 'commons' as representing any part of Sovereignty, saying that they were merely the *delegates of the electors*, and "the sovereignty vested not in the representatives but in those whom they represented."

As to this mode of thinking about the scope of constitutional law of England, it would be observed that there would undoubtedly be a great deal of what is ordinarily understood by the term "constitutional law" which would have to be excluded from the definition offered of that term by *Austin*. "To take one instance", says Professor Maitland, "the question whether the King has power to tax without the consent of Parliament would be very generally treated as a grave and typical question of constitutional law, but it does not fall within Austin's definition; it might be admitted that the sovereign power was possessed by King and Parliament, or by King, Lords and electors in certain shares, and yet the question would be possible whether law gave the King a power of imposing customs duties." (*p.* 531).

Professor Holland's attitude to the concept of Constitutional law.

So far as Professor Holland is concerned, he, to begin with, divides *law* into '*public* and '*private*', and he further subdivides public law into six departments, the first of which he calls '*constitutional*' and the second '*administrative*'. The primary function of constitutional law is "to ascertain the political centre of gravity of any given state". (See his *Jurisprudence*, 12 *Ed.*, p. 370). It announces in what portion of the whole is to be found the 'internal sovereignty'. "The definition of sovereign power in a state necessarily leads to the consideration of its component parts. The distinction between Legislative, Executive, and Judicial functions is as old as *Aristotle*, but it was left for Montesquieu to point out the importance of these several functions being discharged by distinct group of persons. With reference to all these questions Constitutional Law enters into minute detail. It prescribes the order of succession to the throne, or, in a Republic, the mode of electing a President. It provides for the continuity of the executive power. It enumerates the '*prerogatives*' of the King or other chief magistrate. It regulates the composition of the Council of State, and

of the Upper and Lower Houses of the Assembly, when the Assembly is thus divided, the mode in which a seat is acquired in the Upper House, whether by succession, nomination, [illegible]

their respective spheres of action, the government offices and their organization, the armed forces of the State, their control and the mode in which they are recruited, the relation, if any, between Church and State, the Judges and their immunities, their power, if any, of disallowing as unconstitutional acts of non sovereign legislative bodies, local self government, the relations between the mother country and its colonies and dependencies It describes the portions of the earth's surface over which the sovereignty of the State extends, and defines the persons who are subject to its authority It comprises, therefore, rules for the ascertainment of nationality, and for regulating the acquisition of a new nationality by '*naturalization*' It declares the rights of the state over its subjects in respect of their liability to military conscription, to serve as jurymen and otherwise " (*pp* 370—372)

Professor Maitland does not regard this as a *definition* of constitutional law but only *an enumeration of its particulars* Similarly, *Professor Holland's* distinction between constitutional law as dealing with structure, and administrative law as dealing with function, is equally arbitrary and hardly fits in with the accepted notions of what those expressions stand for Constitutional Law deals not only with the *structure* of the sovereign power but also with the structure of inferior bodies possessing legal powers of the central or local government, and this can hardly be comprehended without some reference to the functions of the several organs into which the sovereign power is distributed It is for these reasons that Professor Maitland says that the distinction between constitutional law and other species of law in the English system is one, not of logic but of '*convenience*' "I do not think", says he, "that we have any theory about it (i e constitutional law) which can claim to be called orthodox I think that *Austin's* definition is decidedly *too narrow* I think that Professor Holland's description is fairly conformable to our ordinary usage, but that the line between the constitutional and the administrative departments is one which it is very hard to draw" (See Professor Maitland's *Constitutional History of England p* 536)

Maitland's Criticism of Holland and Austin approach stated.

5. Idea of the Fundamental Law of Pakistan

The Fundamental Law of Pakistan is contained in the written constitutional document which was finally adopted by the Constituent Assembly on 29th of February, 1956, and which received (as required by *S* 6 *of the Indian Independence Act*, 1947) the assent of the Governor General on 2nd of March, 1956, and which came into force on the midnight of the 23rd of March 1956, i e, on the date which is described by the Constitution as the 'Constitution Day (See ARTs 218, 220)

But even this document is not a complete Code indicative of what the Law of the Constitution is at best it could be described as an *important source* of the law of our Constitution The Constitution itself contains a warrant that the provisions of the General Clauses Act, 1897, unless the context otherwise requires, shall apply to the interpretation of the Constitution in the same way as it applies to the interpretation of a Central Act, as if the Constitution were a Central Act (*See ART 219*). *It also, for instance, in effect, refers* us to the *Citizenship Act of Pakistan* for the interpretation of the term 'Citizen' used by it (See *ART* 218, wherein the definition of that term as also of the expression 'Citizen of Pakistan' is given as meaning "a person who is a citizen of Pakistan according to the law relating to Citizenship" For the text of these two Acts see Appendix, pp 859 876)

But quite apart from reference to these laws that exist outside the Constitution, there

would be a considerable bulk of its provisions which could be properly understood and applied only if we knew the historical background which led to the formulation of the Articles of the Constitution or the political or constitutional principles responsible for the adoption of its scheme or the improvisation of the structure of the principal organs of the sovereign Power within the State. This is so because, in itself, the text of the Constitution contains only a bare statement of those aspects of the question relating to the establishment of Government as have been considered essential.

No written Constitution can possibly give an exhaustive statement of the principles that underlie the operation of the governmental machinery established by it. Every Constitution is designed to be applied to the problems posed by the day-to-day administration of a given country, and it is not possible to *work* any written Constitution unless "we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government" (Chief Justice *Stone in United States v. Classic, (1941) 313 U.S. 299)*. In fact no constitutional instrument can provide a solution for all conceivable situations that are likely to arise in the matter of securing the governance of a country: all it can hope to do is to indicate the rugged and bold outline of a scheme concerning the distribution of the sovereign Power within the State.

6. Provisional Definition offered

The Law of our Constitution may thus be defined as that body or set of rules which the *Courts of Law apply* in the determination of questions relating to the interpretation and application of the provisions of our Constitution.

The definition is valid even in respect of those cases where, upon a constitutional problem being presented to a Court of Law for its adjudication, a problem for the resolution of which there is no direct, affirmative or clear provision in the Constitution, the Court of Law proceeds to declare the rule of Law that it would apply thereto—for even the declaration that there is no rule to apply to such a specific situation is virtually to apply a rule and thus determine the rights and liabilities of the parties and thereby set the controversy at rest. It was for this reason that former Chief Justice Hughes of America, when he was Governor of New York, said, "We are under a Constitution, but the Constitution is what the *Judges* say it is . . ." Of course, even the Judges, as will be argued later, have no unbridled power to say what the Constitution is—for *Judicial* power like the *Executive* or *Legislative* power is itself the creature of and is, therefore, subordinate to and regulated by, the Constitution and the Law. But there is a great deal of truth in the remark of the Judge-Governor just quoted and this would become apparent when we come to deal with the doctrine of Judicial Review.

Nature of the Principles and Rules that Courts apply to the interpretation of our Constitution.

Now what these rules relating to the interpretation or construction of our Constitution are, could only be discussed *in the light of the principles of Constitutional Jurisprudence*. These rules have a close connection with the leading features or the chief characteristics of our Constitution. For instance, our Constitution :

(a) recognises the Supremacy of Law, for it establishes Government by the Law and not of men ;

(b) distributes the Sovereign Power in accordance with the Federal Principle between the National Government and the Provinces ;

(c) establishes the Parliamentary Form of Democratic Government, as opposed to the Presidential pattern of Democratic government ;

(d) consigns to the courts of the country the power to interpret the Constitution and

thus in effect upholds the doctrine of judicial review as opposed to the principle of comparative Supremacy of the Legislative Will ;

(e) enumerates the Fundamental Rights of Citizens and non Citizens resident within the territory of Pakistan, and thereby declares the rights which cannot be abridged or taken away by means of the ordinary administrative, executive or legislative process ,

(f) recounts the manifesto of National Policy in the Chapter relating to the "Directive Principles of State Policy" as also sets forth the ideological basis of our State (See Chapter relating to *Islamic Provisions* in Part XII etc)

All these leading characteristics of our Constitution cannot, it is obvious, be discussed as if in a splendid isolation They have to be seen in the light of the essential principles of comparative Constitutional Jurisprudence before their significance can be perceived and the provisions of our Constitution in which they have been set forth can be intelligently applied to the concrete situations posed by the day to day administration and governance of our Country

7. Nature and Purpose of written Constitutions

As a preface to the Study of Pakistan's Constitution, it is necessary that a few general observations on *the Nature and Purpose of Constitution* be made in an effort to set forth the perspective in which their pragmatic relevance and legal significance can be appreciated

In his *The Rights of Man*, which is one of the greatest books on Political Philosophy of the Eighteenth Century, and in the third chapter of Part II, Thomas Paine writes about the Old and

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says, "All power exercised over a Nation must have some beginning It must either be delegated or assumed All delegated power is *trust*, and all assumed power is *usurpation* "

Observations of Thomas Paine Difference between the Old and New concept of "Government"

This fundamental difference to which Thomas Paine refers can be expressed in another way · the old system of government was based on *domination* by the strong over the weak, whereas the modern system is (at least professedly) based on the idea of Government based on the *consent* of the governed The ruling Philosophy of our time teaches us to believe that sovereignty lies with the people A Constitution is the act of the People, of *the Nation and not that of Government It is Constitution that gives power to Government*—and also sets bounds to its authority by imposing well defined restraints Constitution is a device to make the *exercise* of political power directly or indirectly responsible to the People or the Nation The highest manifestation of this principle is to be found in the *idea of the Republic* " What is called a Republic", says Paine, "is not any particular form of Government It is wholly characteristic of the purport, matter or object for which Government ought to be instituted, and on which it is to be employed *Res Publica*, the public affairs, or the public good, or, literally translated, the *public*

Government by consent of those who are to be governed

Paine on the Idea of Republic"

A sovereign People wishing to establish the conditions in accordance with which political power should be exercised and the processes by resort to which public welfare should be secured and promoted "through an undefined and expanding future", could

Written Constitution as a compact embodying the 'Consent' of

not do any better than what the Founding Fathers did in enshrining the will of the people in [illegible] they met in the *Philadelphia Federal Convention of 1787*—that is, to draw up a charter of their Government, imposing a system of 'checks and balances' to regulate the exercise of political power. A constitution thus drawn up, in effect, says to those organs of Government it itself sets up to secure and promote Public Welfare, "Thus far shalt you go and no further". "If need be", say the People whose will is enshrined in the Constitution, "come to us and we will, if necessary, reconsider and revise our opinion and grant you more powers and redefine the limits under which the several organs and authorities established by us to exercise political power within the State shall thereafter operate." It is thus to the *People*, the Constituent Power, and not to Government, that the right to amend the Constitution belongs.

This idea of Government as an instrument of the National Will was revolutionary indeed! The idea that the exercise of all political power is a *trust*, *too was revolutionary*. From the concept of Government by the Divine Right of Kings, to that of the Government based on the fundamental and inviolable rights of Man, is a long leap in History: between the demoralising relationship involved in the correlates 'Kings & his Subjects' and the edifying idea of everyone having the status of a citizen of the State and of therefore being equal before law and entitled to the equal protection of the law, lie centuries of tyranny and exertion of arbitrary power, under the weight of which mankind has had to suffer [illegible].

Thomas Paine sums up the position of this 'general advance', this transition from the old to the new conception of Government, *in words that cannot be improved upon*:

"When we survey the wretched condition of Man, under the monarchical and hereditary systems of Government, dragged from his home by one power, or driven by another, and impoverished by taxes more than by enemies, it becomes evident that those systems are bad, and that a general Revolution in the principle and construction of Governments is necessary. What is Government more than the management of the affairs of a Nation? It is not, and from its nature cannot be, the property of any particular man or family, but of the whole community, at whose expense it is supported; and though by force and contrivance it has been usurped into an inheritance, the usurpation cannot alter the *right of things*. Sovereignty, as a matter of right, appertains to the Nation only, and not to any individual; and a Nation has at *all* times an inherent, indefeasible right to abolish any *form* of Government it finds inconvenient, and to establish such as accords with its interest, disposition, and happiness. The romantic and barbarous distinction of men into *Kings and Subjects*, though it may suit the conditions of courtiers, cannot that of Citizens; and is exploded by the principle upon which Governments are now founded. Every Citizen is a member of the sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can be only to the laws.

"When men think of what Government is, they must necessarily suppose it to possess a knowledge of all the objects and matters upon which its authority is to be exercised. In this view of Government, the Republican system, as established by America and France, operates to embrace the whole of a Nation; and the knowledge necessary to the interest of all the parts, is to be found in the centre, which the parts by representation form; but the old Governments are on a construction that excludes knowledge as well as happiness; Government by monks, who know nothing of the world beyond the walls of a convent, is as inconsistent as Government by Kings.

"What we formerly called *Revolutions*, were little more than *a change of persons, or an alteration of local circumstances*. They rose and fell like things of course, and had

nothing in their existence or their fate that could influence beyond the spot that produced them But what we now see in the world, from the Revolutions of America and France, are a renovation of the natural order of things, a system of principles as universal as truth and the existence of man, and combining moral with political happiness and national prosperity

"I Men are born, and always continue, free and equal in respect of their rights Civil distinctions, therefore, can be founded only on public utility Basic Principles

II The end of all political associations is the preservation of the natural and imprescriptible rights of man, and these rights are liberty, property, security and resistance of oppression

III The Nation is essentially the source of all sovereignty, nor can *Any Individual, or Any Body of Men,* be entitled to any authority which is not expressly derived from it " (*The Rights of Man pp* 134 135)

8 Historical Review of the emergence of "Constitutional Government"

The era of Constitutional Governments begins towards the close of the eighteenth century, and the American Declaration of Independence (*July* 4, 1776) is the first of the series of those important steps that were taken to lay its foundations and to fortify its institutions The American example inspired the French National Assembly, and the contagion spread throughout the Americas, Continental Europe, Australia, South Africa and somewhat later but equally effectively, to the Orient In the bare course of a hundred and eighty years, the wave of republican influence has practically girdled up the whole planet And this *trust* which men repose in written Constitutional Documents, this faith in the power of words engraved on parchments to limit the power of the power applying organs within the 'State', may well be regarded as the tribute we pay to this most important political invention of the recent past From all indications it seems Constitutionalism has come to stay, and even the Marxians, who otherwise profess their allegiance to *Revolution and therefore to unconstitutionalism*, as can be seen in their scriptures from the Communist Manifesto down the present day Russian and Chinese Constitutions, have provided us with unimpeachable evidence of the fact that *even they have found the written word to be the most potent means of setting forth not only their political goals but also the structure and scheme of their Constitutional processes in the form of exact and enduring language*

If Society is to be conceived as the result of a compact after the manner of *Rousseau's Contrat Social*, a written Constitution, which is to embody the Law for Government, could be regarded in reality as representing a significant change, from a convenient metaphor and a useful fiction to a real covenant Hitherto, the parchment had contained the Decrees of the Kings, and even the history of the English people's crusade to wrest some rights from their despotic Stuart Kings, shows up to us the use of expressions like *Petition of Rights, etc* as if to suggest that these rights were *conferred* and *vouchsafed* by a benign and benevolent Power and not *declared* as natural and inalienable *Rights of Man* The truth of the matter is that "All men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their *just* Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute Written Constitution as a 'real covenant"

People and cannot be suffered to interfere with their inalienable Rights. "It is not enough", said *Condercet*, "that the rights of man should be written in the books of the Philosophers and in the hearts of virtuous men, it is necessary that the ignorant or weak men should read them in the example of a great people; America has given us this example. The act which declares its independence is a simple and sublime exposition of those rights so sacred and so long forgotten." (*Oeuvres VIII, (II)*, quoted in *Becker*, *The Declaration of Independence*, pp. 230-231).

9. Written and unwritten Constitution—compared.

In the first place, it ought to be realised that whereas it is possible for a people to choose to be governed under a written Constitution, no such choice could be said to underlie the *adoption* of the unwritten type. The latter type of Constitution has steadily evolved—unwritten Constitutions have not been *adopted*: they have not been made.

The emergence of written Constitutions like those of the U.S.A. or of France was preceded by the rejection of monarchical form of Government. They were the off-spring of tragic upheavals, not of Bloodless Revolutions. The People, who wrested power, wished to set up the Republican form of Government, and the only way to do this was to reduce to writing the compact representing the mode in which the exercise of the Sovereign Power within the State was to be regulated.

Importance of written Constitution in a Federal Polity.

In the case of a Federal Government the necessity to adopt a written Constitution is practically unavoidable. It is of the essence of Federation that the power should be distributed between the 'regional' and 'national' Governments and further, this partitioning of the sovereign power must be achieved in such a manner that each Government is confined to the sphere of its allotted jurisdiction. This cannot be achieved unless the actual limits of the authority of each Government are reduced to writing and some technique is designed to keep in check the natural inclination and propensity of each Government to trespass upon the field of authority reserved to the other. The only way to limit the power of Government is to set bounds to it by means of a written word.

Virtues of a written Constitution offset against its rigidity and the difficulties of interpretation of the written word.

The main virtues of a written Constitution, namely, its concise formulation of the limits of Governmental power, its availability to every one who cares to know what those limits are, are often set-off against, what has been regarded by its detractors, as the chief reproach against it, viz. its rigidity and the difficulties inherent in the interpretation of a written word. When you want to *change* the Written Constitution in order to keep pace with the changing conditions of Society, the change cannot be easily effected because of the relative difficulty of securing compliance with the requirements of the special amendment procedure. As to the difficulty involved in the interpretation of a written word, "It (i.e., the written Constitution)", says Walton H. Hamilton,

> "is not a self-regulating mechanism which automatically holds official conduct to conformity with its lines. An instrument which sets up a government of laws and not of men begins with compromise in its need for interpretation. Its compulsions lie not in what is written down but in what is read from the parchment. The office of construing the text, which the Supreme Court holds by self-appointment, is beset by hazards. Words have no true and natural meaning; verbal currency passes uncertainly between different generations. An intent packed away in stately phrases may be lost; principles may be drawn out of a document which were never stored there. The justices of the highest Court do not of necessity embody the law. They are men of acumen, knowledge, reason, unlike one to another; even in resolving constitutional issues they behave like human beings. In the endless process of the finding

out of meaning the vote of the odd man counts for more than insight into the true meaning of a phrase

"In the procedure questions of policy become issues of Constitutionalism The validity or the nullity of legislative acts contrived to meet the needs of a great industrial society depends upon the manifest intentions of the distant authors of the covenant The test runs in terms of jurisdiction, powers and processes of law, the existence of the evil and the appropriateness of the remedy are considered only as they fit into the formula or as justices allow their minds to stray from legal law

"Yet in matching statutes against the organic law many ingredients unknown to its authors get drawn into the construction Justices make use of the common law, as it is understood, to clear up ambiguities They draw upon the previous decisions of the Court to bridge the gap between novel issues and ancient verbiage They sometimes listen to plausible rules made up by ingenious attorneys and set them down as constitutional principles As men of experience and opinion they never escape the light of their own understanding The less sophisticated often believe their own preferences are to be found plainly written in the constitution, the wiser ones frequently make up arguments which march straight to their chosen conclusions The "let's pretend", with its submission of current issues to the judgment of the Fathers, imparts to the process of interpretation aspects of an ordeal at law" (See *Article on Constitutionalism* in *Encyclopaedia of the Social Sciences, Vol IV, pp* 256 257, *Edition*, 1949)

But the Criticism of Written Constitution is based on a misconception of its real significance

But it is submitted with respect, that the foregoing criticism misses the mark since the *written* word must be *interpreted* in order to be applied, it is but natural, human language being what it is, that much of the certainty of law is in effect abandoned at the altar of the relativity involved in the judicial interpretation of legislative enactments Thus, this reproach can equally be urged against the whole institution of codified law, and it may, with equal justification, be extended to denounce all forms of literature as being the parents of confusion rather than of clarity And so following Aristotle must we not remind ourselves that, what can be urged against all need not be urged against any—for such a sweeping criticism ultimately defeats itself But the criticism, as the author of the passage just quoted himself remarks is "directed rather at the judgments of the Courts than at the provisions of the Charter" If the question is one of making a choice between the written and unwritten Constitution, the problem could hardly be said to have been properly tackled if what could be urged against the whole system of written Law were urged against the written Constitution The English Lawyers, curiously enough, prefer their "unwritten" Constitution precisely because they are suspicious of the value of the method *of employing the written word to express the Will of the Sovereign* "The prejudice against Statutes", says C K Allen, "of which Judges trained in the Common Law are often accused, is not merely captious, it springs from the conviction, based on long experience that a sound and vigorous rule or principle once imprisoned within the formula of words is like Gulliver bound by the Lilliputians Thus many Constitutional Lawyers would agree that an enactment like the Statute of Westminster has complicated rather than clarified relations with the British Commonwealth and it is for the same reason that English Lawyers, observing the complexities which have risen out of the written or rigid Codes, obstinately prefer their own vague and amorphous Constitution the chief merit of which, as a French observer has said, is that *elle n'existe pas*" (p 420 *Law in the Making Ed* 1939)

C K Allen on 'English Prejudice against Written Statutes'

But it is contended with respect, that a Constitution does not become clear for

of the Constitution easy of amendment. But it cannot, on the premises of this criticism, be validly said that the written constitutions ought to be abandoned in favour of an unwritten one ?

Paradox to which a written Constitution is no proof.

And it is on this account that Walton H. Hamilton himself poses the paradox to which a written Constitution as a purposive device is no proof. (In his Article on "Constitutionalism" in Encyclopaedia of Social Sciences (Vol. IV, p. 255) our Author says:

Judicial interpretation in accordance with the written law.

"As a purposive device, the Constitution has not been proof against paradox. Men write their words into formulas and time and chance play upon them. A supreme law is invented to guard the rights of a people against an unpopular Government. The scroll is written, the Government becomes popular, the judiciary proclaims itself interpreter—and divine right is replaced by the sovereignty of the robe. It is set down that the great offices in the new republic are to be filled with the wise and good, chosen by select men; there is formal amendment, the rise of political parties, the growth of strange customs—and the aristocratic provisions of the Constitution become democratic. An abracadabra is provided to make the people secure in their persons and property against arbitrary acts of an untrusted officialdom; corporations become persons, vested interests are accounted property, social legislation appears a deprivation, due process becomes a standard of judicial review—and the democratic provisions of the constitution become aristocratic. A society which thinks in static terms of political perfection contrives the best Government it can and safeguards it with a rigid amendment clause; a society which talks in the dynamic terms of progress finds the provision a formidable obstacle to political adaptation. If the Court cannot square current necessity with the ancient law, a small minority have the power to block formal change—and the creation seems to have taken its creators into captivity. The Constitution as a protection born of experience is an admirable protection against the dangers of another age; as a current instrument its validity lies in its extra-constitutional gloss. The failure of event to accord with intent does not distinguish it among human arrangements."

10. Power of Judiciary to Interpret "Constitution"—is a requirement of the Constitution itself.

It is pertinent in the context of foregoing considerations to point out that the power of the Judiciary to interpret the Constitution and to apply it in the adjudication of cases submitted for its cognizance is itself the requirement of the Constitution. Judges interpret the law but they do not interpret it capriciously or arbitrarily. They are guided in the determination of the questions relating to the meaning and significance of the provisions contained in the Constitution, by the legal arguments submitted at the bar, by appeal to precedent if it is available, by considerations based upon the practice of civilised communities having organic systems of Constitutional Jurisprudence. And every case of first impression decided by the Judges in its turn introduces an element of security in the administration and practice of the Law and the Constitution, in so far as it thereafter becomes a precedent, which would control the interpretation and application of parallel cases that might come before courts of law.

Rigidity of American Constitution.

It is true that the American Supreme Court has read more into the Constitutional Instrument of 1787 than was infused into it by the Founding Fathers or the Authors of the later amendments, but then, be it remembered, that this is mainly due to what might be characterised as the abnormal rigidity of the American Constitution. The judicial interpretation bestowed on the Constitution by the American Judges has been so much in accord with the prevailing mood of the people of the United States that they have acquiesced in the power of the Judiciary to apply liberally the constitution to situations for which admittedly the

Founding Fathers could not have very well laid down any clear guidance After all, the Constitution of 1787 was written for an eighteenth century agrarian republic of less than 4 million people, and if the same document had at all to serve as the frame work of Government for a modern urban industrial society confronted as it is with all the new complex social and economic problems incidental to such a society, its interpretation had to keep pace with the growing complexities of the new era It is for that reason, that Kelly and Harbinson, the authors of *American Constitution—its Origins and Development*, have no hesitation in saying "Industrial Revolution opened a new chapter in American Constitutional history After 1880, constitutional questions became increasingly entangled in a series of political and social issues of basic consequence to America's destiny" It was for this very reason that as far back as 1819 Marshall, the Chief Justice of the U S Supreme Court had observed " A Constitution is intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs" (In *M'Culloch v Maryland*, 4 *Wheaton* 316—(1819) (4 L Ed p 579)

Government of Laws— and not men— necessarily involves the idea of some Organ of Sovereign power to Interpret the Written Constitution

If the Government is to be Government of the Laws and not of Men, the laws must be *made*, and after they are made, since they are ome organ of the sovereign power within the State to en*forcing* them It is Men who must draft, enact, egal system, however perfect could be made to operate with automatic, impersonal and machine like precision Laws like any other human institution must be adjusted to the varying needs of the Community, and the Judges who interpret the Supreme Law of the Land have a duty cast upon them of applying that law consistently with the letter and *spirit of the Constitution under which they themselves have been appointed and to* maintain which they have to take that oath of office which has been prescribed by the framers of the Constitution as a condition precedent for the assumption of such a high and responsible office

11. Relative merits and demerits of a written Constitution—A summing up

These reflections show that, in the ultimate analysis, the relative advantages and disadvantages that can be predicated of the written and the unwritten type of Constitution turn out to be a mere matter of academic debate Here as elsewhere Constitution should be adjudged in terms of its pragmatic relevance, and that, it is submitted, is the only decisive test The question in each case would be Does the Constitution, written or unwritten, actually work? The answer to this depends upon numerous factors, the outstanding of these being the character of the people and the extent to which it enables them to organise themselves politically After all, it is the coat that must fit the baby and not the baby that must fit the coat! The Constitution has to be construed and applied No country can be permanently imprisoned in the straight jacket of a written constitution, either the jacket is stretched by judicial interpretation—witness the immense developments at the hands of American Supreme Court of the inter state commerce clause—or it is expanded by the growth of *conventions* If it were not so, a written constitution would indeed be a lethal thing of *De Maistres Epigram—Des que l'on ecrit une constitution, elle est morte* (*Constitution and Constitutional Law, Enc Britt* p 314 1914 *Ed*) It is for this reason that Judges in the United States do not regard their Constitution as a *printed finality* "Every legal system for a living society, even when embodied in a written Constitution", says Justice Frankfurter, "must itself be alive It is not merely the imprisonment of the past, it is also the unfolding of the future Of all the laws for ordering the political life of a nation the Federal system is the most complicated and subtle It demands most flexible and imaginative adjustment for harmonising national and local interest The Constitu

tion of the United States is not a printed finality but a dynamic process; its application to actualities of Government is not a mechanical exercise but the function of Statesmanship". (*Frankfurter, Mr. Justice Holmes and the Supreme Court*, 1938, page 75).

In this and such other observations of the American Jurists one detects a desire to help the growth of the Constitutional Law without tampering with the original Constitutional Document and it is doubtful if, as has been hinted earlier, the extent to which the American Judiciary has gone in interpreting its provisions would have been the same had the provisions of that document been capable of being changed by, broadly speaking, a more easy amendment procedure.

Before we conclude, let us recall the observations of Sir Henry Maine and Lord Bryce upon the questions we have been considering.

Sir Henry Maine on U.S. and English Constitution.

(1) Sir Henry Maine in his *Popular Government* has some pertinent observations to make about the essential difference between the rigid and the flexible Constitution and, of course, the references to the American and the English Constitutions are to be taken in the following extract, as references to the written and the unwritten constitutions respectively.

"The powers and disabilities attached to the United States and to the several States by the Federal Constitution . . . have determined the whole course of American history. That history began, as all its records abundantly show, in a condition of society produced by war and revolution, which might have condemned the great Northern Republic to a fate not unlike that of her disorderly sisters in South America. But the provisions of the Constitution have acted on her like those dams and dykes which strike the eye of the traveller along the Rhine, controlling the course of a mighty river which begins amid mountain torrents, and turning it into one of the most equable water-ways in the world. The English Constitution, on the other hand, like the great rivers of England, may perhaps seem to the observer to be now-a-days always more or less in flood, owing to the crumbling of the banks and the water poured into it from millions of drain pipes." (p. 245)

Rigidity of U.S. Constitution—Views of Bryce stated.

(2) The best case that has been put up about the advantages to be derived from a rigid constitution is to be found in Bryce's *American Commonwealth*, Volume I, in words that follow:

"The rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to over-pass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.

"It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements. It makes them feel that to comprehend their supreme instrument of Government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based. These are enormous services to render to any free country . . ." (p. 420, New York, 1908 Ed.).

12. Is our Constitution a rigid one?

How far could *our Constitution* be characterised as being a *rigid* one? The answer to this question must depend upon our appreciation of *Article* 216 of the Constitution itself which lays down the procedure for amending the Constitution. An analysis of that Article would show the following features — ART 216

(i) In respect of amendment or repeal of the provisions contained in Articles 1, 31, 39, 44, 77, 106, 118, 119, 199, and 216 itself, a Bill, *which specifically provides for the amendments of any of these Articles,*

(a) must be passed by a *majority* of the *total number* of members of the National Assembly, and by the *votes of not less than two thirds* of the members of that Assembly *present* and *voting*

It should then—

(b) be approved by a resolution of *each* Provincial Assembly (i e of the Provinces of East Pakistan and West Pakistan) or, if the amendments relate to any one Province, of only Provincial Assembly of the Province concerned, and

(c) be assented to by the President

(ii) For the purpose of amendment or repeal of any other provision of the Constitution (excepting, of course, the provisions of the Fifth Schedule and of Part IV of the Fourth Schedule) the Bill should be passed by the kind of majority mentioned in (i) (a) above, i e majority of the total number of Members of the National Assembly and by the votes of not less than two thirds of the members of that Assembly present and voting, and then be assented to by the President, and,

(iii) All Schedules, other than the provisions of the Fifth Schedule and Part IV of the Fourth Schedule, may be *amended* or *repealed* if a Bill for that purpose is passed by a simple majority of members *present* and *voting* and is assented to by the President

It should be noted that it is also competent, for the Provincial Legislature, to make a law and thereby provide for any of the matters specified in Part IV of the Fourth Schedule

A certificate under the hand of the Speaker of the National Assembly that a Bill has been passed in accordance with the provisions of ART 216(1) is conclusive and cannot be questioned in any court (See ART 216(2))

Thus analysis of ART 216 would show that our Constitution is rigid in certain respects and what is more, this rigidity itself is of varying degrees There are, however, certain parts of the Constitution which can be amended by a *simple majority*—and to that extent our Constitution is flexible—and the only difference between that amending legislation and the ordinary legislation consists in this that the Bill providing for constitutional amendments must be specifically designated as being a Bill for that purpose In respect of the Articles mentioned in (i) above, the amendment procedure involves not only the support of the kind of majority provided therein but also requires, in addition, that a resolution of approval be passed by either both or one of the two Provincial Assemblies concerned, as the case may be

Rigidity of our Constitution is of varying degrees—depending on the provision sought to be amended

13. Comparative Study of Amendment Procedures

For the purpose of making a comparison between the 'amending procedure' provided *in our Constitution* and those provided in other Constitutions, reference might usefully be made to ART 368 of the *Indian Constitution*, ART. 5 of the *United States Constitution*, ART 128 of the *Commonwealth of Australia Constitution*, ART 46 of the *Irish*

Constitution of 1937, ARTs. 207 to 210 of the *Burmese Constitution*, 1948, and Section 29(4) of the *Ceylon Constitution*, (*Order-in-Council*) 1946.

(a) Canada.

So far as the Canadian Constitution is concerned, there is no specific provision in the *British North America Act* providing for amendment to that Constitution. In the absence of specific provision to the contrary contained in the *British North America Act*, the power to amend the same must be deemed to be reserved to the Imperial Parliament that passed the Act. *The Statute of Westminster*, 1931, in its seventh section provided that that Act shall not be deemed to apply to the repeal, amendment, or alteration of the *British North America Acts* 1867-1930 or any Order, Rule or Regulation made thereunder. Although there is no legal power with the Dominion Parliament of Canada to amend the *Canadian Constitution Act*, the convention has grown for the Imperial Parliament to effect amendments only after presentation to it of a joint address of both Houses of the Canadian Parliament, and in respect of such amendments as are to affect the position of the Provinces under the Constitution, the Dominion Parliament makes recommendation only after the consent of the Provinces concerned regarding those amendments has been taken. The latter *convention*, namely that of obtaining consent of the Provinces was however not followed at the time of the passing of the *British North America Act*, 1943, which was enacted despite the protest of the Province of Quebec to the passing of the said Amendment Act. Section 92(1) of the Canadian Constitution Act gives to its Provincial Legislatures the power to effect amendments in respect of those provisions that relate to their governance, and this is done by ordinary legislative process. The Imperial Parliament, however, by an Act of 1949 (*British North America* (2) *Act*, 1949, 12, 13 and 14 Geo. 6 c. 81), has empowered the Canadian Parliament to amend any of the provisions of the *British North America Act* which relates to matters within its jurisdiction. This Act gives the Federal Parliament wide powers of amendment, and it is only in respect of the matters excepted from the general power thus conferred that an Act of the Parliament of the United Kingdom will in future be necessary. (Consult further *Constitutional Amendment in Canada* by Paul Gerin-Lajoie, Toronto, 1950).

Distinction between the amendment procedure concerning ordinary and important provisions.

A comparative study of the provisions contained in the several Constitutions with regard to the amendment procedure would tend to show that, by and large, a distinction is invariably drawn between amendments that affect *ordinary* Constitutional provisions, and amendments that affect the *scheme* of the Constitution or the pattern of the Government established under these constitutions. The amendment procedure in the latter category of cases has been made more difficult than in the former. To illustrate this, one instance will suffice.

(b) Amendment of the Indian Constitution.

In the case of Indian Constitution it has been provided that provisions relating to :

(a) Election of the President, ART. 54;

(b) Manner of election of the President, ART. 55 ;

(c) Extent of the executive power of the Union, ART. 73 ;

(d) Extent of the executive power of the State, ART. 162;

(e) Power of the Parliament to constitute High Courts, ART. 241;

(f) Provisions relating to the High Courts of the State, Chapter V of Part VI or Chapter IV of Part V (Union Judiciary);

(g) Matters mentioned in Chapter 1, Part XI, Legislative Relations between the Union and the States;

(h) Any of the matters mentioned in the Seventh Schedule, (referring to the Legislative Powers of the Federation and the Provinces), and the Representation of States in Parliament and the amending Article itself—

are all capable of being amended by resort to a relatively more difficult procedure in that, over and above the special kind of voting procedure mentioned in the Article relating to amendment (a majority of the total membership of the House and a majority of not less than two thirds of the members of that House present and voting), the additional requirement of the Constitution is that the proposed amendment must be ratified by the Legislatures of not less than half of the States composing the Union (*See* ART 368)

The provisions for which the relatively more difficult amendment procedure is provided, are precisely those which vitally affect the distribution of the sovereign power within the State, and therefore vitally concern the Administration of the States within the Indian Union It is perfectly in accord with the principle of *Government by consent* that whenever any change is sought to be effected in these vital provisions, ratification by Federal Units should be required

The amendment procedure provided in the United States Constitution, ART V, is decidedly more difficult The abnormal difficulty of moving or proposing amendments can be seen from the fact that the proposed amendment must have the support either of two third votes of both Houses of Congress, or of the two third number of the State Legislatures who should petition to the Congress to call for a Convention for the purpose of considering the proposed amendment There has then to be a *ratification* by the Legislatures of three fourths of the several States of the Federation, in the case of amendment being proposed by two thirds of the votes of both the Houses of Congress or by the Conventions in three fourths of the States in the event of amendment being proposed upon the application of the Legislature of the States No distinction has been drawn between the several provisions of the *American Constitution* for the purpose of designing different amendment procedures in relation to the subject matter of the proposed amendment The amending procedure is the same, irrespective of the nature of the provision sought to be amended in or added to the Constitution It should be noted, as an exception to this generalization in this respect, that under ART V it is also provided that no State without its consent shall be deprived of its equal suffrage in the Senate (c) Amendment of the U S A Constitution

It would be apparent from a perusal of the United States Constitution, first, that it makes provision *only* for the Federal Scheme and structure of the Constitution, leaving the Constitution of the various States federating in the Union to work out their own constitution subject of course to certain limitations (*See S 4 of ART IV*) and secondly that the document itself is a short one and recites only those provisions which are of *real* constitutional importance It is in fact the absence of detail that is the greatest merit of the *United States Constitution* and it is this circumstance, which more than anything else, has contributed most to its permanence and effectiveness

In Switzerland the amendment can be effected by a referendum (See ARTS 118 *to* 123, contained in Chapter III of the *Federal Constitution of the Swiss Confederation of* 1848) Under the *Swiss Constitution* there is a distinction between total and partial revision of the Constitution and the procedure is different in each case Either House may pass a resolution for total revision, and in the case of a disagreement between the two Houses on the question whether or not there should be a revision the matter is referred to the people, or the question is so referred if 50,000 voters demand a total revision If the vote is in the affirmative, then new elections to the two Houses take place to prepare the necessary revision Similarly partial revision can be proposed by the two Houses—or upon petition of 50,000 voters After the total or partial revision takes place, the same is put before the people by means of referendum and can become effective as law if it be accepted by a majority of the voters and the Cantons composing the Swiss Federation Thus the Swiss constitution provides for a novel method of securing the amendment of the Constitution (d) Amendment of the Swiss Constitution

The voice of 50,000 voters, which would be one-eightieth fraction of the total Swiss population, is necessary before the Constitution can be amended. This may appear as an unusually difficult method for bringing about a constitutional change but according to *Finer* "the process is deliberate, not difficult, and its value is partly created by a set of conditions peculiar to Switzerland: long experience in democratic institutions, comparative simplicity of its problems, and the smallness of the country, which sets much easier problems in propaganda techniques than in larger countries." (See Finer's Theory and Practice of Modern Government, 1950 Edition, page 133).

(e) Amendment of the Constitution of the Fourth French Republic

The principle on which this amendment procedure has been devised is demanded by the logic of the Swiss Constitution which declares Cantons as sovereign units, (See ARTs. 3, 5 and 6), and the procedure imparts to the Constitution a distinctiveness which has hardly any parallel—save perhaps in the *Constitution of Fourth French Republic*, for which reference to ART. 90 of that Constitution of the year 1946 should be made. ART. 90 of the French Constitution is as follows :

> "ART. 90.—Revision of the Constitution shall take place in the following manner:
>
> Revision must be decided upon by a resolution adopted by an absolute majority of the members of the National Assembly.
>
> This resolution shall stipulate the purpose of the revision.
>
> After at least three months, this resolution shall have a second reading under the same rules of procedure as the first, unless the Council of the Republic to which the resolution has been referred by the National Assembly, has adopted the same resolution by an absolute majority.
>
> After this second reading, the National Assembly shall draw up a bill to revise the Constitution. This bill shall be submitted to the Parliament, and voted by a majority and according to the rules established for any ordinary act of the legislature.
>
> It shall be submitted to a referendum unless it has been adopted on second reading by a two-thirds majority of the National Assembly or voted by a three-fifths majority of each of the two assemblies.
>
> The bill shall be promulgated as a constitutional law within eight days after its adoption.
>
> No constitutional revision relative to the existence of the Council of the Republic may be made without the concurrence of this Council, or resort to a referendum."

14. Rigidity vs. Flexibility considered from the viewpoint of political principle.

The question whether a Constitution is rigid or flexible cannot be answered in terms of any well defined principle. The terms 'flexible' and 'rigid' recall to us the name of Lord Bryce, who was the first to coin this classification, but even he, so it appears from his writings, uses these terms interchangeably—if not indiscriminately.

It has been rightly remarked, "An unwritten constitution might or might not be flexible; a written constitution may or may not be rigid". A few words to explain this dictum are necessary.

In legal theory, British Parliament may, at one stroke, alter the British Constitution in any respect that it chooses, or the Prime Minister may destroy the convention of Cabinet Government by the simple expedient of not calling the Cabinet altogether. But such things do not happen. In the realism of history the *British Constitution* is not so flexible

after all It changes very slowly Apart from several extensions of suffrage, the subordination of the House of Lords in 1911, and the altered Imperial Status of the Self governing Dominions since the last war, it has flexed very little in the course of a century Indeed, despite the potentialities for change that exist under the unwritten constitution, it is probably true to say that they foster tendencies towards rigidity rather than flexibility, nor is this surprising for they rest largely upon customs—and customs wax and wane but slowly

Cases can, however, be cited to show that some countries having written Constitutions have altered them frequently, whereas others have maintained their Constitutions and there is no change despite the flexibility of amendment procedure provided in those Constitutions The Constitutions of many of the American States are of the former category, and the case of France falls within the latter Despite the fact that French Constitutional Laws may be amended almost as readily and quickly as the ordinary statutes, no amendment was adopted between the years 1884 and 1906, and it is true to say that they have been seldomly changed

Commenting on this aspect of the *French Constitution*, *Howard Lee McBain* remarks in his article on "*Constitution* in the *Encyclopaedia of Social Sciences*, "This is certainly not referable to the perfection of the French system of Government" A reference to ART 90 of the *Constitution of the Fourth French Republic* (1946) would show that in the *French Constitution* quite apart from the Referendum provided therein, the amendments can be effected in the same way as ordinary legislation Quite apart from limitations provided in ARTs 94, 95 and the last clause of ART 90, it would appear that the amendment procedure visualised in the Constitution of the *Fourth French Republic* is on par with the procedure prescribed for consumating ordinary legislation (These limitations are contained in ARTs 94 and 95 ART 94 In the case of occupation of all or part of the metropolitan territory by foreign forces no procedure of revision may be undertaken or continued, ART 95 The republican form of government may not be the subject of any proposal of revision, and for the last clause of ART 90, see *supra* p 20)

15. Amendment Procedure of our Constitution is in accord with well-settled principles on the subject

ART 216 of our Constitution is thus in accord with the well settled principles in terms of which amendment procedures have been designed in other Constitutions, and to some of these reference has already been made A relatively more difficult amendment procedure is provided only in those cases where the proposed change would affect the Federal Units vitally or where the scheme of the distribution of the sovereign power within the State would, to an appreciable extent, be necessarily affected Thus, ART 1, which deals with the character of Pakistan's polity as a Federal Republic, ART 31 which mentions that effort shall be made by the State to enable people from all parts of Pakistan to participate in the defence services of the country and to achieve parity in the representation of East Pakistan and West Pakistan in all other spheres of Federal Administration, ART 39 which mentions the extent of the executive authority of the Federation, ART 44 which describes the composition of the National Assembly, ART 77 which mentions the composition of the Provincial Assembly, ART 106 which talks of the jurisdictions of the Federal and Provincial Legislatures and establishes *procedures for the determination of relative* priorities in the matter of their competence to enact laws, ART 118 which mentions National Finance Commission for securing just distribution between the Federation and the Provinces of taxes etc , ART 119 which safeguards inter provincial trade, ART 199 which mentions the formation of a National Economic Council, and ART 216 which

describes the procedure for effecting amendments to the Constitution: would seem to be the Articles that deal with matters in which the Provinces are vitally interested and any change in those provisions is likely to affect their interests. The Constitution, therefore, requires that these provisions can only be amended *after* the amendments in question have been duly ratified by the Province or Provinces, as the case may be, in the manner provided for in ART. 216.

Constitutional Powers of Parliament of Pakistan.

The National Parliament of Pakistan thus has *constituent powers* in certain restricted fields and can act as a Constituent Assembly provided it can muster up the majority required by ART. 216 for effecting changes in those well-defined portions of the Constitution. In respect of the Articles mentioned in the proviso to Clause (1) of ART. 216, its constituent powers are encumbered by a further constitutional requirement, namely, that a resolution must be passed by the Federal Units ratifying constitutional Bills amending those provisions. In respect of certain matters, e.g., Schedules other than the Fifth Schedule and Part IV of the IV Schedule, its power to amend the Constitution is to be exercised in the same way as though it were engaged in the ordinary law-making activity reserved to it under the Constitution—with, perhaps, the only limitation that Bills to amend those provisions must be *expressly* described as being Bills for that purpose.

Thus the Constitution of Pakistan is partly flexible and partly rigid, and its rigidity is of varying degrees, as has been shown earlier.

16. Character of English Constitution—no difference between Fundamental and Ordinary Laws

England has a flexible Constitution. In England there is on that account, from the point of view of Constitutional Law, no difference between 'Fundamental' and 'Ordinary' Law. "In England", writes de Tocqueville, "Parliament has an acknowledged right to modify the Constitution; as therefore the Constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a Legislative and Constituent body." Professor Dicey on the other hand considers that flexibility of the English Constitution has, in effect, prevented it from being written. He says :

> "When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing, or, to use English phraseology, is enacted as a statute. Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution. One main reason then why constitutional laws have not in England been recognised under that name, and in many cases have not been reduced to the form of a statutory enactment, is that one law, whatever its importance, can be passed and changed by exactly the same method as every other law. But it is a mistake to think that the whole law of the English constitution might not be reduced to writing and be enacted in the form of a constitutional Code." (See his *Law of the Constitution*, p. 90).

Flexibility of English Constitution is its primary trait.

The essential thing, then, about the *English Law of the Constitution is not that it is unwritten, but that it is flexible*. Even a written Constitution could be made flexible by providing therein that it could be changed by resort to the ordinary legislative process. (See *Constitution of New Zealand*, more particularly the *New Zealand Constitution Amendment (Requests and Consent) Act of November 25, 1947 (1947, No. 44)*, which provides that the New

Zealand Parliament may now *alter, suspend, or repeal all or any of the Provisions of the New Zealand Constitution Act of* 1852)

Inflexibility—as the very essence of Constitution

Professor Herman Finer is of the opinion that the *essence of the Constitution is its inflexibility as compared with the ordinary laws* "We might define a constitution", says he, "as its process of amendment For to amend is to deconstitute and reconstitute That is the respect in which all other constitutions differ from the *British Constitution* " (See *Theory & Practice of Modern Government*, 1950 Ed, p 127) After reviewing the amendment procedures mentioned in various constitutions the author remarks

"The chief distinction, then, between constitutions, from the standpoint of form, is in the amending process Who has the power to alter the constitution is master of the State, and the amending clause gives this power Everywhere except in England this has been made exceptionally difficult, and difficulty is established to provide the advantages of conservation of a set order of social relationships, and to secure deliberateness, in the hope that from this will issue respect, and both respect and growth are sought for in popular ratification and initiative ' (p 137)

After examining the *pros* and *cons* of the advisibility of making the amending procedure difficult of achievement he raises the all important question, ' Is Great Britain the worse off for making no special rules concerning constitutional amendments?" and proceeds to answer it thus

"Now, any State in which care is not bestowed on the reform of fundamental institutions wastes its well being physical and spiritual Care is fundamental not writing nor a difficult amending process If care a rational weighing of all factors, is possible and probable without artificial compulsion then difficulty of amendment is unnecessary None of the fundamental institutions is, in fact, treated without due circumspection "

Even in England, continues the same writer, "the possibility remains that in abnormal times, when excitement has been roused to an uncontrollable intensity, unwise things may be done, or acts committed which sting by their injustice and leave a mood of smoldering resentment Occasions may arise like the General Strike of 1926 which produced the *Trades Disputes Act of* 1927, the law was, in fact repealed in 1946 but for the nineteen years it lasted it unjustly crippled the financing of the Labour Party The advantage of the British Constitution is that errors may be reversed by an ordinary majority What is fundamental, in short, is left to the people to decide, and they are also left to decide whether this shall be amended They are expected to control themselves rather than to be controlled by the Constitution " (See p 137 et seq)

17. Constitution as "Supreme Law of the Land"

What is it that is implied when it is said, "Constitution embodies the Supreme Law of the Land? ' The Constitution of the U S A, for instance, in *ART* VI Para 2, provides "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding " There is thus in the *Constitution of the U S A* an *express declaration* that the Constitution shall be the supreme law of the land Similar is the case with the *Australian* Constitution· Covering *clause* 5 provides that the Act and all laws made by the Parliament under the Constitution shall be binding on the Courts, Judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the Laws of any State There is, be it noted, *no such express declaration con*

tained either in the Constitution of Pakistan or of India. But despite the total absence of any such expressly worded declaration the Constitution in both of these countries, as will be argued later, *is supreme.*

By the supremacy of the constitution is meant its fundamentality; so that, in the event of a conflict between the ordinary law and the provisions of the Constitution it is the latter that should prevail.

How is the Supremacy of Constitution conserved.

The essential question for the constitutional lawyer to answer is, *How is the supremacy of the constitution maintained?* It is maintained in the United States by the *courts* in the sense that it is they that interpret and apply the supreme law of the land and, in the event of any law made by the Congress coming in conflict with the Constitution, it is the former that is declared by them to be null and void, that is, as being of no legal effect whatever. In some other Constitutions it is by means of "political processes", the precise nature of which will be disclosed in the sequel, that the supremacy of the Constitution is conserved and maintained.

Supremacy of English Parliament.

England may be regarded as a typical instance of a country possessing the latter category of Constitutions. In England, constitutional law and the conventions of the Constitution are maintained by means of the doctrine of the supremacy of Parliament. No organ of the English State has the power or the authority to declare an Act of the Parliament invalid, and the Parliament, to the exclusion of any other organ of sovereign power, has the final power to interpret its own enactments. And this it manifestly does when, for example, it passes declaratory legislation, the effect of which is to set aside any judicial determination or decree which may have been passed by a court of law upon the footing of its own interpretation of the words, terms or expressions used by the Parliament. This is what is implied by the dictum that in England it is the doctrine of omnipotence of the Parliament that holds the field. In the words of Blackstone:

> " 'The power and jurisdiction of parliament', says Sir Edward Coke, 'is so transcendent and absolute, that it cannot be confined either for causes or persons, within any bounds'. 'And of this high court,' he adds, 'it may be truly said "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. . . . It can, in short, do everything that is not naturally impossible; and, therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament." (*Blackstone's Commentaries, Vol. I, p.* 128—*London John Murray* 1876).

English Parliament cannot delimit the power of the Successor *Parliaments*—But this is merely a convention.

It is a rule of convention in England that Parliament cannot bind its successor Parliaments by limiting their power of legislation. The growth of a rigid constitution, in the sense that it is incapable of being amended by simple majority vote, is inconceivable so long as this convention is respected. If Parliament were to pass a law limiting the power of the future Parliaments to legislate in respect of a given subject-matter, such a law would be respected by the courts since the courts have not the power to review it and declare it invalid, but the successor Parliaments would not be bound by such a limitation and could repeal the law by means of a simple majority vote.

1932, 1. K.B. 733

That no Parliament can bind its successors is amply indicated in the decision reported in *Vauxhall Estate v. Liverpool Corporation*, 1932, 1 *K.B.* 733, where it was ruled that

a later provision embodied in the *Housing Act*, 1925, section 46, prevailed, by implication, over the provisions of an earlier Act (Section 7(1) of *Acquisition of Land (Assessment of Compensation) Act*, 1919) The point of the decision is that a statutory provision enacted by a later Parliament repeals, by implication, an inconsistent provision in the law passed by an earlier Parliament

> "We are asked", observed Avory, J, "to say that by a provision of this Act of 1919 the hands of Parliament were tied in such a way that it could not by any subsequent Act enact anything which was inconsistent with the provisions of the Act of 1919
> of the C
> the con
> future Act shall interfere with its provisions"

In this connection we may also notice the case of *Ellen Street Estates Ltd v Minister of Health*, (1934) 1 K B 590 wherein at p 597 Maugham L J said (1934) 1 K B 590

> "The Legislature cannot according to our Constitution, bind itself as to the form of subsequent legislation and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal If in a subsequent Act, Parliament chooses to make it plain that the earlier statute is being to some extent repealed effect must be given to that intention just because it is the will of the legislature

Is there a sense in which it could be said the English Parliament is not omnipotent

Thus, however paradoxical it might appear, there is a sense in which it is true to say that Parliament *is not legally considered omnipotent*—*at least it cannot do* anything which would effectively detract from its own continuing sovereignty The *incapacity* of Parliament to bind its successors is an argument against its own omnipotence The basis of legal sovereignty of Parliament in England is not to be traced to the supremacy of the Constitution, but only to the rule that no Act of Parliament could be regarded as being invalid by a Court of Law The sovereign Parliament's inability to bind its successors is thus an incident of the rule evolved and recognised by Courts of law to the effect *that they would not regard any Act of Parliament as being incompetent on any ground*, and further that they would give effect to the *later* Act of Parliament in the event of its conflict with an earlier one on the supposition that the Act, which is later in point of time reflects the *last will of the continuing legal sovereign* (For a critical comment as to the view that this incapacity of Parliament to bind its successors flows from the flexibility of the *English Constitution* see *Attorney General for the State of the New South Wales and others v Trethowan & Others*, 44 *C L R* 1930 31, 394 *at p* 427)

18. Doctrine of Judicial Review—*The American Experience*

The doctrine of judicial review has reference to the all important method of securing the supremacy of the Constitution by means of judicial recognition and enforcement of the requirements of the Constitution

So fundamental is this doctrine of the Judicial Review of legislation that a few brief remarks about its *genesis* and the circumstances in which it rose to the position of its present power would not be out of place Since the doctrine in its present form was first *applied by the U S Supreme Court*, it would be necessary to recount briefly the various steps by which it came to be firmly established in America Considerable forensic literature exists which throws a great deal of light on this doctrine of American Constitutional Law—although it must be admitted that the precise tactical principle, in terms of which the controversy which has raged in America as to the Constitutional foundation for the assumption of this power of judicial review by the courts can be settled has not yet found

the general support even with the constitutional historians of that country. According to Professor Finer, "There are two main possibilities: (a) that the Courts at a certain point of time simply took this power and expediency caused its confirmation, and/or (b) the Fathers of the Constitution really intended that there should be a judicial review. The first is demonstrably true. But the question of intention is still obscure . . ." (See his "*Theory and Practice of Government*", p. 140).

As to what the Founding Fathers intended to accomplish in regard to the problem of conserving the supremacy of the Constitution, the following extract from the *Federalist* is often relied upon in defence of the view that judicial enforcement of the constitutional limits imposed on the exercise of legislative power was contemplated by at least one of them.

> "By a limited Consitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no Bills of Attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the Court of justice whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." (*Alexander Hamilton, in Federalist*,. *No.* 78).

Two leading cases consider-ed.

The two leading cases that established the doctrine of Judical Review in the United States of America, are :

(1) *Marbury v. Madison*—1 *Cranch* 137,2 *Lawyer's Edition* 60 (1803).

(2) *M'Culloch v. Maryland*—4 *Wheat*, 316, 4*L. Ed.* 579 (1819).

Marbury vs. Madison.

The facts of the first case were: One William Marbury and three others claimed title to a commission of the Justice of the Peace, and James Madison, then Secretary of State, refused to deliver the same. Through their counsel, the four men asked the Supreme Court to issue a writ of *mandamus* ordering the Secretary of State to deliver the commissions. The action had been brought under the *Judiciary Act of* 1789, passed by the Congress, an Act which had empowered the Supreme Court to issue writs of *mandamus* to other Courts or officers of the United States. Congress had not the constitutional right to confer this power on the Supreme Court since the power of the Congress was limited to conferring appellate jurisdiction except in four kinds of cases. Chief Justice Marshall rendered the opinion which has since become the foundation for the power of the judicial review, which the Supreme Court has ever since exercised as a part of its judicial power.

The following extracts show the reasoning on the basis of which that opinion was delivered :—

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

"That the people have an original right to establish, for their future Government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the Government , and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The Government of the United States is of the latter description. The powers

of the legislature are defined and limited, and that *those limits may not be mistaken, or* forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a Government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it, or, that the legislature may alter the constitution by an ordinary Act.

"*Between these alternatives there is no middle ground. The constitution is* either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such Government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and, is consequently *to be considered, by this Court, as one of the fundamental principles of our society.* It is not, therefore, to be lost sight of in the further consideration of this subject.

"If an Act of the Legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what *the law is. Those who apply the rule to particular cases must of necessity expound* and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So, if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the Courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that *courts must close their eyes on the constitution, and see only the law.*

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our Government, is entirely void, is yet, in practice, completely obligatory. It would declare that

if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

"That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

"The judicial power of the United States is extended to all cases arising under the constitution.

"Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?"

"This is too extravagant to be maintained.

"In some cases, then, the constitution must be looked into by the Judges. And if they can open it at all, what part of it are they forbidden to read or to obey?"

Comment on Marbury vs. Madison.

Commenting on the revolution that was wrought by this decision, Mr. Albert J. Beveridge, the famous Biographer of Chief Justice Marshall, says, "By a *coup* as bold in design and as daring in execution as that by which the Constitution had been framed, *John Marshall set up a landmark in American history so high that all the future could take* its bearings from it, so enduring that all the shocks the nation was to endure could not overturn it."

Thus it is that the doctrine of Judicial Review in the U.S.A. became a means of conserving the supremacy of the constitution. *It is not a substantive power affirmatively granted by the constitution but its existence was inferred from the tenor of the written instrument and was regarded by the Supreme Court as being incidental to the Court's judicial power to interpret the Constitution and the law.*

And what is more important, the nation has acquiesced in the exercise of this power by the Judges of the American Courts. As to this, it has been well said by one of the protagonists of the exercise of this power by the Judges, "The glory and ornament of our system which distinguishes it from every other government on the face of the Earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of governments within the walls of governmental fabric which our Fathers built for our protection and immunity." (*Congress Records, Vol. 23, p. 6516*).

M'Culloch vs. Maryland

In the second case, the doctrine of the Judicial Review was reinforced and applied to "the supremacy of the Federation over the States". This case is also important since not only does it affirm this power of Judicial Review but it also enunciates and applies the doctrine of "*Implied Powers*".

The facts of that case, shortly stated, were the following :—

Maryland Legislature in 1818 taxed banks and bank branches not chartered by the State Legislature. M'Culloch was an employee of the Baltimore Bank that had been established under an Act of the Congress in 1816. He failed to pay $15,000 annual fee, or comply with the alternative requirement by affixing tax stamps to the bank notes issued. M'Culloch appealed against the judgment of the Maryland Court and Chief Justice Marshall opined, being fully conscious of the "awful responsibility in-

volved in the determination of the question before him , that *Congress had* (a) *the power to incorporate such a Bank and* (b) *to that extent the State legislature had not the power to stultify this venture*

There was indeed no clear provision in the Constitution empowering the Congress to establish banks but then this power was, according to the judgment of Marshall implied in the power to lay and collect taxes, to borrow money to regulate commerce, to declare and conduct war to raise and support armies and navies His argument was ' The sword and the purse all the external relations and no inconsiderable portion of the industries of the nation are entrusted to the nation It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior Such an idea can never be advanced But it may with great reason be contended that a Government entrusted with such ample powers on the due execution of which the happiness and prosperity of the nations vitally depends, must also be entrusted with the ample means for their execution The power being given, it is the interest of the nation to facilitate its execution

As to the main question of the supremacy of the Constitution and of the Laws of the United States which shall be made in pursuance thereof *vis a vis* the authority of the Federal units composing the Union the following observations are important

If any one proposition could command the universal assent of mankind we might expect it would be this—that the Government of the Union though limited in its powers *is supreme within its sphere of action* This would seem to result, necessarily, from its nature It is the Government of all its powers are delegated by all, it represents all and acts for all Though any one State may be willing to control its operations, no State is willing to allow others to control them The nation on those subjects on which it can act must necessarily bind its component parts But this question is not left to mere reason the people have in express terms decided it by saying this constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and by requiring that the members of the State legislatures and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it

"The Government of the United States then though limited in its powers is supreme, and its laws when made in pursuance of the constitution form the supreme law of the land anything in the constitution or laws of any state to the contrary notwithstanding

"Among the enumerated powers we do not find that of establishing a bank or creating a corporation *But there is no phrase in the instrument* which like the articles of confederation excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described Even the 10th *amendment, which* was *framed* for the purpose of quieting the excessive jealousies which had been excited omits the word 'expressly', and declares only that the powers 'not delegated to the United States nor prohibited to these States, are reserved to the States or to the people, thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other to depend on a fair construction of the whole instrument The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation and probably omitted it to avoid those embarrassments A constitution to contain an accurate detail of all the sub divisions of which its great powers will admit, and of all the means by which they may be carried into execution would partake of a prolixity of a legal code, and could

scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding."

Marshall's Contribution to Constitutional Jurisprudence.

That John Marshall rendered a great service, in his capacity as Chief Justice of the United States Supreme Court, to the growth of Constitutional doctrine of Judicial Review, is beyond dispute. But to the lawyer, the argument upon which he built up his conclusions as to the supremacy of judicial power in relation to its competence to strike down unconstitutional legislation, considered purely from the intellectual stand-point, would appear to be open to criticism. That the doctrine of Judicial Review was not his invention is proved by the fact that the classic tradition of juristic thought in which the lawyers and judges of his time were steeped, owed much of its vitality and vogue to the writings of Blackstone whose *Commentaries on the Laws of England* had been reprinted five years before the Declaration of Independence in America and must have been chewed and digested by a rising generation of lawyers of the day, and right up to the end of 19th century that Book formed the basis of legal education in the country. Further, the contention that the doctrine of Judicial Review as evolved and applied by Marshall in *Marbury v. Madison* was not based on any cogent premises is fully borne out by the following criticism offered by M. R. Cohen in his book "*American Thought*" :

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"No scholar today will defend either on historical or on logical grounds Marshall's argument in *Marbury v. Madison*, 1 *Cranch*. (5 *U.S.*) 137 (1803), that the section of the *Judicature Act of 1789* was unconstitutional. That Act was drawn by several framers of the Constitution and one of them, Ellsworth, became Marshall's predecessor as Chief Justice of the United States. It would certainly require very cogent arguments to prove that these men, the members of the First Congress who passed the Act, and President Washington, who presided at the deliberations of the Constitutional Convention and signed the Act, either were all ignorant of the Constitution or wilfully disregarded it. Logically, Marshall's argument that Congress could not give the Supreme Court original jurisdiction in *mandamus* proceedings, because this was not mentioned in the second clause of Section 2 of ART. III of the Constitution, rests on the untenable assumption that grants of jurisdiction must be exclusive and that otherwise the clause would have no meaning. But this is quite fallacious. An affirmative grant of jurisdiction to the court may mean that Congress cannot take away that jurisdiction. It does not mean that Congress may not add to it. In fact, the Supreme Court subsequently ruled that the grant of original jurisdiction to it was not exclusive and that it could also be conferred on district courts (in the case of consuls). Marshall's decision in *Marbury v. Madison, supra*, was a clever trick for escaping from an embarrassing situation, into which the federal courts had become involved when the Federalist Party created judicial offices for its followers after it was defeated in the election of 1800. The trick is obvious when we note that in quoting the Constitution Marshall left out the concluding words of the Second clause of Section 2, ART. III, which gives Congress express power to make exceptions to the appellate jurisdiction of the Supreme Court. For a clear indica-

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Lord Bryce *summed up* Marshall s main contribution to the development of American constitutional theory as follows

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"(1) Every power alleged to be vested in the National Government must be affirmatively shown to be granted The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it then whatever the executive or legislature of the National Government may have done in the pursuasion of its existence, must be deemed null and void

(2) Whenever the grant of power by a people to National Government has been established that power will be construed generously The people when they confer a power must be deemed to confer a wide discretion as to the means whereby it is to be used in their service for their main object is that it should be used vigorously and wisely which it cannot be if the choice of the methods is narrowly restricted (see his *American Commonwealth Vol 1 p* 378)

With regard to the principle of the case decided by Chief Justice Marshall in *M Culloch v Maryland* it is pertinent to mention the criticism made upon that decision by President Jackson in his *Vetoing Message* of 10th July 1832 concerning the renewal of the *Charter of the Bank of United Stat* Bill passed by the Congress The President in the passage quoted below was dealing with the argument that the constitutionality of the Bill he was vetoing had been settled by the decision of the Supreme Court

President Jackson s protest against Marshall s views

"If the opinion of the Supreme Court covered the whole ground of this Act, it ought not to control the co ordinate authorities of this Government The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it and not as it is understood by others It is as much the duty of the House of Representatives of the Senate and of the President to decide upon the constitutionality of any Bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision The opinion of the judges has no more authority over Congress than the opinion of Congress has over the Judges and on that point the President is independent of both The authority of the Supreme Court must not therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve"

As between the power of Judicial Review exercised by the Supreme Court to declare the Acts of Congress void and its power to declare the laws passed by the States void, the exercise of the latter power, politically speaking, has been of immense service for protecting the Union and it is for this reason that Justice Holmes said

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The origin of the doctrine of Judicial Review has been traced back to the dictum of Sir Edward Coke who is regarded as the greatest of the 17th Century authorities on the *Common Law of England* He contended that *Magna Charta* had embodied certain funda

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The origin of the doctrine of Judicial Review has been traced back to the dictum of Sir Edward Coke who is regarded as the greatest of the 17th Century authorities on the *Common Law of England* He contended that *Magna Charta* had embodied certain funda

mental principles of right and justice, and that the common law contained a further expression of the same principles. *Magna Charta* and the *Common Law*, he argued, were, therefore, supreme law having such force that they controlled both the King and the acts of Parliament. In a famous case reported in *The English Reports, Vol. LXXVII, p.* 638 *at* 652 (8 *Co. Rep.* 107*a* at 118*a*), more popularly known as *Dr. Bonham's case* decided in 1610, Sir Edward Coke, then Chief Justice of England, in an appeal, preferred by Dr Bonham charged for having violated the statute, adjudged the appellant to be 'not guilty' upon the ground that the law in question was void, his reasons being:

Dr. Bonham's case.

"And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void......"

Commenting on the significance of this decision on the growth of the doctrine of Judicial Review, Kelly and Harbison, the authors of the "*American Constitution—its Origins and Development*" at p. 46 make the following observations :

"This case upon casual examination appears to be a seventeenth-century application of the doctrine of judicial review. Actually, it may not be so regarded. The modern American concept of judicial review has to do with the power of a court to hold an act of a co-equal legislative body invalid as repugnant to the Constitution. In Coke's day, however, no clear-cut idea of Parliament as being strictly a legislative body had yet emerged, nor had the later notion of the separation of powers any hold upon political thought at the time. Coke was thus upholding the validity of one set of courts, those of the Common Law, as against another, the High Court of Parliament. Notwithstanding this, the case certainly contains the idea that the common law embodies the principles of natural law and natural right, and that it therefore can control the acts of an important agency of the Government.

"Coke became the principle legal authority in colonial America in the eighteenth century, in part because his *Institutes and Commentaries on the Common Law* were among the very few legal works accessible to colonial lawyers, in part because many colonists studied law at the Inns of Court in London, where Coke's ideas were still given wide currency, even though many of them were no longer generally recognized in English practice. Coke's notion that the common law and *Magna Charta* reflected natural law and could, therefore, control acts of Parliament thus gained wide acceptance in America, even though the doctrine was generally rejected in England after 1700."

20. Postulates of the Doctrine of Judicial Review

The doctrine of Judicial Review pre-supposes the truth of the following propositions :—

(1) Constitution is a law which is *enforceable* by Courts.

(2) It is a law of *higher obligation* than the ordinary law.

(3) In the event of conflict between constitution and ordinary law, it is for the *Courts* to declare the ordinary law, on the ground of its repugnance to higher law, as void.

This doctrine, in the context of American Constitutional history, has acquired a further implication (which, it is submitted, it cannot conceivably have in so far as its application to the interpretation of our Constitution is concerned), namely that by reason of the principle of the separation of powers, a judicial interpretation of the statutory law and so of the Constitution is final for the determination of the case in which it was rendered.

In the United States, a final opinion delivered by the Supreme Court, pronouncing the invalidity of a law upon the ground that it is beyond the law making power of a subordinate and non sovereign organ like the Congress or the State Legislature, cannot be set aside by any Legislature by means of a declaratory Act The only way to dispose of the situation created by the decision of the Court, is to amend the Constitution and take power to re enact the impugned law In England on the other hand all that the Courts can do is to accept the law passed by the Parliament and proceed to interpret it and apply it In our country, if a piece of legislation is struck down as being inconsistent with the Constitution, it is not clear if the appropriate Legislature would be competent to set aside the decision of the court by means of a declaratory Act and support the validity of the legislative process upon the footing of an argument that the *meaning and effect of a certain Act passed by it has been misunderstood by the Court that has declared it as invalid* It is true that it is for the Courts in this country to interpret and apply the Constitution, but it is not clear whether the power to interpret and apply the *ordinary* law is *exclusively* vested in our judiciary In the scheme of our Constitution and from the historical background of the law which must be pre supposed to have been perpetuated by *ART* 224 thereof (which speaks of the continuance of the existing laws in force immediately before the Constitution Day), it is clear that the Legislature is also empowered to interpret its own legislation and give effect to such an interpretation by enacting a declaratory Act thereby virtually annulling the decision of the Court which had been rendered on the footing of an incorrect interpretation given by it to an ordinary law No such case has arisen so far as this author is aware even in India and the problem posed here may thus be regarded as an open question, that is, as a matter which is yet *res integra*

In amplification of what is said above with regard to the competence of the legislative organ of the State to interpret its own enactments, it is necessary to refer to a *Canadian case, Beauharnois Light Heat & Power Co Ltd v The Hydro Electric Power Commission of Ontario* (1937) *O R* 796, where the Court of first instance declared a certain provincial statute that purported to make null and void an agreement for Electric Power which the Plaintiff Company sought to enforce as being *ultra vires* despite the fact that the Court s competence to do so was disputed in so far as the consent of the Attorney General for the commencement of the action, which was required to be taken under a statutory provision, was not taken Before the case could reach the stage of hearing in the Court of Appeal the Legislature passed a statute which explained the meaning and effect of the provision as to consent and declared that the meaning thus declared was at all times the meaning of that provision

The Court of Appeal declined to take notice of the legislative declaration of the [illegible] parties had already passed [illegible] But the Court of Appeal [illegible]

"The Legislature in matters within its competence, is unquestionably supreme, but it falls to the courts to determine the meaning of the language used If the Courts do not determine in accordance with the true intention of the Legislature, the Legislature cannot arrogate to itself the jurisdiction of a further appellate court and enact that the language used in its earlier enactment means something other than the Court has determined It can, if it so pleases use other language expressing its meaning more clearly It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the courts, and that it always has meant something other than what the courts have declared it to mean Very plainly is this so when, as in this case, the declaratory Act was not passed until after the original Act had been construed, and judgment pronounced "

How are we to understand the principle upon which the decision of the Court of Appeal in the case quoted above turned? In the first place, the 'Appeal Court' has to rehear and retry the issues that are struck before the trial court and has to take notice of the law as it actually exists at the time of its own decision on the case. It would be different if the same court were to exercise a power of review: the law that would be considered by a Court of review would be the law as it was at the time it rendered the judgment and not, as it came to be, afterwards. In this case, the Court of Appeal was competent to give effect to the intervening enactment that had been passed by the Legislature after the judgment was given by the trial Court. The real question then is: Is it open to the Legislature to give to its own Acts a meaning which is at variance with the meaning given to it by the Courts—and thereby, in effect, interfere with the judicial function which it is for the courts to discharge? Is it right, in the words of the Judge to say "that the *Legislature transcends its true function* when it undertakes to say that the language used in a statute has a different meaning and effect to that given to it by the courts." If we rigidly go by the 'Theory of separation of powers' there is *much to be said for the view* that the legislative power cannot intermeddle with the function of the judiciary—which is to interpret and apply the law. If a Legislature passes a law which, as judicially interpreted, is beyond its competence, does it lie with the same Legislature to explain, by means of a *post facto* legislation, the true meaning and effect of the impugned legislation so as to show that it was competent to enact it?

In yet another Canadian case, a Legislature declared by means of a *retro-active* legislation the effect of its own enactment by saying that *that enactment was not intended to implement or carry into effect the recommendation or findings of any report and, more or less, directed that in construing that enactment no reference to any such report should be made.* After the passing of this explanatory Act, the question arose of giving effect to this declaration of legislative intent in a case before the Court wherein an injunction had already been given upon the assumption that the enactment sought to be subsequently explained by the Legislature had a meaning which was different from the one that was attempted to be read into it by the Legislature. The court ignored this *retro-active post facto* declaration by the Legislature of the meaning and effect of the previous enactment observing, "a mere assertion, even by the Legislature, does not make that a fact which is not a fact". [See *Home Oil Distributors Ltd. v. Attorney-General for British Columbia* (1939), 1 *W. W. R.* 449 (*B. C. C. A.*)]. This view was defended by the Court of Appeal upon the ground that "the Court regarded the interlocutory enactment as *ineffective to curtail the unassailable jurisdiction* of the Courts of Canada to adjudicate upon constitutional questions under the British North America Act and under the circumstances before us, we regard it as not of much weight in other respects". [See (1939) 2 *W.W.R.* 419-20 (*B.C.C.A.*). See also the *Canadian Bar Review for* 1941 *at p.* 45, for a critical appraisal of the argument involved in the decision of these Canadian cases].

Judicial Power and the Constitution.

In Article III of the Constitution of the United States, it is provided: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .". In *Section* 2 of the same Article, it is further provided, "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of United States, and Treaties made, or which shall be made, under their authority. . .". The combined effect of these provisions is to make it clear beyond all controversy that the judicial power is vested in one Supreme Court, even as the legislative power is vested in the Congress [composed of (a) The House of Representatives plus (b) the Senate] and the Executive Power is vested in the President.

Under our Constitution, as has been remarked earlier, *there is no express declaration*

to the effect that the Constitution is the Supreme Law of the Land In certain special cases, however, in effect, although not in terms, it is provided that certain portions of our Constitution embody the supreme law of the land

21. Doctrine of Judicial Review of Legislation and our Constitution

Our Constitution in *ART* 4 provides that any existing law or any custom or usage having the force of law in so far as it is inconsistent with the provisions of Part II (which deals with Fundamental Rights) shall to the extent of such inconsistency be void It also imposes restriction upon the *State* and forbids it from making any law or taking any administrative or executive action which takes away or abridges any or all of the Rights conferred by Part II and proceeds to decree that any law which is made in contravention thereof, shall be void It however saves laws relating to the members of the armed forces or forces charged with the maintenance of public order from a challenge based on *ART* 4

To that extent then it could be said that the provisions of the Part relating to Fundamental Rights are expressly declared to be the Supreme Law of the Land In the same part of our Constitution —to be precise in *ART* 22 —the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the said Part is guaranteed The right to move the Supreme Court for the enforcement of Fundamental Rights is thus itself a Fundamental Right The combined effect of *ARTs* 4 *and* 22 is to confer on the Supreme Court the Power of Judicial Review of State action (be it in the sphere of law making or law executing) and of declaring it to be of no effect whatever in case it appears to it to contravene any of the provisions of Part II, or is inconsistent therewith This right has also been conferred on the High Courts of our country (*ART* 170)

The species of cases where the power of Judicial Review for the purpose of the present analysis, would be exercisable by our Courts may be subdivided into two main categories

(A) Cases where there is an absolute prohibition to pass certain laws or to act in a certain way as for instance, No person shall be deprived of life or liberty or property save in accordance with law [(ARTs 5(2) 15(1) etc]

(B) Cases where although there is no absolute prohibition to act in a certain way or pass a certain type of law there is a qualified limitation on State action, as for instance in ARTs 8 9 10 and 11, we have *right of citizens* like freedom of speech freedom of association freedom of movement freedom to hold and dispose of property etc guaranteed "subject to any reasonable restrictions imposed by law

What is and what is not a reasonable restriction would in each case depend upon the judgment of the forum in which the question of the enforcement of any of the fundamental rights in question is raised and regarded in the abstract, it could be safely asserted that this judgment itself would depend on the Courts' appreciation of the existing economico political situation in the country and the judgment would to that extent, be capable of being determined by appeal to evidence In substance, therefore the question, whether or not any *restrictions* imposed by law upon these rights are reasonable, would be, in the language of jurisprudence a question of fact, and would be decided upon the state of evidence that might be disclosed to the Courts or upon such other facts of which the Courts under the law relating to evidence, are entitled to take judicial notice

22. Courts of our Country—Are they Super-Legislatures ?

The latter species of the power of Judicial Review, in effect, invests the courts of law in this country with the character of being *super legislatures*, for it confers upon them

what might be characterised as the *power of veto upon the legislation passed by the law-making or law-executing organs within the state.* But it must be remembered that, strictly speaking, it is a power of veto, which could only be exercised by our Courts upon *a case being presented to them for adjudication.* It is only in cases where the question of the enforcement of the relevant fundamental rights guaranteed by Part II of the Constitution is involved, that the exercise of this power of the Courts would manifest itself.

Legislation void if the Legislature enacting it is incompetent.

Next we may turn to cases where a Legislature passes Laws when it has not the power to pass a law upon a given subject matter. In *ARTs.* 105, 106 *and* 110 we have an account of the limitations imposed upon the law-making power of the Parliament and the Provincial Legislatures in respect of matters mentioned in the Federal, Concurrent and Provincial Lists (see the 5th Schedule). In the event of any Legislature passing a law in defiance of these limitations, there would, in the language of law, be manifestly a lack of *initial competence on the part of the relevant legislature to pass the impugned law*, and the courts of law in our country, on being of the opinion that a given Legislature has trespassed into the field of law-making activity reserved to another Legislature under the Constitution, would proceed to ignore the law in question and not give to it any effect whatever, that is to say, they would declare it as *ultra vires* of its legislative powers.

23. Power of Courts to give full effect to Constitution

We may notice in this connection the power of courts to give effect *generally to the provisions of the constitution.* Unless there is a clear constitutional provision prohibiting the interference by the courts, all constitutional processes prescribed under the Constitution are capable of being enforced by our courts of law, and any result which has been reached by violation of or non-compliance with any of these provisions would be declared by them as invalid. Illustrations of the cases bearing upon express exclusion of the general power of the judiciary to interfere in these cases would be met with in diverse parts of our Constitution. For instance:

(a) in *ART.* 32(3) it is provided, "The validity of the election of the President shall not be questioned in any court; or

(b) in *ART.* 37(2) it is provided "The question whether any, and if so, what, advice has been tendered by the Cabinet, or a Minister or Minister of State, shall not be enquired into in any court"; or

(c) in *ART.* 56(1) it is provided, "The validity of any proceedings in the National Assembly shall not be questioned in any court; or

(d) in *ART.* 58(3) it is provided, "Every Money Bill, when it is presented to the President for his assent, shall bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court"; or

(e) in ART. 142(5)it is provided: "The validity of anything done by or under the authority of the Delimitation Commission shall not be called in question in any court."

The very fact that, in several parts of our Constitution, the *power of courts to interfere* has been expressly excluded, lends itself to the interpretation that in regard to the enforcement of the remaining parts of the Constitution (as, for instance,,where a certain appointment is to be made under certain conditions or a certain legislative or executive action has to be initiated in a certain way) that power of interference by Courts exists: this construction tends to show that, if there is any disregard of any of the constitutional requirements, the result can, subject only to the prohibitions imposed by the express constitutional provisions on the judicial power of the courts, always be attacked as being

contrary to the Constitution and therefore of no legal effect, and our Courts would be duty bound to give effect to a well directed challenge on this score

The whole of our Constitution thus appears to be designed to create a kind of polity which is law dominated, and all the authorities and organs of the State Power and the specific modes in which they are to act and inter act in the discharge of the duties assigned to them, are all matters that are liable to be controlled in the manner provided for in the Constitution, and the courts of law, in the exercise of their professed power of interpreting the written word of the Constitution in effect become, subject to certain well defined limitations mentioned in the Constitution itself, final authorities in the adjudication of questions relating to the constitutionality of governmental acts and omissions

Our Polity is Law Dominated

The Government thus established by the Constitution may well be described as a Government by the Judges The powers of the executive and the legislature, as even of the judiciary, being themselves the creatures of the Constitution, must operate within the spheres of their allotted jurisdiction The authority of the Constitution being superior to the judgment of the authorities it creates the organ of the sovereign power which is authorised to interpret and apply the Constitution thus, in a qualified sense atleast becomes *superior* to other organs and authorities It is no doubt true that the judiciary, while inter preting and applying the law must surrender itself at the altar of the obvious constitution

Government by the Judges

the limits of their own jurisdiction power or authority

This is an e
of belief that *hones*
tution and as the
under our Constitution But then even honest Judges are only honest *men*—men of flesh and blood, men who are heir to all the ills that men suffer from ills to which the whole of mankind is a prey Extra judicial factors do sometime operate and whereas some of these have reference to the besetting sins inherent in the constitution of human mind there are others that have reference to the nature of the system itself Judges are called upon to appeal to artificial standards of judgment and in the conflict of views between them it is the majority view that is made to prevail a view which need not be a valid view to take of the case before the Court As it has been wisely remarked What is the rule or principle which is to be applied in the settlement and adjudication of con troversies that come to courts of law in the last resort depends upon the way in which the majority of the judges who compose the supreme court opine about them " Similarly, it has been said by the same writer, ' Now, there is no set rule of construction which will unify the judgment of nine men who at any one time constitute the Supreme Court, or the many inferior judges throughout the country The logic of construction is created by the Judges, it governs their mind and it is not something external to them For logic is pro cedure and no more, but the decision of a judge depends upon the nature of the premises from which he proceeds There is no indisputably authoritative system of interpretation nothing which is universally accepted That which exists is the synthetic production of the commentators and law schools It is a collection of sayings and reasons extracted from the judgments rendered But the Judges contradict each other They contradict themselves—not always on different occasions Their real motives do not always square with their ex pressed reasons Obviously the rules are general and vague and just as obviously their number complicates the issue and trammels the conscience A fresh case is liable to call for a fresh rule, or such an application of an old one that it becomes unrecognizable without

Internal Limitations and Restraints on Judicial Power

the services of intricate casuistry, as considerations of some of these rules show." (*Professor Herman Finer, Theory & Practice of Modern Governments, p. 145*).

24. Role of Judiciary in the English Constitution

The role of judiciary in the English Constitution is radically different from the one that has been discussed above. There, the Judges receive the ordinary as also the constitutional laws passed by Parliament as though they constituted the Supreme Law of the Land, and in relation to which they could not exercise the power of judicial review. They cannot question these legislative acts as having stemmed from *a lack of competence in the legislative body that made them nor can they pronounce upon the reasonableness or the wisdom of the courses of conduct they command or forbid.* They are there only to interpret and apply the legislative mandates.

Lee vs Bude

Repelling the contention that the English Court was competent to ignore the Acts of Parliament that were fraudulently procured, Willes, J. remarked in the case of *Lee v. Bude* "I would observe as to these Acts of Parliament that they are the Law of this land; and we do not sit here as a Court of Appeal from Parliament. It was once said,—I think in Hobart, (*In Day v. Savadge Hob.* 87)—that if an Act of Parliament were to create a man Judge in his own case the Court might disregard it. That dictum, however, stands more as a warning, rather than as an authority to be followed. We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly it is for the Legislature to correct it by repealing it: but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them." (See *Lee v. Bude and Torrington Junction Railway Co.* (1871) *L.R.* 6 *C.P., p.* 576 *at* 582).

Principles of statutory Interpretation in England.

If the words are unmistakably clear, there is no possibility for judicial bias clouding the issue of their interpretation, and no loophole "for the introduction of extraneous doctrine or philosophy". The function of interpretation in England is regulated by principles of common law and these have been indicated by Keir & Lawson (*Cases on Constitutional Law—Oxford* 1928—Chap. I). These are :

"(1) The State is not liable to be sued unless by express legislative provision.

(2) Fundamental rights are not to be withdrawn by other than direct legislation; thus there is to be no deprivation of the common-law rights of individual freedom, or property without compensation, unless expressly stated, and penal and taxing legislation is to be strictly construed.

(3) Any change in the process of governments which is the unintentional result of legislation on other matters will not be permitted.

(4) Wide latitude will be granted to the executive in question on the extent of its powers during periods of national emergency."

Principles of Judicial Interpretation—Position in Pakistan.

It is submitted that although the historical background of the *corpus juris* of Pakistan has been considerably influenced by these common-law doctrines, now that there is a written constitution which includes in its folds a chapter on fundamental rights, the principles that would apply to the interpretation of our Constitution will have to be evolved by our courts, and it is submitted that the pedigree of these principles will be a some sort of "cross-breed" and would partake of a dual character in that, in some respects, canons of interpretation developed by the British Courts and, in some other respects, canons of interpretation and construction evolved by the American courts will have to be blended with the

ultimate result that our judiciary will negotiate a course of interpretation which would be somewhere midway between these two forensic extremes

25. Supremacy of some Constitutions is secured through means other than that of "Judicial Review".

It becomes necessary in this context to notice how in countries where the doctrine of judicial review does not apply the supremacy of a written Constitution is maintained

In Switzerland, for instance, the federal judiciary has no power to review the con stitutionality of the federal laws Its powers are confined to adjudicating the constitutionality of the *Cantonal* laws The Swiss constitution does not establish any clear-cut division between the *executive* and the *judicial* organs of the state power It is the Federal Assembly that is the final judge of questions involving determination of the respective jurisdictions of the executive and of the federal court The Judges themselves are appointed by the Federal Assembly (ART 107) and that, the Federal Court, as an organ of the State power has not to be viewed as being on par with the Federal Assembly In Part IV of Chapter II (ARTs 106 to 114) of the *Swiss Constitution* we have the powers and jurisdiction of federal judiciary defined, but more particularly it is ARTs 110, 111, 112 and 113 that set forth specifically the elements of its jurisdiction It is provided in Article 113, " in all cases abovementioned the federal tribunal shall administer the laws passed by the Federal Assembly, and such ordinances of that assembly as are of general application It shall likewise act in accordance with treaties ratified by the Federal Assembly " (a) Swiss Example

"The reason why", says Dicey, "all Acts of the Assembly must be treated as con stitutional by the Federal Tribunal is that the constitution itself almost precludes the possi bility of encroachment upon its articles by the federal legislative body No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the Cantons, and an ordinary law duly passed by the Federal Assembly may be legally annulled by a popular veto The authority of the Swiss Assembly nominally exceeds the authority of Congress, because in reality the Swiss Legislative body is weaker than Congress For while in each case there lies in the background a legislative sovereign capable of con trolling the action of the ordinary legislature, the sovereign power is far more easily brought into play in Switzerland than in America When the sovereign power can easily enforce its will, it may trust to its own action for maintaining its rights, when, as in America, the same power acts but rarely and with difficulty, the courts naturally become the guardians of the sovereign's will expressed in the articles of the Constitution" (*Dicey's Law of the Constitution*, pp 170-171) Dicey quoted

In the Constitution of the Fourth French Republic, a special procedure for securing the constitutional validity of laws has been improvised A study of *ARTs* 91, 92 *and* 93 would exhibit this procedure in all its details It is for the Constitutional Committee created under *ART* 91 of the *French Constitution* to say whether the laws passed by the National Assembly imply amendment of the Constitution The Committee is presided over by the President of the Republic and includes President of the National Assembly, the President of the Council of Republic and 7 other members elected by the National Assembly by proportional representation of party groups at the beginning of each annual session These members are drawn from outside its membership Likewise, Council of the Republic also elects three other members Upon receiving a joint request, (namely that it examine the impugned law) from the President of the Republic and the President of the Council of Republic, it proceeds, in the first instance, to bring about *agreement between National Assembly and the Council of Republic*, but if it does not succeed in accomplishing (b) French Example

this, it is required to decide the matter within *five* days, next after the date on which the request is received. This period could be reduced to two days in cases of emergency. If it holds that the law in question implies amendment of the Constitution, the impugned law shall be sent back to the National Assembly for reconsideration, and if the Parliament adheres to its original vote, the law will not be promulgated until the Constitution has been amended according to the procedure set forth in *ART.* 90. It would be noticed that interpretation of the constitutionality of the impugned law does not partake either of the method provided in the *Constitution of United States* (namely by means of judicial review), nor again does it conform to the English Constitutional practice (that is, of rendering the Parliamentary legislative Acts immune from challenge). The French Assembly *is not supreme in the sense in which British Parliament undoubtedly is supreme.* The Committee created under the Constitution, although its personnel consists of high and responsible persons, cannot claim the independent status of the Judges. By this method, however, before a law can be made effective, delay is bound to intervene. If the law is declared to be unconstitutional it cannot be promulgated as effective law until the compliance with the prescribed procedure and the special majority required for constitutional amendments are complied with. It would also be noticed that the jurisdiction of the Constitutional Committee to declare Acts of the National Assembly unconstitutional, does not extend to the bill of rights—that is, precisely the part in respect of which legislation must in the ordinary course of things suffer the greatest measure of challenge.

Conclusion

The cases of Swiss and French Constitutions have been referred to by the author in an attempt to show that the procedure of judicial review is not the *only device of conserving the supremacy of a written constitution.*

Both of these constitutions, that is of Switzerland and France, exhibit appeal to political processes and not to a judicial forum in the matter of determining constitutionality of laws enacted by their legislatures.

26. Meaning of "Unconstitutional Law"

To begin with, the expression "Unconstitutional Law" is a contradiction in terms: if what the Legislature has done is beyond its constitutional powers, the result cannot be *law*, and if it is law it must be the result of an act done by a Legislature in the exercise of its constitutional authority and cannot, on that account, be dubbed as "Unconstitutional". An unconstitutional law is in reality *no law at all*: it confers no rights, imposes no obligations, creates no liability—it is of no legal force or effect whatsoever.

Our Parliament unlike the Parliament in England is a *non-sovereign* Law-making body and its acts would be without any legal force if they did not conform to the requirements of those constitutional provisions which define the limits of its law-making powers. The sovereign power, which under the theory of our Constitution resides in the *People*, "who have adopted, enacted and given" to themselves "this Constitution", has imposed certain well-defined limitations upon the exercise of law-making functions of the Parliament and the Provincial Legislatures (as also upon the Federal or Provincial Executive) and an exercise of a power by any of the organs of State-power beyond these limits, that is, beyond the powers conferred by the Constitution, would therefore be denounced by Courts as "unconstitutional".

The rule that is to be applied in the determination of the question whether a given law is "void" or "unconstitutional", is precisely the same as the one that is applied by the courts in England when they have to deal with the acts of administrative authorities who have to work within the ambit of only those powers that have been granted to them under the Act of Parliament: as, for example, the powers delegated by Parliament to a Corpora-

ion like the English Railway Company, powers in the exercise whereof it makes what re called the *bye laws* and the rule is that any bye law made by such a corporation which s beyond the powers conferred upon it by the Parliament is *ultra vires* of its charter and herefore legally considered, null and void In short, it is inoperative as Law

7 Position under Government of India Act compared with the position under present Constitution

The Government of India Act 1935 as it stood before the coming into being of the two overeign Dominions of India and Pakistan could only be amended by an Act of Imperial Parli ment The Federal Legislature (or the Indian Legislature) that the Parliament had set up inder its provisions being a non sovereign law making body could pass only those laws which ell within the ambit of its authority as circumscribed under that Act, and the Indian Courts iad the power to denounce a statute enacted by the Legislature as being of no force and ffect in case the same was adjudged by them as having been made beyond its law making owers The present legal position under the Constitutions framed in India and Pakistan s precisely the same—with the sole difference that the new Constitutions in these count ies are ordained and established by the *sovereign people instead of the Imperial Parliament in ngland* The Legislatures that have been set up under either of those Constitutions are ion sovereign law making bodies The two Constituent Assemblies of India and Pakistan hat were set up under the Indian Independence Act, 1947, and charged with the duty of raming the Constitution for the two sovereign Independent Dominions had under *section* 6 of that *Act*, full power to make laws including laws having extra territorial operation, and n *sub section 6 of the said Section their power to make laws was expressly declared to extend to the naking of laws limiting for the future the powers of the Legislature of the Dominion* Both the ndian as also the Pakistan Constitutent Assembly have actually imposed limits on the egislative powers of the law making orgins they have set up under their new Constitutions The imposition of limits on these powers was necessary in view of the fact that the authority of the Government was to be divided on the basis of Federal principle between the National and Regional Governments The Constitutions framed by these Assemblies also included hapters relating to Fundamental Rights and to the extent the framers of these Constitutions ecognised the justiciable character of these constitutional rights and guarantees they in ffect, limited the power of the law making organ of the State to make laws in violation of those rights and guarantees

Enforcement of limits on Power requires the existence of an agency charged with the duty of maintaining these limits

Limits to Legislative Power necessarily postulate the existence of some agent or organ within the State, to which is left the duty of recognizing and if possible enforcing those limits on power Under our Constitution that power, subject to such express limita tions as have been placed upon that power (i e power of judicial review), is reposed in the courts of law

The juristic aspect of this power, as an incident of the American concept of the constitution, being the ' Supreme Law of the Land " has been stated by Kent thus "The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance, and there can be no doubt on the point with us that every act of the legislative power contrary to the true intent and meaning of the Constitution, is absolutely null and void The judiciary department is the proper power in the Government to determine whether a statute be or be not constitutional The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law To contend that the courts of justice must obey the requisitions of an Act of the Legislature when it appears to them to have been passed in violation of the Constitution would be to

contend that the law was superior to the Constitution, and that the Judges had no right to look into it, and regard it as a paramount law. It would be rendering the power of the agent greater than that of his principal and be declaring that the will of only one concurrent and co-ordinate department of the subordinate authorities under the Constitution was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the Government, and the fundamental laws on which it rested. The attempt to impose restraints upon the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them". *Lecture XX* (*Commentaries on American Law*). *Vol.* 1., *p.* 447, 1889—*Philadelphia. The Blackstone Publishing Co.*

28. Power to declare laws "Unconstitutional"—not inconsistent with giving effect to the will of the People

When the courts of law hold certain laws to be unconstitutional their declarations cannot be construed as defeating the *will of the people* as expressed in the legislatures of the country. From what has been said so far it would be apparent that the legal sovereign that ordains and establishes the constitution is the People, but this term ought not to be confused with the *people as the voters who have returned their representatives to act as legislators.* The people as a *historic community* must be distinguished from the People *as a community of the entire living population with their predecessors and successors.* "The people, acting solemnly and deliberately", says Professor Willoughby in his book on *The Constitution of the United States*, "in their sovereign capacity, declare that certain matters shall be determined in a certain way. These matters, because of their great and fundamental importance, they reduce to definite written form, and declare that they shall not be changed except in a particular manner. In addition to this they go on to say, in substance, that so decided is their will and so maturely formed their judgment, upon these matters, any act of their own representatives in legislature inconsistent therewith, is not to be taken as expressing their true will. Therefore, when the courts declare void, legislative acts inconsistent with constitutional provisions, the Judges are giving effect to the real will of the people as they have previously solemnly declared it (p.9)".

Thus, in effect, in declaring laws unconstitutional the Judges are administering the real will of the legal sovereign—a will, which having regard to the view they take of the impugned law, has been thwarted by the representatives of people considered as a *historic Community*.

(a) The case of U.S.A. Constitution.

It is interesting to recall some facts which have a bearing upon the question as to in what sense was it right for the Founding Fathers to say, "We the people of United States... ordain and establish this Constitution". On the best evidence that is now available as to the number of persons who could be said to have become party to that document, it is by now well-settled that the vote was under 5 per cent of the whole population. Here is what Walter Lippmann has to say on this aspect of the question relating to the Constitution having been ordained and established by the People of America. "On September 17, 1787, about forty members signed the draft on which they had been working since May 25, for one hundred and sixteen days. In *ART. VII of* their text they stipulated that if and when conventions in nine States had ratified it, then for those nine States The People of the United States would have ordained and established the Constitution. In this context a majority of the delegates elected to nine State conventions were deemed to be entitled to act as The People of the United States.

Walter Lippmann quoted.

"The inhabitants of the United States who were qualified to vote for these delegates were not a large number. They included no slaves, no women and, except in New York,

only such adult males as could pass property and other highly restrictive tests We do not have accurate figures But according to the census of 1790 the population was 3,929,782 Of these, 3,200,000 were *free persons and the adult males among them* who were entitled to vote are estimated to have been less than 500,000 Using the Massachusett figures as a statistical sample, it may be assumed that less than 160,000 actually voted for delegates to all the ratifying conventions, and of those voting, perhaps 100,000 favoured the adoption of the Constitution

"The exact figures do not matter The point is that the voters were not—and we may add that they have never been and can never be—more than a fraction of the total population They were less than 5 per cent when the Constitution was ordained They were not yet 40 per cent in 1952 when, except under the special conditions in the South, *we had universal adult suffrage Manifestly, the voters can never be equal to the whole* population, even to the whole living adult population

"Because of the discrepancy between The People as voters and The People as the corporate nation, the voters have no title to consider themselves the Proprietors of the Commonwealth and to claim that their interests are identical with the public interest A prevailing plurality of the voters are not *The People* The claim that they are is a bogus title invoked to justify the usurpation of the executive power by representative assemblies ... fact demagoguery can be ... voters are invested with ... mmitted *in the people's* name" See his *Public Philosophy (pp 32 33) Boston 1955*

It is on the basis of this very realization that Herman Finer is of the opinion that the People of the United States did *not*, in any real sense give to themselves the Constitution It is only metaphorically true that the People established the constitution The delegates to the Convention were chosen without any popular awareness of what they were to accomplish Beard has called the convention's resolution, that the constitution go into effect when 9 of the States had ratified it, as a sort of *coup d'etat*, a remark which is strongly reminiscent of Hume s description of the making of Glorious Revolution in England of 1689 by the majority of 700 (*Charles Beard—Economic Interpretation of Constitution N Y 1913, p 16*)

What has been said about the meagre vote in support of the United States Constitution is equally true of the Revolutionary Constitution of France Anyone examining the nature and extent of the popular support, which the Revolutionary Constitution of 1871 *secured from the people's will, would be amazed to discover the extremely unrepresentative* character of the Constituent Assembly that was responsible for its enactment Even the question, whether France should have a constitutional monarchy on the lines of English pattern or it should have a republican form of government, which was decided in January, *1875*, was itself adopted *by majority of one vote (353 to 352), and even this* extremely meagre margin was secured by a shift of 26 voters from moderate monarchists who were afraid that a further delay in the installation of a Constitution would provoke radical disorder in the country The later vote on the same test brought the affirmative votes upto 425 though some of the converts voted in the hope that the republic would fail

(b) Case of French Constitution Revolutionary Constitution.

Even the Constitution of Fourth French Republic of 1946 could hardly, considered in the light of well known facts, be said to have been ordained and established by the People of France The position of the party alignments indicative of the strength of voting for the Constituent Assembly of October 21, 1945, was as follows —

(c) Case of French Constitution of 1946

Communists	26 1%
M R P	23 9%

Socialists	23·4%
Left Association, including Radical Socialists	10·6%
Conservatives and various other small groups	15·2%

and the basic question, whether the Assembly should be constituent, which was referred to the people, was settled by a narrow margin of votes: 15·66 million for, over half a million against, and 8 million abstentions. The position of the parties remained roughly the same in the Constituent Assembly of June 2, 1946. The first draft prepared by it was rejected by 52.8% of the votes at the referendum. In the referendum of October 13, 1946, a slightly amended draft was approved only by 35.9% of the electorate. Out of a total of 26.2 million, 9.25 million said 'yes', to the Constitution; 8 million said 'no', and 8.5 million did not even vote. (See Finer's *Theory and Practice of Modern Govts. pp.* 123-124)

(d) Cases of Weimar and Soviet Constitution.

Instances of the *Weimar Constitution of Germany*, and of course of the *Soviet Constitution* could be more adequately pressed in the service of the argument to show that the thesis that it is the people who establish the institutional fabric of the Government under the written constitution is just a useful fiction and at best only a convenient metaphor.

(e) Case of our Constitution.

A student of constitutional history would, therefore, not be amazed at the thought that the Constituent Assembly of Pakistan, that gave this Constitution to the country, did not have much popular support, and that its representative character is open to grave doubt. After all a House of 80 members is supposed to have represented a Nation of 76 million. The election of these members to the Constituent Assembly was secured *indirectly* by the Legislatures of the various provinces of Pakistan. And what is worse, those electoral colleges by then had no *mandate* from the people to vote for any representatives to constitute the New Constituent Assembly. The Constitution when adopted was rejected by the opposition which consisted of nearly 30 per cent of the total vote of the members present in the House. And what is more, it was rejected by a majority of the *representatives* of a major province of Pakistan, namely East Bengal.

29. Usefulness of the fiction of Sovereign People establishing the Constitution

Lippmann quoted.

But all the same, in the ultimate analysis it is, "The People" who ordain and establish the Constitution, speak on behalf of the nation. And it is for the purposes of practical politics important that they should speak in the name of the ' people ' understood as a corporation, that is, as an entity which lives on while individuals come into it and go out of it. This is because, in the words of Walter Lippmann, "This invisible, inaudible, and so largely non-existent community gives rational meaning to the necessary objectives of Government. If we deny it, identifying the people with the prevailing pluralities who vote in order to serve, as Bentham has it, 'their pleasures and their security', where and what is the nation, and whose duty and business is it to defend the public interest? Bentham leaves us with the state as an arena in which factions contend for their immediate advantage in the struggle for survival and domination. Without the invisible and transcendent community to bind them, why should they care for posterity? And why should posterity care about them, and about their treaties and their contracts, their commitments and their promises? Yet, without these engagements to the future, they could not live and work; without these engagements the fabric of society is unravelled and shredded." (See *Walter Lippmann's "Public Philosophy"* 1955).

30. Meaning of "Sovereignty"

Austin's View.

We are now in a position to consider the precise meaning of the term "sovereignty". John Austin in his lectures on "*The Province of Jurisprudence Determined etc.*" examined the concept of sovereignty strictly from the point of view of the limited purpose which he had

set before himself, namely How to explain the main characteristics which distinguish positive laws from other kinds of laws—like the moral law etc It would be recalled that, according to him, laws proper or properly so called are commands, laws which are not commands are laws "improperly so called" In his opinion, the essential feature of a positive law stems from the fact that it is in the nature of a command issued by a sovereign person or a sovereign body of persons to a member or members of the independent political society wherein that person or body of persons is sovereign or supreme A command, according to Austin, has a peculiar meaning "If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command Being liable to evil from you if I comply not with a wish you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it If, in spite of that evil in prospect, I comply not with the wish you signify, I am said to disobey your command, or to violate the duty which it imposes Command and duty are thus correlative terms The evil which will probably be incured in case a command be disobeyed or (to use an equivalent expression) in case a duty is broken, is frequently called *sanction*, or an enforcement of obedience Or (varying the phrase) the command or the duty is said to be sanctioned or enforced by the chance of incurring the evil" (See *Lecture* 1, *of The Province of Jurisprudence Determined*)

He distinguishes sovereignty from other superiority or might, and society "political and independent" from society of other descriptions In words that are memorable and may as well be quoted, (See pp 220 *et seq of Lecture VI of Province of Jurisprudence Determined London—John Murray*—1911) he stated his thesis as follows

"The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters —1 The *bulk* of the given society are in a *habit* of obedience or submission to *a determinate* and common superior let that common superior be a certain individual person, or a certain body or aggregate of individual persons 2 That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience

"Or the notions of sovereignty and independent political society may be expressed concisely thus—If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent"

Austin defines independent Political Society as consisting of a Sovereign The relation between subject and sovereign is one of power the sovereign cannot be said to have legal rights against his subjects and to that extent, it cannot be said that the sovereign is bound by any legal duties It is necessary that this contention of Austin should be clearly understood

It is of the essence of a legal relationship that it can subsist between two parties only when, transcending them both, there exists a sovereign who will enforce the breach of the rule of law or the *vinculum juris* which ties up the two parties together Thus regarded, the subject matter of Constitutional Law may be divided into two parts in the

changing conditions under which a given politically independent society lives, moves, and has its being It is in this sense that people are the true sovereign— "For the true legislator is he, not by whose authority law was first made but by whose authority it continues to be a law" (*Adopted from Hobbes and quoted by Austin p* 193)

31. Contemporary Thought on the subject of "Sovereignty"

In a recent paper, (by W J Rees) the theory of sovereignty has been reconstituted in the light of what has been said about it by modern jurists Sovereignty in the legal sense has been used by some as equivalent to supreme *legal authority* It has been used by others to mean some legal authority in so far as it is also *a completely moral authority* And yet for another group of philosophers, the word is meant to indicate a "supreme coercive power exercised by a determinate body of persons possessing a monopoly of certain instruments of coercion" And finally, it has also been used as equivalent to a supreme coercive power exercised *habitually* and co operatively by all, or nearly all the members of the community Mr Rees considers that the *first* version of sovereignty is rendered by *John Austin and by lawyers of the Austinian School*, the *second* by writers like *Rousseau and the Hegelians* like Bernard Bosanquet, the *third* is illustrated in the case of a determinate body of persons capable of enforcing decisions against any likely opposition, no matter who makes or otherwise carries out those decisions, and the use of the concept, in this sense, is implied in Lord Bryce's idea of the "*Practical Sovereign*" which he defines as "the strongest force in the State, whether that force has or has not any recognised legal supremacy", and in the *final* sense, reference is made to the representative thinkers of the school of thought like Locke and others who speak of this supreme coercive power as "the force of the community", "the force of the majority" and "the force of all the people" in such a way as to imply a distinction between this and the exercise of power of a professional police or a standing army "Where there is constituted a commonwealth", says Locke, "there can be but one supreme power which is legislative to which all the rest are and must be subordinate, yet the legislative power being only the fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative power act contrary to the trust reposed in them" (See his *Treatise* para 149)

Dicey's Criticism of Austin's Theory of Sovereignty

Austinean theory of sovereignty reflects a generalisation based upon the distinctive feature of English Constitution, viz the supremacy of the Parliament Under the English Constitution, Parliament does represent the Sovereign strictly in accordance with Austin's conception of what sovereignty ought to denote This is the reason why Professor A V Dicey regards the Austinean theory of sovereignty as, in main, having been influenced by the peculiar history of the English constitutional law Besides, all this, there is, all along, a confusion in the writings of Austin resulting from his indiscriminate use of the word 'Sovereign'—a word which as used by him sometimes is suggestive of the concept of 'legal sovereignty' and at other times that of 'political sovereignty'

That body of persons is *politically* sovereign or supreme in a State, the will of which is, as a matter of *fact*, obeyed by the citizens of the State In cases of rebellion, for instance, the legal sovereign—that is the body of persons recognised by law as sovereign—suffers a set-back and the *defacto* political sovereign who may have usurped power comes up prominently to the fore front It is important to bear this distinction between the legal and political sovereign clearly in view It is for this very reason that Dicey is of the opinion that Austin uses the term 'sover [illegible] power of law making unrestricted by any [illegible]

"If the term [illegible] wer under the English constitution is clearly 'Parliament' But the word 'sovereignty' is sometimes employed in a political rather than in a strictly legal sense That body is

'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British Government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some part of his work, Austin has apparently confused the one sense with the other." *(See Dicey's Law of the Constitution P. 73.)*

Theory of Sovereignty and our Constitution

Applying the distinction between the political and legal sovereign within the framework of power relations established by our Constitution, if we disregard for the time being the assertion contained in the preamble, namely that all sovereignty belongs to *Allah*, one could say that (a) the legal sovereign is the Constitution itself, in that the several organs and authorities established under its mandate are controlled in the exercise of the power vested in them by the very limitations contained in the Constitution, and that (b) the political sovereign is the 'people' who in the exercise of their 'constituent power' can change the Constitution itself. The juristic implication of the declaration contained in the first paragraph of the preamble, namely, that the sovereignty over the entire universe belongs to *Allah Almighty* alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him as a sacred trust, will be dealt with in the last chapter of the present study. But suffice it to say that this declaration is totally irrelevant to the judicial interpretation of our Constitution and this, for the obvious reason that *even* this declaration is made by the very *people* of Pakistan who have given to themselves the present Constitution.—(See the last paragraph of the preamble.) Besides, the true nature of authority to be exercised by the people of Pakistan within the limits prescribed by Him, is incapable of being *judicially interpreted and determined* for the simple reason that there is no indication anywhere in the Constitution as to the nature and extent of the limits imposed thereon to which reference is made, nor again is there a reference to the *means* by which these limitations are to be enforced as operative part of the constitutional processes that have been sanctioned by our Constitution.

32. Paradox of the relative priority of Law and the Constitution

It is often the indiscriminate use of these "legal" and "political" meanings of the word sovereign, this incapacity to discriminate between the competing versions of the notion of sovereignty that gives rise to a paradox which has been posed by Salmond thus: If constitutional law is to be regarded as "the body of those legal principles which determine the constitution of State—which determine, that is to say, the essential and Fundamental portions of the state's organisation—we have here to face an apparent difficulty and a possible objection. How, it may be asked, can the Constitution of a State be determined by Law at all?

There can be no law unless there is already a State whose law it is, and there can be no State without a constitution This is how Salmond puts the case in his "Jurisprudence"

"The State and its constitution are therefore necessarily prior to the law How, then, does the law determine the constitution? Is constitutional law in reality law at all? Is not the constitution a pure matter of *fact*, with which the law has no concern? The answer is, that *the constitution is both a matter of fact and a matter of law* The constitution as it exists *de facto* underlies of necessity the constitution as it exists *de jure* Constitutional law involves concurrent constitutional practice It is merely the reflection, within courts of law, of the external objective reality of the *de facto* organisation of the State *It is* the theory of the constitution, as received by courts of justice It is the consti

law The

tter of law

There may be a State and a constitution without any law, but there can be no law without a State and a constitution No constitution, therefore, can have its source and basis in the law " (p 140)

It is interesting to observe that both the constitutions of Pakistan and India have a *legal* basis in so far as they have admittedly been enacted by the two Constituent Assemblies set up by the departing political sovereign on the eve of the establishment of the two independent sovereign States with power to make provision for the constitution of the new dominions The state of subjecthood of the Indian peoples came to an end when the British Parliament ceased to be responsible as a legal and political sovereign in respect of the governance of India and declared the independent and sovereign character of the two Dominions that were brought into being under the aegis of the *Indian Independence Act of* 1947 In respect of the constitution of Pakistan and India it would not, therefore be correct to say that they have no source and basis in the law By the contention of Sir John Salmond, "No constitution, therefore, can have its source and basis in the law," all that is implied is that the revolutionary constitutions, say the Constitutions like those of U S A and France of the 18th Century Constitutions which came into being after the *status quo* was disrupted by the people who rebelled against the monorachical institutions of the day, were *not* the constitutions that had a source and basis in the law, i e law considered as a command that was habitually being obeyed by these peoples But to pose the problem thus, as it would be apparent now, is to confuse the issue and the confusion arises, be it noted, due to the failure to carefully distinguish between the meanings of the term "law", in the varying contexts in which that term occurs in the argument If the sovereignty is defined as that ultimate authority which sanctions law, then by the coming into being of revolutionary constitutions all that does take place is that the locus of *sovereignty shifts from a determinate body* of persons, whose commands were habitually being obeyed, to another determinate body of persons whose commands will hereafter be obeyed Politically, a sovereign continues to sanction the existence of the legal order in both the cases and even the revolutionary constitution is thus, from this point of view atleast, *founded in law, upon the will of* the political sovereign The political sovereign manifests its existence by the very extent to which it is able to coerce an independent political society to submit to its decrees The ruling ideas of the revolutionary era, which began at the close of 18th Century, therefore, did not give rise to any contradiction of the *sort to which reference has been made in the extract quoted from* Salmond's *Jurisprudence*

Constitutions of India and Pakistan—Legal basis of—

CHAPTER II

SOME OUTSTANDING CHARACTERISTICS OF OUR STATE

tion shall be conferred by the State on any citizen, although the President has the power to award decorations in recognition of distinguished military or public service. No citizen of Pakistan can accept any title, honour, or decoration from any foreign State except with the approval of the President. This provision is in accord with the principle of Republicanism which enjoins that all men are equal before the law and it is the law itself and not the humour or whim of an irresponsible autocrat that determines the qualifications for admission to elective office or franchise.

A Republican form of Government necessarily implies that sovereignty resides in the people and that all the constitutional processes within the State are regulated and controlled by such decisions as the people take or might wish to take. It is obvious that the entirety of the total population of a country cannot directly participate in its administrative or political set-up; so also for reasons that are obvious, children or persons suffering from demented dispositions cannot be allowed to play any role in the political life of the State. Similarly, in some Republican States, adult women are *not* permitted to vote, and this limitation on franchise, since it is prescribed by the law, is not regarded, from the point of view of constitutional theory, as in any manner being incompatible with the principle of Republicanism.

35. State of Pakistan and the Federal Principle

As to the meaning of the term *federal* its proper comprehension demands, as a first step, that we determine the limits within which the *federal principle* is said to operate.

Federalism may be broadly *described as a device by which a system of double government is made to operate in one and the same State.* It envisages a scheme of securing division of power between the National Government, on the one hand, and the Regional Governments, on the other, in such a way that, both of them discharge their law-making and executive functions strictly within the sphere of their allotted jurisdiction. It is one of the important characteristics of the federal constitutions that they invariably contain a well defined procedure for resolving conflicts and clashes of authority, between the two governments thus established within the framework of one and the same State. The two governments accommodated within the framework of a Federal polity are of co-ordinate authority and work independently of each other in the spheres marked out for them. So far as the external appearances go, a Federal State is like any other State, and can hardly be distinguished from what the constitutional lawyers describe as a *Unitary State*: but it is the *internal division of power* that gives to it the character of a composite State. Federal Government operates upon the *whole* of the territory of the State in respect of matters over which it has the authority given to it under the Constitution, whereas the 'Regional' or 'Local Government' although it has *exclusive authority in respect of the subjects consigned to its care and control operates only upon the limited territory defined for it by the Constitution.*

Distinction between Federation and Confederation.

A Federal Government differs from a *Confederal* Government in one essential particular: the authority of the Confederation *does not directly reach over to and operate upon the people.* It operates *through* the intermediary Governments which stand, as it were, midway between the people and itself.

Professor Wheare's Views referred to.

Professor K. C. Wheare, in his recent book on "*Federal Government*" defines "federal principle" thus: "By 'federal principle' I mean the method of dividing powers so that the General and Regional governments are each, within a sphere, coordinate and independent." (p. 11). He admits that there would be many students of the subject who would like to further qualify the statement of the principle attempted by him, in that, they would insist that, the *residuary powers, as they are called, must lie with the Regional Governments.* It would be their view that a government is not Federal if the powers of the

Resolutions and so must be accepted as a treaty of Union among the then provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of Imperial Parliament which was their legal source."

Applying the foregoing test, Lord Haldane declared that Canada was not a true Federation, because the British North America Act created not only a new National Government but also new Provincial Governments with powers defined in the Act: on the other hand, he thought, the United States and the Australian Constitution were *truly Federal* because they merely created the General Governments without substantially altering the powers of the component units, except in so far as they themselves had surrendered such powers as were necessary for the creation of the National Government in question.

Here again it would be noticed that the emphasis is on the *accidental* traits and not upon the *essential characteristics* of a Federal system of Government. Confining our attention to the essentials, we note that in a Federal Constitution there are really *two* governments working side by side, and the operation of each one of them, within the limits defined by the Constitution, is independent of the control by the other. They are co-ordinate, independent organs of sovereign power, each being a master in the sphere of its own allotted jurisdiction. How this co-ordination between the two well-defined organs of sovereign power is achieved, what in particular is the measure of authority of each one of them, to what organ of the State power or type of procedure conflicts between the two governments are to be referred for adjudication or resolution, where the residuary powers are made to lie—all these are mere matters of detail, and although information as to these matters is of considerable importance to the student of political science, they are not, by any means, to be construed as constituting *the essential traits of a Federal Polity*.

Federation involves Supremacy of Constitution which must be a written one.

Observation shows that, by and large, adoption of federal principle involves the *supremacy* of the Constitution. The constitution must not only be in *writing* but it must be *supreme*. A Federal State can only be brought into being by a *compact* and must derive its existence and powers from a *written instrument* which defines the authority of the Regional and General Governments, and also provides for a method for resolving *conflicts between them*. A Federal Government may be formed by a *compact* between a number of sovereign and independent States for the purpose of creating a National *Government, a government which should administer subjects that are of general interest and affect the whole of the State or it may be the result of decentralisation of the power of a central government in a State and the resulting devolution of those powers from the National Government to the several component States that are created by its Constitution.* United States of America is an example of the first mode of the creation of Federal Government, and India and Pakistan of the second. The case of Canada falls into a class by itself, and although its Constitution, as shown by Lord Haldane in the passage from Privy Council judgment cited above, has resulted from a compact, the actual form it has taken is somewhat anomalous indeed.

36. India & Pakistan—Are they Federations ?

Whether India and Pakistan can *strictly* be regarded as Federations is a matter on which there are bound to be conflicting opinions. The fact, however, remains that if they are at all to be regarded as Federations *stricto sensu*, the emergence of this form of government must be regarded as falling in the latter category of the two modes described above by means of which Federations could be formed. A study of Constitutional development of India would show that its progress in the direction of federalism has been made by means of securing progressive decentralisation of the central governmental power. It was really the Imperial *Act of* 1935 which, for the *first* time, emphasized the scheme of Federal Government

for India, for *the Act of* 1919 gave to India a Constitutional Government of a Unitary type, as the several provinces under the Government of *India Act*, 1919 were not autonomous Provinces but local Governments that is they were mere administrative units completely subordinate to the Central Government (See further discussion on this point on pp 178 9)

Residuary Powers in Indian Union left with the National Govt

The Constituent Assembly of India had initially, in its objectives resolution desired to locate the residuary powers within the States, that is, in the regional governments This approach was further modified later on when Pakistan was conceded and actually came to be The relevant paragraph of the *objectives resolution* passed by the Constituent Assembly of India on the 22nd January 1947 reads as follows —

"(3) WHEREIN the said territories whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution shall possess and retain the status of autonomous units *together with residuary* powers and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom

But, in the *draft constitution* which was published in February 1948 authors of the draft departed from this mandate contained in the objectives resolution in that they consigned the residuary powers not to the States but to the Union of India This was a step calculated to make the Union Government strong now that the State of Pakistan had been erected quite close to the compound wall of India

India a Union of States—not a Federation but a quasi Federal Govt

Constitution of India does not use the word federal in its text In its preamble the relevant words are that India is to be a Sovereign Democratic Republic and in its ART 1, it is stated, ' India that is Bharat shall be a *Union of States* It is true that upon a careful examination, the constitutional relation hip between the Union and the States turns out to be one which could be called as quasi federal in character Part XI of the Indian Constitution deals with relations between the Union and the States and the Seventh Schedule contains three lists of subjects—the Union List State List and the Concurrent List The power of the National Parliament to make laws as also the power of State Legislatures to make laws is controlled by *ART* 246 In *ART* 249, however the power of Parliament to legislate with respect to the State List has been provided as follows

'(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force except as respects things done or omitted to be done before the expiration of the said period '

Over and above this power is the power of the Parliament to legislate with respect to matters in the State List if a proclamation of emergency is in operation. (*See ART.* 250). By *ART.* 248 the residuary powers of legislation are exclusively vested in the Parliament. Under *ART.* 254, *inconsistency* between laws made by Parliament and laws made by the Legislatures of States are resolved, in the manner indicated in that Article. The appointment of the Governors of the Part 'A' States, under *ART.* 155, is to be made by the President.

Thus from the foregoing analysis of the provisions of the Indian constitution it would be observed that if the Constitution of India lays a claim to being considered as a Federal Constitution at all, the same can be substantiated only if the federal principle enunciated earlier is appropriately re-defined to cover this case. It is for this reason that Professor K. C. Wheare considers that the Constitution of India is really quasi-federal in character. (See page 28 of his book on *Federal Government*). According to him, "This Constitution established a Union of States, organized out of the former provinces of British India and the Indian States, and operating at the centre and in the States (with certain exceptions) the system of responsible cabinet government much like that in Canada. But just as in Canada the federal principle was modified by unitary elements in the form of control by the general government over the provincial governments, so also in the *Indian Constitution*—but much more so—the central government is given powers of intervention in the conduct of the affairs of the state governments which modifies the federal principle. The Constitution does not indeed claim to establish a Federal Union, but the federal principle has been introduced into its terms to such an extent that it is justifiable to describe it as a *quasi-federal* Constitution. Whether, in its operations, it will provide another example of federal government remains to be seen."

No territorial Integrity of Provinces guaranteed by the Indian Constitution.

Finally, we might notice that there is no guarantee contained in the Indian Constitution that the States are at all immune in so far as their territorial integrity is concerned, for the Parliament by means of an ordinary law under *ART.* 3 can form a new State by separation of a territory from any State, or by uniting two or more States or parts of States or by uniting any territory to a part of any State. It can increase the area of any State, diminish the area of any State, alter the boundaries of any State or the name of any State. This power is subject to the condition that no bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President, and in cases where the proposal contained in the bill affects the boundary of any States, or States specified in Part A or Part B of the First Schedule, or the name or names of any such State or States, the views of the Legislature of the States, or as the case may be of each of the States, both with respect to the proposal to introduce the bill and with respect to the provisions thereof have been ascertained by the President. It would thus appear that it is comparatively easy in India to secure the reorganization of the States. This power of reorganization of States in India had been availed of by the Indian Parliament in 1956.

Art. IV. S. 3 (1) of the U.S. Constitution.

This should be contrasted from the position as it obtains in a real Federal polity like that of the United States. Under *ART. IV*, *Sec.* 3 of the United States Constitution it has been provided, ".....But no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress." There is thus an absolute guarantee in the United States Constitution that the territorial and juristic integrity of the States in the Federal system is inviolable.

Federal Principle and our State.

Sufficient has been said to indicate the considerations that have to be kept in view in adjudging the question whether or not a given State is federal in character. We might now consider the application of federal principle to our State. The State of Pakistan has been declared as a Federal Republic in the first Article of the Constitution. The *residuary*

Art. 109.

powers under our Constitution are vested in the provinces (*ART.* 109). It is true that so

very exhaustive is the enumeration of subjects in the three Lists mentioned in the Fifth Schedule of our Constitution that hardly any subject remains which could conceivably constitute a significant addition to the contents of the residuary field that has been vested in the Federal Units But one important constitutional implication, which flows from the fact that the residuary powers of legislation have been assigned to the provinces, is that *the Courts of Law when called upon to interpret the entries in the several Lists of the F Schedule will start with the presumption that unless a matter falls strictly within the federal field or the concurrent field it must be d emed to be within the exclusive legislative competence of the province* The Indian courts will, on the other hand raise this presumption in favour of a subject being covered by the Federal or Concurrent List unless it can be shown that the matter is *strictly* covered by the Provincial List

Residuary Powers in the Provinces leading to a rule of Construction

Both in India and in Pakistan enumeration of several subjects which form the subject matter of Federal and Provincial Lists is so comprehensive that, except for the rule of interpretation referred to above very little by way of practical result has been achieved by the residuary powers being concentrated in the case of India in the federal field, and in the case of Pakistan in the provincial field

Enumeration of subjects in the Fifth Schedule of our Constitution exhaustive

There is no provision of the kind contained in *ART 3* of the *Indian Constitution* (which provides for the formation of New States and alteration of areas boundaries or names of existing States by means of the Act of Parliament) in our Constitution the effect of this omission is that the territorial integrity of the provinces of East Pakistan and West Pakistan has been duly safeguarded The provinces of East and West Pakistan cannot be annihilated, say, for the purpose of making Pakistan a Unitary State otherwise than by an amendment of the Constitution
is abnormally difficult for over
the total number of the member
two thirds of the members of the Assembly present and voting there must be before such a bill is assented to by the President *an approval of such a bill by the two Provincial Assemblies* Amendment of *ART* 1 *of our Constitution* thus being comparatively speaking, more difficult to achieve there is a substantial guarantee of the inviolability of the territorial integrity of the two provinces that compose the Federation

Territorial integrity of Provinces of Federation under our Constitution has been fully safeguarded

37. Doctrine of Dual Sovereignty has no place in our Constitution

In our Constitution there is no recognition extended to the doctrine of the dual sovereignty The federal units do not represent any distinct part of the sovereignty of the people of Pakistan The federal units are in no sense sovereign although they are in a significant sense, independent subject of course to certain well defined constitutional limits, within their own field There is no such thing as dual citizenship known to our Constitution *The 14th Amendment of the American Constitution, for example provides* All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside " Thus *the 14th Amendment* recognizes that there is a citizenship of the United States and also citizenship of the several States and this dual legal character may co exist in the same person According to Cooley, "Both Governments (i e Federal and State Governments) owe a duty of protection to the persons who are subject to their
and may punish breache
p 319 1931 Ed Bostor
of dual c
State of
only to

38. No Dual System of Courts under our Constitution

Nor again is there a dual system of Courts in our Country. In America, as is well known, there are *State Courts* and *Federal Courts.* The Federal Courts derive their jurisdiction from ART III Sec. 1 of the Constitution which refers to "one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish."

The power of Federal Courts as derived from *ART.* III, *Sec.* 2 of the United States Constitution, is described as follows:

"Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State—between citizens of different States; between citizens of the same State claiming lands under grants of different States and between a State or the citizens thereof and Foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public Ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact with such exceptions, and under such Regulations as the Congress shall make."

The judicial powers of the State Courts in America is defined by the State Constitutions.

In our Constitution, however, we have no dual system of judiciary. The Federal principle makes no inroads upon the distribution of judicial power between the Federation and the Provinces. One and the same Court takes cognizance of the Federally made or Provincially enacted laws and enforces them irrespective of any consideration based on questions like the nature of agency by which actions have commenced or offences have been committed etc.

39. Federal Principle: Territorial Extent of the Federal and Regional Governments

The territories of Pakistan comprise of (a) the territories of the provinces of East and West Pakistan, (b) the territories of States which are in accession with or may accede to Pakistan, (c) the territories which are under the administration of the Federation but are not included in either Province and (d) such other territories as may be included in Pakistan. (See ART. 1).

The President of Pakistan has the power, by Order, to make provision for the government of and administration over the territories of Pakistan other than the territories of the two provinces. (See ART. 2)

40. Federal Capital

Federal Capital Art. 211.

The Federal Capital at Karachi, although a part of the Province of West Pakistan (See Expl. to ART. 1 and S. 2 of the Establishment of West Pakistan Act, 1955), is a federally administered area, and its administration is vested in the President, who may, by *order*, make such provision as he may deem necessary or proper in respect of matters enumerated in *ART.* 211. The administration of the Federal Capital is controlled by the *Federal Capital Order*, dated 23.7.1948, (*G.G.O. No.* 15), passed by the Governor-General in pursuance of a Resolution passed by the Constituent Assembly of Pakistan, and continued as Law by *ART.* 224 of our Constitution.

The Parliament has the power to make laws for the Federal Capital with respect to matters enumerated in the Provincial List and *matters not enumerated in the Provincial* List and matters *not* enumerated in any List in the Fifth Schedule, *other than matters relating to the High Courts* (See ART 211(3))

It would appear that the provisions of *ART 211, clauses* (2) *and* (3) are anomalous It is doubtful if the President can be validly made a 'recipient' of delegated authority "to make such provisions as he may deem necessary or proper with respect to the *laws* which are to be in force in the Federal Capital This would ordinarily be a clear case of delegated *legislation* but since it is sanctioned by the Constitution a Court of Law may not have the jurisdiction to annul this grant of the law making powers Anyhow it seems somewhat out of place to confer legislative and administrative powers upon the President, i e the Federal Executive and not even make these laws and decrees amenable *to being interfered with and* controlled by the National Parliament There is no obligation on the President to place the Orders issued by him under ART 211 before the Parliament for its ratification, as he is duty bound to do in case he made an *ordinance in the exercise of his powers under ART* 69 It is further doubtful if this power can co exist with the power of the Parliament to pass laws in respect of "matters appearing in the three Lists of the Fifth Schedule and matters not enumerated therein other than matters relating to the High Courts In other words clauses (2) *and* (3) appear *to create a situation in which the President by an administrative* order can interfere with the laws passed by the Parliament but he is under no obligation to have those laws ratified by it at a later date He can even act when Parliament is in Session,—a thing he cannot do if he legislated by means of an Ordinance under ART 69 Provis ns of Art 211 are anomalous

The President also has over and above this power of making orders under ART 211, the power of law making conferred on him by *ART* 69 This power of *ordinance making* is available only when (a) the National Assembly is not in session and (b) the President is satisfied that circumstances exist which render immediate action necessary An ordinance made by the President shall be laid before the National Assembly and shall cease to operate at the expiration of six weeks from the next meeting of the Assembly or if a resolution disapproving it is passed *by the Assembly, upon the passing of that resolution*

The ordinances thus made and promulgated have the force of law as though these enactments had been passed by the Parliament and further they can be controlled or superseded *by an Act* of the Parliament

It would thus appear that orders issued by the President under *clause* (2) *of ART* 211, with respect to the laws which are to be in force in the Federal Capital, are perpetual and there is no requirement under the Constitution that they be placed before the Parliament for its ratification and acceptance This power to issue orders includes even the power to issue an order authorising expenditure from the revenues of the Federation It would seem that even the budget with regard to the administration of Karachi need not be voted by the National Assembly

Equally anomalous is the provision that the Parliament shall not *have the power to pass laws with regard to matters relating to High Courts* Now, "High Courts" are matters within the *Provincial List* of 5th Schedule as entry No 2 says, ' Administration of Justice, constitution and organization of all courts, except the Supreme Court " In other words, the Provincial Legislature, subject only to the Constitutional provisions relating to the constitution and jurisdiction of High Courts, can effectively deal with matters relating to High Courts, and since the Provincial List has been made a part of the field of legislation competent to the Parliament in respect of the Federal Capital, ordinarily it will have the power to deal with matters relating to the High Court (Karachi Bench) But since the power to deal *with High Courts* has been expressly taken away, the Parliament

would not be competent to deal with "matters relating to High Courts" although th President, under *ART.* 211 (2) (*c*), can issue an order with respect to "the jurisdiction expenses or revenues of any court exercising the jurisdiction of a High Court in th Federal Capital." It is difficult to understand the wisdom of the limitation appearing i *clause* (3) *of ART.* 211, which says that matters relating to High Courts cannot b legislated upon by the Parliament. This reservation is in conflict with the power of th President given to him under *sub-article* (2) (*c*) *of ART.* 211, which says that he *can* make a *order* with respect to the jurisdiction, expenses or revenues of any court exercising th jurisdiction of a High Court therein. It may be that the framers of the Constitution de sired that the powers of the Provincial legislature of West Pakistan be kept intact in respec of the High Court of West Pakistan, Karachi Bench Division included. As it is, repre sentatives from Karachi occupy a fair number of the seats in the Legislature of the Provinc of West Pakistan—but the anomaly is that they cannot legislate in respect of the are of the Federal Capital in regard to matters that fall in the Concurrent or the Provincial List. It would appear to be anomalous in the extreme to give the Provincial Legislatur of West Pakistan power to legislate in respect of High Courts but not the power to control jurisdiction, expense or revenue of any court exercising the powers of a High Court in the Federal Capital—and yet, curiously enough, even the Parliament cannot pass laws about the High Court of West Pakistan. (See *ART.* 211(2) (*c*) *and* (3)). It is submitted with respect that the whole Article (more particularly *its clauses* (2) *and* (3)), is clumsily drafted: some of the difficulties that have been pointed out above have arisen only because some provisions of the original Government of India Act and of the Federal Capital Order have been indiscriminately brought into the Constitution without due regard being shown for the fact that some of them, after the passing of the *Establishment of West Pakistan Act*, 1955, have become absolutely unnecessary and redundant. (For the purpose of enabling the student to analyse these conflicting provisions the relevant provisions of the Government of India Act as also the Federal Capital Order have been set forth in the Appendix. (*See S.*290/*A, and Federal Capital Order, dated* 13.7.1948). (*See also Remington Rand v. Pakistan,* (1957) *PLD. S.C. Pak.* 170).

Art. 211. contd: Determination of the Area of Federal Capital.

The determination of area of the Federal Capital can be provided for by ordinary law passed by Parliament. But such a *law* is restricted specifically to the narrow question of determining the area of the Federal Capital. It is doubtful whether by the law which can be made under *clause* (1) *of ART.* 211, any changes can be brought about in the constitutional set-up or in the administrative powers as envisaged in *clauses*(2) *and* (3) of *ART.* 211. In order to change the constitutional set-up it would be necessary to amend *ART.* 211, *clauses* (2) *and* (3) in the manner provided for in *ART.* 216. Besides all this, the language employed in *ART.* 211(1) is defective if the legislative intention be to give power to the Parliament to change the location of the Federal Capital. The change of location of the Federal Capital is not the same thing as the "determination of the Area of the Capital." The one refers to the idea of a *shift* of the Federal Capital to some other place in Pakistan and the other has reference merely to the extent to which the *area* of the capital can be increased or decreased.

41. Pakistan—A Parliamentary Democracy

What is a Parliamentary Democracy?

Our Constitution envisages a form of government which students of Politics and Constitutional Law call "Parliamentary Democracy". By a Parliamentary Democracy is understood a form of government in which the executive is responsible to and drawn from the Legislature. The Prime Minister of Pakistan, under *ART.* 37(3) is to be appointed by the President in "his discretion" from amongst the members of the *National Assembly*. He is to be a person who, in the opinion of the President, "is most likely to command the

confidence of the majority of the members of the National Assembly." The Prime Minister is to be the Head of the Cabinet of the Ministers and the Cabinet of Ministers is to aid and advise the President in the exercise of his functions (*ART* 37(1)). The Cabinet, along with the *Ministers of State* is *collectively responsible* to the National Assembly (see [illegible] tive months from the date of their appointment. Under *ART* 37(8), 'A Minister who for any period of six consecutive months is not a member of the National Assembly shall, at the expiration of that period cease to be a Minister and shall not before the dissolution of that Assembly be again appointed a *Minister unless he is elected a member of that Assembly*.'

Prime Minister, Minister of State, Deputy Minister or Parliamentary Secretary must be members of the legislature before they can be so appointed

Curiously enough although a Minister can be appointed for six months at least despite the fact that he is not a member of the National Assembly Prime Minister, Minister of State and Deputy Minister cannot be so appointed even for a day unless the person to be so appointed is a member of the National Assembly.

Similar position obtains in the Provinces. Cabinet is drawn from and is responsible to the Provincial Legislature and Governor takes the place of the President. (See Chapter 1 of Part V, of our Constitution). The only difference between the Federal and Provincial set up is that whereas in the former the executive head of the Government is *elected*, in the latter he is *appointed*.

Observations about Federal Government apply to Provincial set up also

So much is the structure of Provincial Government identical with that of Federal Government that, on that account no separate discussion of the provisions of the Constitution (*ARTS* 70 *to* 75) is necessary. Observations made with regard to the nature and character of the Federal Government are to be applied *mutatis mutandis* to the Provincial Government.

Sufficient has been said to show that the Cabinet which is under our Constitution to be the repository of executive power has to be drawn from and is collectively responsible to the Legislature. If the Prime Minister who is to be at the Head of the Cabinet and who is to command the confidence of the majority of the members of the National Assembly before he can be appointed loses that confidence he is liable to dismissal or in the language of clause (6) *of ART* 37 he shall cease to hold office. If the President is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly he can exercise his power under this clause and when he does exercise that power the consequence will be that the Prime Minister will cease to hold his office. This shows that it is a condition precedent for the continuance of a Prime *Minister in office that he at all material times is able to command* the confidence of the majority of the members of the National Assembly. Whether the President exercises his power under this clause or as a result of any legislative process the Prime Minister is thrown over by the National Assembly the resulting situation arises from the principle of Parliamentary Democracy—namely that the executive envisaged by the Constitution is dependent on the continued support of the majority of the members of the National Assembly.

42. Presidential Pattern of Democratic Government

This form of Government—Parliamentary Democracy—should be distinguished from the Presidential form of Democratic Government in which we have an 'irremovable' and an 'irresponsible' executive. The President in the American Constitution, for instance, has the executive *power of the Union* vested *in* him. He has a Cabinet which he appoints upon his entering the office of the President but these persons are not members of the Legislature. There is no such thing as 'motion of no confidence', or a parallel procedure known to the U. S. Constitution as a result of which the Legislature can throw over the

executive in the United States. The executive there is completely independent of the Legislature. Of course, if the President acts unconstitutionally he can be impeached by the Congress, but that is not the same thing as saying that the President and his Cabinet must either continue to enjoy the confidence of the majority of the members of the Congress, or vacate their office as such President and Cabinet.

The student of Constitutional Law is not very much interested in the political implications of the two rival forms of Democracy, that is the Parliamentary and the Presidential, but a few remarks of a somewhat general nature upon this subject may not be out of place in this context even for the student of Constitutional Law, and these are offered in the belief that their grasp would help comprehension of the nature of Government that has been envisaged and established by our Constitution.

The relation between 'executive' and 'legislature' under the Parliamentary Democracy is radically different from that which obtains under the Presidential form of Government. The Parliamentary Democracy is based on the theory of the comparative supremacy of Parliament, i.e. of the Legislature: there the Government is really by the Parliament, the Cabinet being merely the Executive Committee of the Parliament. It is not entirely correct to assert, as does Sir Ilbert in his book on *Parliament* (*Home University Library* 1950), "Parliament does not govern and is not entitled to govern". Of course it is to some extent true that the modern English Cabinet influences the Parliament in that the bulk of the legislation is sponsored by the Cabinet in the first instance, and what is more, it has exclusive control of the House in the matter of initiating financial legislation. Due to well organised party system in England, much of the initiative in the matter of making laws has passed on to the Cabinet, and there is hardly any appreciable legislative activity to be noticed in the Parliament that may have been sponsored or moved by private members. Essentially much of the business transacted by the House of Commons is Cabinet-sponsored business. But despite this increasing influence which Cabinet exerts on the Parliament, it remains ever true that Cabinet is the *creature*, and therefore remains all through completely at the mercy, of the majority in the Legislature. And the rule by the Cabinet is really rule by the Parliament.

43. Presidential form of Govt. is based on the Theory of Separation of Powers

As opposed to this, the Presidential form of Government is based on the theory of separation of powers, which among other things enjoins that the Executive will be, to the extent to which it can, independent of the Legislature. It is true that the text of the American Constitution does not anywhere show that the Legislative, Executive and Judicial Departments stand on completely independent and separate grounds, but the very arrangement of several Articles relating to these departments and the total scheme underlying the Constitution make it abundantly clear that the Founding Fathers were to a not inconsiderable extent influenced by the theory of Separation of Powers as it is to be found stated in the writings of *Montesquieu's* "Spirit of Laws". Witness for example the following Provisions of the U.S. Constitution :

(a) *Section* 1, *ART.* I. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives",

(b) *Section* 1, *ART.* II. "The executive power shall be vested in the President of the United States of America. . . " and,

(c) *Sec* 1, *ART.* III "e judicial Power of the United States shall be vested in one urt, nferior Courts as ongress may from time to time o lish .

This mode of distributing sovereign power into several well defined organs of the State machinery shows that the theory of separation of power is the implicit underlying assumption in the light of which the constitutional framework of the government of the United States of America is to be perceived

U.S Constitution—A system of Checks and Balances

Numerous indications are discoverable in the text of the United States Constitution which tend to show that certain internal checks and balances have been improvised therein, and it appears that all this became necessary not only because the Founding Fathers had distrust in the public functionaries who were to exercise the political power within the State, but also because the three principal departments of the Government had been erected by them on a distinct and well defined basis and in the total absence of those controlling constitutional links that are reflected in the system of checks and balances designed by the Founding Fathers not only would the Government have lacked in unity and in that coherency of construction without which no vigorous lead can be given in the management of public affairs, but also the day to day working of the governmental organisation would have been involved in a wasteful friction

Here are the wise words of Madison taken from Federalist No 47 which show what really was at stake No political truth is certainly of greater intrinsic value or is stamped with the autho
objection is founded
in the same hands whet
or elective may justly be pronounced the very definition of tyranny

44. There is no 'Cabinet' in the U S. System of Government

The Constitution of the United States is silent with regard to the formation of a Cabinet "to aid and advise the President, and in fact what does correspond to our notion of the Cabinet, in the United States is a creature of convention and has emerged as a result of the operation of historical factors Despite the emergence of the Cabinet in the U S as a Governmental institution the executive responsibility continues to lie with the President and it is merely the Heads of various executive Departments who are appointed by the President that are collectively spoken of as the Cabinet It is an advisory body responsible to the President and it is not in any manner *constitutionally responsible either to the Legislature or to any one else*

45. Powers of the U S President

(a) Veto-Power of the U.S President.

The President has what is called the *veto power* to overrule within well defined limits, legislation passed by the Congress By the Veto Power all that is meant is that no bill passed by the two Houses can become law until the President signs it in token of his approval The President may, however, instead of approving the proposed legislation return it together with a statement of his objections, to the House in which it was initiated But if upon the bill being thus re examined and reconsidered the two thirds of the House concerned resolve to pass the bill in the form in which it is, it will be sent to the other House whereafter, if it is approved by the two thirds of that House, it shall become law *(S 7 of Art I of the U S Constitution)*

The President must send back the bill within ten days or else it will become a law having full effect as though he had signed it The Congress may, however, decide to adjourn before the conclusion of the ten days within which the President must return the bill for reconsideration if he means to do so—thus facilitating the lapsing of the legislation passed by it This limited power of stultifying legislative measures or of delaying the passage of a bill passed by the Congress from becoming a law, gives to the President of the United

States of America some manner of control over the legislative activity of the Congress.

Distinction between Veto-Power exercised in Parliamentary democracy and Presidential form of Government.

In a Parliamentary form of Government too, several Constitutions provide for the power of the Constitutional Head to withhold his approval and to return the legislation for being reconsidered, but it should be observed, that if a law has been passed in the Parliament, the venture could have been consummated only as a result of the support which Government of the day gave to that measure, and it is once again the same Government which will have to advise whether or not a bill shall be immediately assented to by the Constitutional Head or postponed for the purpose of having it reconsidered by the Legislature. The competence or the power of the executive Government in a Parliamentary Democracy to delay the bill becoming law stands on a different footing than does the power of the President of the United States of America to *veto* legislation. The President, in the theory of the *United States Constitution*, need not have a majority in the Legislature and if in fact he does happen to have some influence there, this is largely by reason of the existence of the two well-organised political parties in that country, to one of which, the President, in the nature of things, is bound to belong.

(b) President's Power to send Messages to Congress

Besides all this, the President can send messages to the Congress wherein he does *not only inform the two Houses of the economico-political state of the Union or report to* it upon any question in which the Nation is vitally interested, but he may *recommend* to them the measures which, in his considered opinion, it is necessary for the Congress to pass into law.

(c) His other powers.

In cases of emergency he can convene both or either of the Houses of the Congress, and in the event of there being differences between them in regard to the time of adjournment, he may adjourn them to such date as he considers fit and proper.

The American President has enormous power of patronage in that it is he who makes appointments to high offices within the State. (See Sec. 2 of Art. II of the U. S. Constitution).

The Position of the President in U.S.A. Constitution—Pear quoted.

A recent writer (Richard H. Pear) delineates comprehensively the relationship of the American Cabinet to the Legislature in the following extract which is taken from his book "*American Government*".

"An American Cabinet is a different institution from a Cabinet in a parliamentary system of government. In America while Cabinet unanimity is desirable from a public relations viewpoint, Cabinet solidarity is not an essential constitutional principle. Cabinet members do differ, sometimes publicly, in their attitudes towards matters of current importance. No Cabinet Minister feels that he has to rush to the defence of a colleague or a President who is under attack, and resignation is not the inevitable price paid for disagreement with the President. Cabinet members sometimes resign when the President repudiates their statements of policy, but the *point of contrast with the British system is that they do not have to resign*, and it is the President who will ask them to do so if he thinks the matter sufficiently important. Neither Congress nor the public consider that public disagreement constitutes grounds for automatic resignation, for the Cabinet members are responsible neither to Congress nor the people, but only to the President. This may be, from some points of view, an administrative advantage, since being the President's servants, in charge of departments for whose actions he holds final responsibility, the President can insist that his point of view prevail even if he is in a minority in Cabinet discussions. But the disadvantage of the Presidential position is that as the Cabinet does not share in a collective responsibility for executive action, the President may be a lonely and worried man unable to feel the support of other shoulders at the wheel when he faces serious crisis. In practice, he may try and lean upon his Cabinet Officers for advice and encouragement, but they may not wish to be leant on in that way. The responsibility

(to give the supreme example) for deciding upon the use of the atom bomb in war is, by American law, the President's responsibility, a responsibility which he cannot share with his administration This, it is suggested, is not the sort of responsibility which should be thrust upon any one man, however great his courage or his wisdom " (p 75)

46. Cabinet Government· Walter Bagehot on the merits of Parliamentary Executive

Walter Bagehot, who according to Professor Laski, first revealed the nature of Cabinet to the Englishmen ', saw the main virtue of the English Constitution, namely, its efficiency "in the close union a nearly complete fusion of the executive and legislative powers " He proceeded to observe No doubt by the traditional theory, as it exists in all the books, the goodness of our Constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation The connecting link is *the Cabinet* By that new word we mean a Committee of the legislative body selected to be the executive body The Legislature has many committees, but this is the greatest It chooses for this, its main committee the men in whom it has most confidence It does not, it is true choose them directly, but it is nearly omnipotent in choosing them indirectly " He characterises the Cabinet as a Board of Control chosen by the Legislature, out of persons whom it trusts and knows to rule the nation He saw in the Cabinet the "fusion of the legislative and executive functions and he contrasted it from the Presidential system, the main features and characteristics of which according to him are, "that the President is selected from the people by one process and the House of Representatives by another The independence of the legislative and executive powers is the specific quality of the Presidential Government, just as the fusion and combination is the precise principle of the Cabinet Government (See Chapter on *The Cabinet* in Walter Bagehot's book "*The English Constitution* *in the World s Classics Series Oxford* 1955)

We are at present not engaged, it should be noted in commenting on the relative merit or superiority of the two rival forms of Government we have been considering, for such questions are incapable of being decided in the abstract and their specific relevance to a given country and a people depends considerably on the historical setting in which a particular form of Government comes to be reflected The importance of a form of Government has also much to do with the genius of a people

What, however in this context, it is pertinent to point out is the fact that under the Constitution of Pakistan we have established a Parliamentary Democracy and this distinguishing feature of our Government should not be lost sight of when we come to interpret those provisions in our Constitution that deal with this aspect of our polity It would not be out of place to refer, for further elucidation and comprehension of the two rival patterns of Democratic Government, to the observations of late Earl of Balfour made by him in his Introduction to Walter Bagehot's book by way of *a very summary comparison of my own* ' They are as follows — Earl of Balfour on Presidential and Cabinet—Government

"Under the Presidential system the effective head of the national administration is elected for a fixed term He is (practically) irremovable Even if he is proved to be inefficient, even if he becomes unpopular, even if his policy is unacceptable to the majority of his countrymen, he and his methods must be endured till the moment comes for a new election

"He is aided by Ministers who, however able or distinguished, have no independent political status, have probably had no congressional training, and are by law precluded from obtaining any during their term of office

"Under the Cabient system everything is different The head of the administration,

commonly called the Prime Minister (though he has no statutory position), is selected for the place on the ground that he is the statesman best qualified to secure the support of a majority in the House of Commons. He retains it only so long as that support is forthcoming. *He is the head of his Party. He must be a member of* one or other of the two Houses of Parliament; and he must be competent to 'lead' the House to which he belongs. While the Cabinet Ministers of a President are merely his officials, the Prime Minister is *primus inter pares* in a Cabinet of which (according to peace-time practice) *every member* must, like himself, have had some parliamentary experience, and gained some parliamentary reputation."

Earl of Balfour considered Cabinet Government after the British model to be a *more closely knit system than the Presidential Government after the American model*—and this is not because America is a Federal country while Britain is a Unitary one, but because: "the great men who founded the Republic deliberately preferred a system in which the task of conducting national affairs was entrusted to three independent organs of Government, dissimilar in character, chosen at different times, for different periods, with different duties, by electorates differently constructed, each justly claiming to be the choice of the people. There is no constitutional reason why the President, the Senate and the House of Representatives should co-operate to carry out any common policy; and it is easy to imagine cases in which they would be reluctant to do so. If these were to occur when unity and rapidity of national *action were required, the country would have to trust to the political genius of its people* rather than to the formal machinery provided for it by the Constitution." Further, to quote his words:

> "The weaknesses of the British Constitution are of a very different character. Whatever be its faults, it certainly does not suffer from too elaborate a system of checks and balances. The House of Commons need not keep a Government in office a day longer than it likes. But if the majority decide to keep it, evidently they have every inducement to provide the money and pass the laws which the policy of that Government requires."

47. The Theory of Separation of Powers

The theory of separation of powers may be regarded from at least two broad points of view:

Theory of Separation of Powers: its origin and development.

(a) As laying emphasis upon the principle that the *same person* or *body of persons*, should *not* be the repository of the powers of the legislature, executive and judiciary or of any two of them.

(b) As enjoining that any of the three principal activities of Government, namely legislation, execution and adjudication, should each be independent of the others and that there should be, as far as possible, absence of control or interference by one over the other.

These two principal elements of the theory of the separation of powers must be kept steadily in view: the rationale or the wisdom of keeping the powers distinct and not permiting one and the same person or authority to exercise any two or more of these powers is ultimately traceable to the distrust that practically all the political theorists and the sociologists show in the human nature. "All power corrupts", said Lord Acton, and "absolute power *tends* to corrupt absolutely." The only way to ensure that power will not be abused is to limit it, that is, to make power a check upon power. That is why Woodrow Wilson used to say, 'History of Liberty is the history of limitations on the Power of the Government'. If the dignity of the individual and his freedom to grow and to evolve along the lines of his personal development, have to be at all accommodated within the framework of a Government established under the Constitution, care has to be taken to *minimise* the possibility of abuse of power, *for the abuse of the State Power is practically unavoidable* regard being had to the

within the meaning of rule 8 of this Order at least six copies thereof shall be lodged

3 Where a petition is lodged in the matter of any pend ng appeal of which the record has been registered in the Reg stry of this Court the petitioner shall serve any party who has entered an appearance in the appeal with a copy of such petition and the party so served shall thereupon be entitled to require the petitioner to furnish him at the expense of the said party, with copies of any papers lodged by the ptitioner in support of his petition

tioner himself and shall state that, to the best of the deponent s knoweldge information and bel ef the allega t ons contained in the petition are true Where the petitioner is represented by an Attorney the said aff davit

5 The Registrar may refuse to receive a petition on the grounds that it discloses no reasonable cause of appeal or is frivolous or contains scandalous matter but the petitioner may appeal by way of motion fr m such refusal to the Court within fourteen days

6 As soon as a petition and all necessary documents are lodged the petition shall thereupon be deemed to be admitted

7 Subject to the provisions of rule 5 of Order XIII and the next following rule the Registrar shall as soon as the Court has appointed a day for the hearing of a petition notify all parties concerned of the day so appointed

8 Where the prayer of a petition is consented to in writing by the opposite party or where a petition is of a formal and non-contentious character the Court may if it thinks fit make an order thereon without requiring the attendance of the opposite party and the Registrar shall not in any such case issue notice as provided by the last preceding rule, but shall, with all convenient speed after the Court has made its order notify the parties concerned that the order has been made and of the date and nature of such order

s ons of the last preceding rule

11 At the hearing of a petition not more than one counsel shall be admitted to be heard on one side

ORDER XIX

LODGING OF CONCISE STATEMENT AND SUPPLEMENTAL PROCEEDINGS

1 The appellant shall lodge in the Registry twelve copies of a concise statement of the facts of the case and of the arguments upon which he proposes to rely within thirty days of the lodging of his petition of appeal

i.e. to prevent this abuse it is necessary that "power should be a check to power." According to him "*a constitution may be such that no one shall be compelled to do things to which he is not obliged by law and to do things which the law permits.*" Law should, therefore, impose restraints on instrumentalities and agencies of power and thus regulate the machinery of Government in such a way that the individual liberty, far from being smothered, is preserved and perpetuated.

Distribution of Power in the U.S. Constitution — Finer quoted

Thus influenced by the writings of Montesquieu, the framers of the *United States Constitution* brought about a wise distribution of power and integrated the principal departments of governmental activity by a system of checks and balances; they kept the legislative, executive and judicial powers as separate from and independent of each other "*as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of constitution in one indissoluble bond of unity and amity.*" (See *The Federalist, No. 47*).

The scheme of the distribution of power as embodied in the *United States Constitution* may be described in the words of Herman Finer. (See "*Theory & Practice of Government*", p. 101.)

"Legislative powers were vested in Congress, the executive power in the President, and the judicial in the Courts. Congress was divided into two bodies, each elected for different periods and by different modes, the first having a biennial tenure with complete renewal, the second six-yearly tenure with partial renewals every two year. Their powers are different and check each other. The executive was to be dependent upon neither the Legislature nor the people, nor was it to be fortified by popular election: hence a special electoral college was created. His own sphere was not to be his alone, for the Fathers feared the executive, specially a *national* executive. Hence, the power of appointment of the chief officials was to be shared by President and Senate. Nor was the executive to have a free hand in treaty-making; hence the assent of the Senate was required thereto. War and peace were to be declared by Congress. Officers with a place of profit under the United States Government were excluded from membership of Congress; and though the executive may appoint officers who may act as Cabinet to him, neither he nor they may, by a convention of the Constitution, appear on the floor of the Congress."

Despite these wise restrictions on power, all the same, numerous devices have had to be resorted to for the purpose of securing the harmonious operation of the three great departments of the *United States Government*. Cases of friction, of the conflict of jurisdiction and clash of authority are not the only sources of internal strife and tension which are perceptible in the history of the constitutional development of the United States. The clash of authority between the executive and the legislature is very much dependent upon the personal equation which the President may have or come to sustain with the Congress, and if the two of them happen to belong to different parties, all kinds of stalemates are likely to be reached—deadlocks which can only be resolved by not an altogether dignified kind of compromise. Here is what Harold Laski has to say about the *actual working* of the American constitutional relationship between the President and the Congress.

Views of Harold Laski on the actual working of U.S. Constitution.

"But with the Americans, the Congress may have a different party complexion from that of the President and his Cabinet colleagues; or he may have a majority in one House of Congress and not in another. Even with a majority in both, he need not have his way. He cannot control either House directly. He has no power to dissolve it. He can persuade, cajole, threaten, bribe. But the life of the American legislature continues independently of his will. He sends it his proposals; the Congress makes up its own mind what it will do with them. It is an authority of equal legal standing with him in the determination of policy. If he cannot secure what he wants from its members, he has

fact that those that have power, will not only strive to maintain their right to exercise it but also try to grab more power. Human history, like Nature, appears red, tooth and claw, if only because power seekers have no other way to go about except the way of violence That is why down the ages, the history of man has been, "*dull, nasty, brutish and short*" *The sure way* to avoid abuse of power by the governmental agencies is to divide the political power and vest it into the hands of diverse persons so that there is effective check on power by power "The doctrine of Separation of Powers", said Mr Justice Brandeis in his dissent in "Myers v United States" 272 U S 52, 71, L Ed 160, "was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy " (at p. 242 of L Ed)

While answering one of the principal objections "inculcated by the more respectable adversaries" to the United States Constitution, namely "its supposed violation of the political maxim that the legislative, executive and judicial departments ought to be separate and distinct", Madison had very trenchant and wise observations to make He attempted to expound "the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct " He also attempted to show that the theory of separation of powers as enunciated by "the oracle who is always consulted and cited on the subject"—that is the celebrated, Montesquieu—"did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other His meaning, *as his own words import, and still more conclusively as illustrated by the example in his* eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department the fundamental principles of a free constitution are subverted " (See *Federalist* No XLVII) Madison's views

He then examined cases of several State Constitutions in the light of these principles and concluded his thesis by saying that "the charge brought against the proposed Constitution of violating the sacred maxim of free government is warranted neither by the real *meaning annexed to that maxim by its author, nor by the sense* in which it has hitherto been understood in America "

Those who defend the doctrine of the separation of powers take their stand, whether they explicitly say so or no, "upon a distrust of any sovereignty of the one, the few or the many unchecked by formal restraints " But even the most ardent protagonists of this doctrine realise only too well that a clear cut division of power, the rigid boundaries set to it under the Constitution, can become a wasteful obstacle to those who have to face urgent demands of the people

In countries where the democratic tradition is not well founded and where the rule of law has not become an article of faith, countries, "especially those where the leaders are in a hurry of reformative passion", it is observed that there is an increasing concentration of power in the hands of a few people, and *sometimes the doctrine of separation of* powers is obeyed more in its breach than in its acceptance Situations have arisen in such countries when constitutional scruples have been thrown to the winds and even the right of waging constitutional opposition to the Government in power has been construed as an act of sabotage calculated to overthrow the State.

"A mere demarcation on the parchment of the constitutional limits", says Madison, "is not a safeguard against those encroachments which lead to a tyrannical concentration of all the powers of *Government in* the same hand " And so Montesquieu himself remarks in his *Spirit of Laws*, "But constant experience shows us that every man vested with power is apt to abuse it and to carry his authority unless he is confronted with limits. Is it not strange that we are obliged to say that virtue itself has need of limits." To achieve this,

48. Theory of Separation of Powers and Our Constitution

Enough has been said by way of pointing out the principal points of comparison and contrast between the Cabinet or Parliamentary system of Democratic Government on the one hand, and the Presidential pattern of Democratic Government on the other. It is now necessary to conclude consideration of the doctrine of separation of powers with a few general remarks upon its application to the system of power relations that our Constitution has established between the three principal organs of the State.

(a) Pakistan being a Parliamentary Democracy, the executive is drawn from and is responsible to the Legislature. (*See ART. 37*).

(b) The executive has considerable initiative in the matter of legislation, summoning, prorogation and dissolution of the Legislature. In the matter of legislation having financial implications, Cabinet has an absolute monopoly of initiating the legislation and no money bill can be introduced by a private member except with the prior approval of the Cabinet. The money bill is defined in *ART.* 58 and in *ART.* 59. We have a clog *imposed on the introduction in the National Assembly of* "any bill or amendment which makes provision for any of the matters specified in *clause* (1) *of ART.* 58, or any bill or amendment which if enacted and brought into operation would involve expenditure from the revenues of Federation", *except on the recommendation of the President.* And be it noted, the President can make such a recommendation or decline to make it only on the advice of the Cabinet. *In addition to this, under ART. 57, the power of the President,* and therefore of the Cabinet, to veto legislation passed by Parliament is mentioned. In effect, the Cabinet can, by having recourse to this Veto-Power, compel the National Assembly to pass the measure by either *two-thirds* majority of the members present and voting (and this happens when the President signifies that he *withholds* his assent in respect of a bill) or to require that it should have support of the majority of the total number of members of the Assembly, (and this happens to any bill other than a money bill, if it is *returned* to the Assembly with a message requesting that the bill or any specified provision thereof be reconsidered before the proposed measure can become law).

Besides all this, the power of the President to make and promulgate *ordinances* is in reality the power of the executive to make law during the recess of the Legislature (*ART.* 69). The scheme of our Constitution is that when the Legislature is not in Session, the power to legislate in the interregnum period is transferred to the Cabinet, and the latter can make and unmake laws precisely in the same manner in which the Legislature can itself do. This law-making power of the Cabinet is of course subject to the limits provided in the Constitution. For instance, the Budget or the Appropriation Bill can be passed only by the National Assembly, and as to this subject the President has no right to exercise the ordinance-making Power. The precise nature of these limitations, however, will be considered in the Chapters relating to 'judiciary' and 'executive'. All these powers are in the nature of a controlling influence which the executive exerts in matters relating to legislation.

(c) The personnel of the judiciary is appointed by the executive, subject to the requirement as to consultation provided for in the provisions relating to the appointment of the Judges contained in Part IX of the Constitution. The jurisdiction of the superior courts like the Supreme Court and the High Courts is set forth in the various provisions of the Constitution, and to that extent, their jurisdiction or authority cannot be curtailed by a simple majority support that any proposed measures in that behalf might have in the legislature. The change in the law relating to jurisdiction of the courts can be made by ordinary law only to the extent to which Constitution does not provide for that jurisdiction. These matters will be dealt in some detail

no way of appealing to the electorate against their decision He can advise Congress, he cannot coerce it And Congress, in its turn, cannot coerce him, unless a two thirds majority of its members is prepared to override any veto he may impose

"Even when the President's party has a majority in both Houses, he has no certainty that he will have his way His defeat does not create a crisis in his party, the loss of his prestige may not, necessarily even injure it Congress, as it were, is organised for action independently of his power It broke President Wilson over the *Treaty of Versailles*, in 1937 it inflicted a heavy defeat over President Roosevelt on his proposals for the reform of the Supreme Court Managing Congress is an art, in fact, quite different from the art of managing the House of Commons The one is built on the assumption of distrust in the executive, the other in confidence in him And this explains, in some degree, the difference in the process of choosing a President in the United States and choosing a party leader in Great Britain There is no permanence in the first, everyone knows that, at the end of eight years at most his day is over The loyalties he can evoke are, there fore, quite different loyalties from those a party leader is likely to evoke in Great Britain The President can influence his party profoundly while he is in office, some of his Cabinet may, by their personal qualities influence it also But they are not necessarily party leaders, or even men of considerable party experience The result is that there will always be in Congress itself a little group of men who in fact even if not in form, are a kind of alternative Cabinet of their own a Cabinet the special credit of which must not be over looked in the making of policy It requires a President of quite excep tional quality to centralize public opinion round himself for this reason The separa tion, in a word, makes for the confusion of responsibility There is not necessarily a clear direction of policy because there is always more than one interest competing for the right to direct it and the fact that the President may be compelled to give way means that, even within the ranks of his own party there will always be *cabals* to force him to give way This senator controls this committee that congressman another, the President must in some degree compromise with them both It is not improbable that even so outstanding a *President* as Franklin Roosevelt has never got a bill through Congress in exactly the shape he desired, he has had to sacrifice this clause soften the burden of that, to meet the will of one or another in Congress with an authority that could rival his own And since he cannot effectively appeal to the electorate against these candid friends he is always having to put up with something he may keenly feel to be a second rate compromise

"This, moreover is much more likely to be the case in his second term than in his first The sands of his authority begin to run down Those who dislike him cannot [illegible] ill be another occupant of the [illegible] n, an influential member of [illegible] ve him a chance of the succes sion Another may feel that the time has come to hedge, the President has attacked it may be, the public utilities and they are powerful in his State, it will do him no harm in his State to display his independence The President, to put it briefly, when he deals with Congress is always dealing with a quasi independent empire his hold over which is never certain His position is like that of a minority Government in the House of Commons without an appeal to the electorate as the contingent sanction of its policy The time he needs to think out his measures is largely taken up with maintaining a power which ought not to admit of question And every time he suffers a major defeat, the ability to repeat that defeat is intensified by the loss of prestige he suffers " (See *Parliamentary Government in England* pp 223 5)

v. Reginam, (1957) 2 *All.E.R. p.* 45, had occasion to interpret the provisions of the Australian Constitution with a view to determining the question relating to the validity of the Conciliation and Arbitration Act, 1904-52. The challenge against the Federal Act was that contrary to the requirement of the Australian Constitution it had combined the judicial power of the Court with its administrative, arbitral, executive and legislative powers. The theory of separation of powers and its impact upon the making and, therefore the interpretation, of the Constitution of Australia came in for a comment in words that follow:

"The Constitution was enacted and established by an Act of the Imperial Parliament (63 and 64 Vict. c. 12)—(The Commonwealth of Australia Constitution Act. 1900, 6 Halsbury's Statutes, 2nd Edn. 268). The Act recited that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania had agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom and under the Constitution thereby established and, by s. 9, enacted that the Constitution of the Commonwealth should be as therein followed. Some weight has been attached to the fact that the Act was an Imperial Statute, but it is difficult to see how this can affect its interpretation. It can safely be assumed (and it is the historical fact) that in convention after convention in Australia the terms of the Constitution were hammered out by members of the several states who were profoundly conversant with the political systems of the United Kingdom and the United States and were, in particular, well aware both of the advantages of the separation of powers in a federal system and of the danger of a too rigid adherence to that theory. It is with this background that the Constitution must be interpreted, and their Lordships find it equally easy to accept as general propositions the statement of the appellants that, whereas under the United States Constitution there is a complete separation of powers, in the Australian Constitution which in some aspects follows the British model, the doctrine is not strictly followed, and on the other hand the statement of the respondents, founded on the highest authority, that 'the Constitution is based on a separation of the functions of Government and the powers which it confers are divided into three classes—legislative, executive and judicial'. Both these statements are true, but both are subject to the qualifications which are to be found in the Constitution itself.

Scheme of the Australian Constitution.

"That the Constitution is based on a separation of the functions of government is clearly to be seen in its structure, which closely follows the model of the American Constitution. By s. 1, which is contained in Chapter I 'The Parliament', it is provided that the legislative power of the Commonwealth shall be vested in a Federal Parliament, and the following fifty-nine sections deal broadly with its composition and powers. It is only necessary at this stage to refer to s. 51, which provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to (amongst other matters)

'(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.'

By s. 61, which is the first section of Chapter II, 'The Executive Government', it is provided that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth. The following nine sections of Chapter II deal with the exercise of executive power. By s. 71, which is the first section of Chapter III, 'The Judicature', it is provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The

in the Chapter relating to 'jurisdiction' and 'authority' of Superior Courts

Judiciary, of course, has to *interpret and apply the law*, and since our polity is law-dominated it has, in effect, enormous powers indeed. And the only check against that power is its own self restraint resulting from a conscientious approach to the problem of the extent of its own authority and jurisdiction. This is the more so since it is the *only* organ of the State that has the power to determine, consistently of course with the Constitution and law, the limits of its own jurisdiction. To what extent the Legislature can override *judicial determination of cases will be dealt with in the sequel*. *Suffice* it to say that it is the view of the present writer that under our Constitution enormous powers have been vested in the judiciary, and that a faithful and due discharge of those powers and the corresponding obligation to exercise them judicially will ensure that the executive and the Legislature would move in the spheres of their allotted jurisdiction and not encroach upon the rights of the citizens relating to their liberties, their lives, their properties etc. The importance of a strong and independent judiciary, in the scheme of a written Constitution that sets up a Federal system of Government and guarantees to the people of our Country certain Fundamental Rights, cannot possibly be over estimated.

In our Constitution therefore there is no such thing as an absolute or unqualified separation of powers in the sense conceived of by Montesquieu. There is, however a well marked and clear cut functional division in the business of the Government in that three distinct bodies or organs have been set up to perform the functions of the legislature, the executive and the judiciary. And although the responsibility to discharge these functions is primarily lodged in these organs of Sovereign Power, care has been taken to see that the due discharge of these functions by them combines a sense of responsibility with the due maintenance of an efficient system of administration. In our Constitution there is no clear cut division of power

The judiciary is under our Constitution completely independent of the executive. Good care has been taken to minimise the possibility of either the legislature or the executive attempting to over awe or dominate the judges and the precise methods and techniques that have been prescribed in the Constitution to achieve this end will be dealt with at some length in an effort to show that they do reflect a sincere desire on the part of the Constitution makers to make our judiciary independent of all alien interference. As to the responsibility of the Judges and the role that they play under a system of Written Constitution it would suffice for the present to reproduce an extract from MacIver's *The Modern State* which sums up the extent of their power and defines the limits of their authority admirably.

> "It must suffice to remark that the business of judging both demands and admits an unusual independence on the part of the judge, from the engrossments and fortunes of party politics. He sits apart to interpret and to pronounce, and the limits of his function are set for him not by the policies of the hour but by the spirit of the code and of a *great profession trained in its study*. An ultimate safeguard is even here necessary. None can be entrusted with power without some guarantee against its abuse. A judge, within the limits of his jurisdiction can be a petty and irascible tyrant. But the right of appeal is a restraining influence, and in the last resort the judge may be made subject to the general power of government, exercised through the legislature or through the combined action of legislature and executive. This final guarantee can be secured in such a way that political expediency is not suffered to touch the authority or effect the status of the appointed judge." (See p. 373, *Oxford University Press*)

49 The impact of the Theory of Separation of Powers on the Interpretation of Australian Constitution

Their Lordships of the Privy Council in a recent case *Attorney General of Australia* 1957 (1) A.E.R. 41

To what extent the text of the Constitution which represents the supreme law of the land reflects these high and noble ideals and affirms these principles upon which the future governance of this country is to be based, would be dealt with in detail in the Chapters entitled as *Rights and Fundamental Rights* as also in *Pakistan, as an Ideological State*. But while considering the leading features of our Constitution, it is desirable at this stage to refer to that aspect of our Constitution which has reference to the operation of democratic principle —a principle which, in the opinion of the writer, is the very life and soul of the State that has been established under our Constitution.

Meaning of Democracy.

How shall we define this democratic principle? Is there any agreed definition of this doctrine? In order to answer these questions we need not undertake an examination of the historical development of the form of government which could appropriately be called democratic. Right from the Athenian days of direct democracy to the eve of the French Revolution we, as students of political History of Mankind, witness numerous variations on the theme of democracy considered as a mode of organising the government of the people. Nor is it absolutely essential that the several historic manifestations of the democratic principle be recapitulated, for here, as elsewhere, the history of the institution is no substitute for the analytic understanding of the grammar of its present day operations. Suffice it to say, that the theory and practice of democracy, as it is reflected in the present day governmental institutions, derives its inspiration from the example of French Revolution. France has since the days of Revolution believed, and has, by her practical example, taught the rest of the world to believe, in the principle of national sovereignty. The first step it took was to reject resolutely the principle and practice of autocraticism, absolutism and irresponsible rule,—whether that rule was to be conceived of as being the rule of one person or group of persons, or of a tyrannical oligarchy. She repudiated her *Bourbon* rulers who were claiming through Louis *XIV* "*L'Etat, c'est moi*," and demonstrated to them that the slogan, "*L'Etat, c'st la Nation*" was a more sacred slogan for the freedom-loving people of that great country. *Equality*, *liberty* and *fraternity* thus became the watch-words of those diligent crusaders to whom goes the credit of having, for the first time in History, dismantled the foundations upon which *arbitrary* rule (that is, rule based on coercion and not on the consent of those who were to be ruled) had been erected. These slogans themselves, however, were not fabricated by the French Revolutionaries as if in a fit of absent mindedness, but they had a history of their own, a record of a prolonged period of gestation. The inspiration that led to their formulation as recent scholarship has established, was at least an eleven hundred years old affair.

What was the contribution which the Assembly that gave the French Constitution of 1791 made to the development of democratic method of organising the political life of the people? It taught the people to believe that the principal organ of the nation is the place where they can meet and discuss the affairs of their country and take decisions in terms of which the efficient management of those affairs can be secured for the benefit of all.

Meaning of Parliament.

The word 'parliament' dates back to the French word *parle* which means *to talk*. The word 'parliament' still bears the stresses of this French word. "The word struck root in England", say Sir Courtenay Ilbert and Sir Cecil Carr in their book on *Parliament*, "and was soon applied regularly to the national assemblies which were summoned from time to time by Henry's great successor, Edward I, and which took something like definite shape in what was afterwards called the *Model Parliament* of 1295. The word, as we have seen, signified at first the *talk* itself, the conference held, not the persons holding it. By degrees it was transferred to the body of persons assembled for conference, just as the word 'conference' itself has a double meaning. When Edward I was holding his parliament, institutions of the same kind were growing up in France. But the body which in France bore the

following nine sections of Chapter III deal with the appointment of judges, their tenure of office and remuneration the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction of the High Court, the power of the Parliament to define jurisdiction and certain other matters

"Such is the bare structure of the Constitution, and it will be necessary to look more closely into some of its provisions But *enough has been said to suggest that, in* the absence of any contrary provision, the principle of the separation of powers is embodied in the Constitution Section 1, which vests legislative power in a Federal Parliament, at the same time negatives such power being vested in any other body In the same way, s 71 and the succeeding sections, while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their *jurisdiction, negatives the possibility of vesting such power in other courts or extending* their jurisdiction beyond those limits It is to Chapter III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power That chapter is, in its terms, detailed and exhaustive and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly advanced that, inasmuch as there is no express prohibition of other legislation in this field it is open to the Parliament to turn from Chapter III to some other source of power

Having said that much their Lordships proceeded to look more closely into some of the provisions of the Constitution Act and rounded up their discussion of the central question in the appeal before them (How far, under the Australian Constitution by means of a Federal Act judicial and non judicial power can be united in the same body) by a significant remark

"But, first and last the question is one of construction and they doubt whether had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached Their Lordships would adopt the words of Dixon, J , in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (3) (1931) 46 *C L R 73 at p 96)*

'But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge (i e knowledge of the Constitution of the United States) cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution' "

50. Pakistan—and the Democratic Principle

In the preamble to our Constitution we have a reference to the declaration by the framers of the Constitution that

(a) the State of Pakistan in the words of its Founder, would be a "democratic State" and its authority and powers are to be exercised through the chosen representatives of the people, and further, that

(b) the State would observe the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam

The State [illegible] ch as *equality of status* and of *opp*[illegible] , *faith, worship* and *association,* [illegible] The State would also make provision for minorities freely to profess and practise their religion and deve their culture

indeed, that the other three may labour in vain if it is not present. This fourth and vitally necessary thing is a guiding cabinet—a cabinet guiding parliament, and yet at the same time guided by parliament (*so fine and delicate is the adjustment of the whole machinery of the representative system of government*)—which adds the final touch to the representative system. The cabinet was the last of the four elements of representation to be added, in the course of its slow and gradual development. It began to be added in the eighteenth century; it was finally added in the nineteenth. With its addition the system of representation—the system of parliamentary government—may be said to have assumed its final form." (*Essays on Government p. 69-70*).

Equality, Liberty and Fraternity.

The watchwords of the French Revolution, namely *Equality*, *Liberty* and *Fraternity*, have been woven into the very texture of modern political institutions. They are the principles which are reflected in the theory and practice of modern Democratic Governments and continue to be the dynamic principles of their growth and adaptability. Let us observe the relationship between these three prismatic facets of the thing called democracy. Equality comes first. Unless all citizens are equal in *status* and are *free* citizens they cannot hope to meet together to discuss problems of political organisation that affect the entire nation. In order that each one of them may be able to express himself courageously, he should have the *liberty to utter his opinion, to seek in concert with his fellow men, the realisation of that opinion*. Since the possibility of the clashes of opinions in regard to the wisdom of the proposed course of action sponsored by certain groups within the folds of a community are bound to occur, having regard to the fact that we are disposed to react differently to identical situations, *law must step in to define the sphere of individual liberty in such a way that the liberty of each may be accommodated within the framework of the life of whole community*. Care is to be taken to ensure that liberty of one man may not enslave his neighbour, and there would thus be some essential freedoms which each one of the members of the community will have to be guaranteed so as to preclude the possibility of the State eventually encroaching upon these preserves. Equality and liberty thus are interlinked and in fact lead up to the third: fraternity—the brotherhood of man must be reared not on the precarious sands of the shifting loyalties to petty interests of the privileged few but upon a system of governance inspired by the belief that all men are equal and have therefore the right to express themselves freely in relation to any course of conduct which in their considered opinion is likely to contribute to the greatest good of the entire nation.

Rule of Majority.

These reflections also suggest the justification for accepting the doctrine of rule by the majority: since all men are equal, the only method of resolving conflicting view-points after a general discussion is held, is to determine by appeal to the majority-principle on what side the weight of the national opinion is. It is a good working definition of democratic principle to say that it embodies the *belief* in the capacity of the average man to establish a system of institutions and procedures whereby political decisions could be amicably reached: Democratic method enables its votaries to secure political decisions by resorting to some well established procedures for resolving conflicts in the viewpoints of the members of the State. "A government by the people, for the people and of the people" is the definition of Democracy offered by one of the greatest democrat of all times—Abraham Lincoln—and none has been offered since the day he first voiced it which could be said to have improved upon it. "A majority", said he in his first Inaugural Address, "held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments is the only true sovereign of the people". It was in much the same spirit that Jefferson, in his first Inaugural Address (March 4, 1801) had stated as one of the "essential principles" of U. S. Government the demand that there be "absolute acquiescence in the decisions of majority, the vital principle of republics from

same name as the English Parliament had a different history and a different fate The French *parlement* became a judicial institution, though it claimed to have a share in the making of laws " The parliament thus derives its *authority from the people* and the mechanisms for the derivation of this authority are "open and free elections", held periodically to recruit persons to fill in the Parliament Such a body of men who are freely elected, can well claim to be the repositories of legal sovereignty for they are the trustees authorised by the nation to speak, and act on its behalf and in its interest

Earnest Barker on 'Theory of Representative Government

What is the theory upon which the institution of Representative Government which goes by the name of "parliamentary democracy" is founded may well be stated in a few words "Man, in his essence says Ernest Barker is a rational being His freedom consists in the exercise of his reason He is himself and free, when he is exercising his reason What, then, is the reasonable method—the method according to reason, the method of freedom, since reason and freedom are like the two sides of a coin—for the conduct of the affairs of men in a human society?

"How do men act—or rather how do they plan and determine their action—when *they are an organised body forming some sort of group and bound to act as a group?* The answer is that they 'get together They pool their minds each puts forward his point of view, and all discuss and compare their different points of view That is what happens in a family council that is what happens in a meeting of the members of a company that is what happens everywhere in any living reasoning free society (*Essays on Govt p* 67)

It is the extension of this principle of taking decisions by discussion as applied to the great society called the Nation which presents to us the tactical principle of modern democratic governments Since it is not possible to collect the entire nation at one place and thereby create a common meeting ground for the purpose of free exchange of opinion the only practical method of achieving the same thing be it even so indirectly is to procure by *means of a system of representation a body of selected men who derive their just authority* from the consent of those who have returned them to sit in that body and thus entrusted to them the difficult duty of taking decisions on behalf of the whole nation To quote Sir Ernest Barker again

"Representation is a very great thing It is in fact a multiple thing You may think it a simple thing that a great society should elect representatives to deliberate and decide on its behalf In fact, it is far from simple Four things are involved as men have slowly and gradually discovered during the centuries whenever you embrace the idea of a system of representation The first of the four is an electorate—an electorate organised in constituencies, with regular methods of voting—*which will duly, carefully and wisely elect its representatives The second is a system of parties—national* parties, each reflecting some *general* trend of thought pervading all the society—which will submit to the electorate a number of candidates for its choice, and not only so, but will also submit, along with the candidates the programmes of policy for which the candidates stand Such a system of national parties is a necessary part of any system of representation it provides the electorate with the organized data of choice—alike in candidates and pro [illegible]

thing is the parliament of the elected candidates, the parliament of the world, which debates and discusses the alternative programmes of policy reflected in the nature of its own membership and seeks to discover the elixir of a common policy true to the thought of the whole society But even that is not the whole of the matter There is still a fourth thing which is necessary—as necessary as any of the other three—so necessary,

the democratic governments, itself to be resorted to only in the *interest* of the people in accordance with the constitutional processes established upon the footing of the free consent of those people. In other words, it is the theory of democracy that the ultimate source of the authority or power of the Government must be traced back to the people. Democratic Governments are Governments that are carried on with the free consent of the people to be governed. The sole justification for the existence of representative institutions is to make the articulation of public opinion on matters concerning the business of political society, possible. Representative institutions are manned by persons who have returned triumphant from the election polls. The democratic principle is realised by means of these representative institutions.

51. Delegation vs. Representation

The theory of representative Government can best be stated by saying that persons who are elected, are not the *delegates* of their constituents, but that they are the *representatives* of the people as a whole. A representative is bound, of course, to weigh and consider every political problem from the view-point of his constituents but the important thing to remember is that while so doing he has not to turn a blind eye to the interests of the nation as a whole. In the words that Burke spoke to his electors of the *Bristol Constituency* (November 1774), we have the real role of the *Representative of the People* described to us :

Burke quoted.

"Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But, his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

'My worthy colleague says his will ought to be subservient to yours. If that be all, the thing is innocent; if government were a matter of will upon my side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?

'To deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgment and conscience—these are things utterly unknown to the laws of the land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

'Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent, and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but

which there is no appeal but to force, the vital principle and immediate parent of despotism" Should the majority itself behave unreasonably and assail the rights that the individual could claim under the constitution the courts of law would intervene and declare its decisions as void and inoperative

Disparity between ideals and institutional duress in democratic governments.

Although all are agreed in regard to the *aims* and *ideals* which democratic societies ought to pursue, the question in regard to the establishment of appropriate institutions for the realisation of these aims and objectives still remains a controversial one Modern democracies do not present any homogeneous scheme or identity of constitutional structure concerning the distribution of sovereign power within the State much less do they disclose any stereotype pattern in the warp and woof of the Governments they establish If generalization can at all be made about the essentia [illegible] governance from those that are not we [illegible] for the enunciation of the cardinal features [illegible] democracy", says he in his book on *Web of Government* has always been associated with the free discussion of political issues with the right to differ concerning them and with the *settlement of the difference not by force majeure but by resort to the counting of votes* It has always been associated with the growing authority of some assembly of the people or of the people s representatives such as *Greek Ecclesia* the *Roman Comitia*, the *English Parliament* The right to differ did not end with the victory of the majority but was inherent in the system It was a necessary condition of democracy everywhere that opposing doctrines remained free to express themselves to seek converts to form organizations and so to compete for success before the tribunal of public opinion Any major trend of opinion could thus register itself in the character and in the policies of Government (PP 198 199)

Brazilian device of Safeguarding Democratic Regime based on plurality of Parties.

The Brazilian Constitution has made some unusual provisions for the safeguarding of "democratic regime from the assaults that usually are made upon it by political ideologies that support one party rule with a view to establishing a monolithic state These provisions are contained in Chapter 11 of the Brazilian Constitution which is headed as Individual Rights and Guarantees Some of these are

"ART 141 (12) Freedom of Association for legitimate purposes is assured No Association may be *compulsorily dissolved except by virtue of judicial sentence*

(13) The Organisation, registration, or functioning of any political party or association whose programme or action may be contrary to the democratic regime based upon plurality of parties and guaranty of the Fundamental Rights of Men is prohibited "

In its very first Article, the Brazilian Constitution proclaims

"ART 1 The United States of Brazil maintain, under the representative system the Federation and the Republic

All Power emanates from the people and shall be exercised in its name "

It is obvious that the Communist Party would not be allowed to function under the Brazilian Constitution The Brazilian Supreme Court is known to have cancelled, on the premises of Art 141 of the Constitution, the election of some Communists who were returned to take their seats in the Legislative Chambers of the Brazilian Government.

Democratic principle defined

If State could be described in terms of the two great functions that it fulfils, namely (a) the administration of justice in domestic matters, and (b) the conduct of external relations in the field of foreign affairs —then, the democratic Government may well be defined functionally, as being the Government which is based on politically organized opinion of the people who compose the State for the advancement of the foregoing purposes The coercive apparatus of power, to the use of which State justifiably claims a monopoly, has, in

52. Contents of the Constitution

What are the matters that should be appropriately included in the written constitution of a country, is a question that is incapable of being answered in terms of any principle. As a matter of experience, one observes that the different written Constitutions of the world show different kinds of forms in regard to which provisions are made in those documents. Whether the constitution should contain a few essential provisions or it should be one which should have reference to even the unessential aspects of State-craft is really a question for the Political Scientist to answer.

Our Constitution is prefaced by a long preamble which is, in substance, a reproduction of the Objectives Resolution passed by the Constituent Assembly on [illegible], in which it had defined the goals and the ends which the framers of the Constitution were to set before themselves when drawing up the Constitution. It includes a Chapter on *Fundamental Rights*, rights which are justiciable, and another on *Directive principles of State Policy* (Directives) which are not justiciable. It also contains elaborate provisions with regard to the setting up of several commissions and councils which are not of any fundamental importance to the life of the State and which could well have been set up by means of ordinary legislation. It also establishes the machinery of Federal and Provincial Government, provides for the Constitution of Federal and Provincial Legislatures and sets forth the Constitution and authority of the Supreme Court and the High Courts of our Country. It also makes provisions in the Part relating to Temporary and Transitional provisions for a change over from the sort of Constitutional Government which was in existence under the provisions of Government of India Act, 1935, as adapted in Pakistan, to the government envisaged by the Constitution.

PLD [illegible] Federal Court [illegible] In the case of *The Federation of Pakistan v. Malik Khizar Hayat Khan Tiwana*, reported in *PLD 1956 Federal Court* [illegible], the highest Court of the country when faced with the problem of defining the nature of a constitutional provision *stricto sensu* declared that that was an impossible task. Chief Justice Munir delivering the Judgment of the Court observed:

"In law there is no precise definition of the matters that may be included in a constitution, and the range of the subjects that may be so included is so wide that what is a constitutional matter according to one constitution may not at all be a constitutional matter according to another, though for the purposes of political science or constitutional philosophy it may be possible to enumerate the matters that may properly be provided in a constitution. No Judge, lawyer or writer, however, has ever ventured to assert that certain matters cannot as a matter of law be enacted in a constitution Act. Thus while the constitution of one State may provide that its nationals shall or shall not wear a particular dress or shall or shall not be entitled to certain rights, that of another may completely omit such matters and confine itself only to the distribution of governmental powers among the various organs of the State. Indeed a constitution may say no more than this that all sovereign powers of the State shall vest and be exercisable by a particular person who shall not only be the law-giver of the State but also the executive head and the Chief Justice of that State. It seems to me, therefore, to be perfectly plain that if a body is invested with the power of making provision as to the constitution of a State, it is on any general principle or theory of constitutional law impossible to circumscribe its constituent powers. If it decides to say that a certain provision has to be considered as a constitutional provision, that is the end of the matter and the legality of that provision cannot be questioned on the ground that it did not properly fall within the domain of constitutional law as understood by constitutional lawyers or writers."

The prolixity in the provisions of our Constitution as also in that of the Constitu-

the general good, resulting from the general reason of the whole You choose a member indeed but when you have chosen him he is not a member of *Bristol* but he is a member of parliament "

The ideas to which Burke gave expression in regard to the relationship which ought to subsist as between a representative in the Parliament and his Constituents outside, were in no sense new, for, we find a reference to the same kind of relationship outlined in *Coke's IIth Part of the Institutes of the Laws of England* where it is stated

"Though one be chosen for one particular county or borough, yet when he is returned, and sits in Parliament he serveth with the whole realm for the end of his coming thither as in the writ of his election appeareth is general"

Observations of Lord Shaw *in the case* rep in 1910 A C 87

The position of a parliamentary representative came in for a judicial comment in the case of *Amalgamated Society of Railway Servants v Osborne* reported in 1910 Appeal Cases p 87 In this case, which is incidentally a leading authority on law relating to trade unions, the facts were that a certain Trade Union entered into an arrangement with certain candidates whose election it undertook to finance on the condition that they sign and accept the mandate of the Labour Party and be subject to their whip The candidates were asked to give a pledge to the effect that they would do all that they were asked to do by the Party Lord Shaw in his speech in the House of Lords considered such an arrangement illegal and observed

"A member of the Parliament is not to be the paid mandatory of any man or organisation of men nor is he entitled to bind himself to subordinate his opinions on public questions to others for wages or at the peril of pecuniary loss, and any contract of this character would not be recognised by a court of law either for its enforcement or in respect of its breach

These observations were based on the realization by the learned Law Lord that employment of funds by certain organisations to bind the hands of Parliamentary representatives would deprive them of their moral independence and such a device would gravely imperil the success of a Parliamentary Democracy

Shifts in Party Allegiance

Quite apart from the question affecting the legality involved in the shift of loyalty from one party to another there is the moral problem which confronts those who alter they [illegible] In such a [illegible] given to a [illegible] unknown [illegible] allegiance have felt themselves honour bound to resign their seats in the Parliament In each case, however, the primary question is one of political morality and not of law, and one of the important considerations which would certainly weigh in the assessment of the situation resulting from shifting Party allegiance is to find out whether or not the actual issue, which led to the abandonment of Party allegiance on the part of the Parliamentary representative, was the one which was an essential part of the election manifesto at the time his election took place If it was not, the representative would be justified in case he did not resign his seat In February 1931, for instance, Sir Oswald Mosley and five other members of the Labour Party deserted the Labour Party and formed a new one, and, despite the fact that their conduct was strongly condemned by their constituencies, they did not resign their seats in the Parliament

Our Country and the Democratic Tradition

In our country, however, where Democratic tradition is not, as yet, firmly laid, the cases of, what is called, representatives "crossing the floor" are not infrequent and there is a considerable opinion in our country that some constitutional method should

tion of India is due to the evil example of the *Government of India Act*, 1935, an Act upon which both of them have been modelled *Government of India Act*, 1935, taken by itself, is undoutedly one of the most elegantly drafted enactment of the United Kingdom Parliament: but it had to include variegated details of Administrative Machinery because of the highly complex character of the political problem it had to deal with. Our Constitution could have been made brief and the frame work of the Government it intended to establish could have been set forth in a more simple document—and in the bargain it would have served the purpose for which Constitutions are designed much more effectively than it does today As it is worded, it gives every appearance of having been drawn up by two verbose lawyers who have had to compromise upon the settlement of the rival claims of their highly sensitive and suspicious clients!

There is a tendency to misunderstand the British Parliamentary system because of the historic misunderstanding for which a great Frenchman, Montesquieu, who was a great admirer of the British Constitution, was responsible in his Esprit des Lois. *I refer to the doctrine of the separation of the powers—legislative, executive and judicial—which Montesquieu thought he saw in England. As a contribution to political analysis it is still valuable, but it has very serious dangers if it is not realized that in practice there is never the clear demarcation between the legislature and executive which Montesquieu envisaged. Nor is it desirable that there should be. What Montesquieu failed to see was that, as was already the case when he wrote and is very much truer now, the British system is based upon a close partnership between the executive and the legislature.*

One of the consequences of the emphasis which since Montesquieu's day has so often been placed on the separation of powers is that we all of us tend to think of Parliament first and foremost as the legislature. It is of minor account that this ignores the share of the Government in framing legislation, and the existence of extra-Parliamentary legislation. It is of greater account that it obscures the fact that legislation is only one of the functions which Parliament performs, and it is arguable that it is not the principal one.

Rt. Hon. Herbert Morrison, M.P.
(on British Parliamentary Democracy)

Now it is one of the fundamental axioms of political science that we must distinguish sharply between state and government. The latter is but the agent of the former; it exists to carry out the purposes of the state. It is not itself the supreme coercive power; it is simply the mechanism of administration which gives effect to the purposes of that power. It is not, we are told, sovereign in the sense in which the state is sovereign; its competence is defined by such authority as the state may choose to confer upon it ; and if it oversteps that authority it may, where such provision exists, be called to account. The idea of a government responsible for the commission of acts beyond its allotted powers is the central idea of every state where legal rule has replaced arbitrary discretion as the basis of political action. Louis XIV could, not unjustifiably, identify his private purpose with the will of the state; but even a ruler so powerful as the President of the United States must find authority for the exercise of his will either in the constitution or in some power legally granted to him thereunder by the Congress of his country. There are even countries, of which the United States is itself an example, in which the state expressly forbids its government, by the Constitution under which that government must act, to take certain types of power or to exercise others in certain ways.

Harold J. Laski
(The State in Theory and Practice)

CHAPTER III

MECHANISMS OF PARLIAMENTARY DEMOCRACY

which is hereinafter called "The Parliament" or "The Parliament of the Commonwealth". (See S.1 of the Australian Constitution (1900).) S.17 of the British North America Act also makes the Parliament for Canada consist of the *Queen* and an *Upper House* styled as *Senate* and the *House of Commons*. Similarly, S.19 of the *Union of South Africa* provides that the legislative power of the Union is vested in the *Parliament of the Union* which shall consist of the *King, a Senate and a House of Assembly*. To the same effect we have in S.65 of the Constitution of Burma (1947) the legislative power of the Union vested in the Union Parliament which consists of the President, a *Chamber of Deputies* and a *Chamber of Nationalities*. S.7 of the *Ceylon (Constitution) Order in Council of* 1946 provides for "a *Parliament* of the Island which shall consist of *His Majesty* and *two Chambers, to be known respectively as the Senate and the House of Representatives*".

Head of the State—as a Part of Parliament.

All Parliamentary Democracies thus make the constitutional Head of the State a part of the Legislature, the sole exception being the *Constitution of the Fourth French Republic* which, although it adopts the Parliamentary System of Government, does not make the President as a constituent part of the Legislature, nor does it give to him the power to suspend or veto legislation passed by the Parliament. In its *5th Art.* the French Constitution provides for Parliament which shall be composed of two Houses—the National Assembly and the Council of the Republic. (See also *ART.* 36.)

Uni cameral Legislature & Federalism.

It will also appear that in one essential particular at least the Legislature established by our Constitution is unique; this unique feature of our Constitution is somewhat irreconcilable with the juristic notion of a Federal State in that, representation has not been separately given to the Units of the Federation. Ordinarily, it is to be observed that in no Federation do we have a uni-cameral, that is one House-Legislature, the principle generally accepted being that every Federal Legislature should have two Houses—representation in the Lower House should be given to the people on the population basis and in the Upper House representation should be given to the Units of which the Federation is composed. In American Constitution, for example (*ART.* 1, S.1.) it is provided.

"All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."

Representation in the *Senate* is given on the basis of equality to all the Federating States, large or small, and representation in the House of Representatives is given to the people of the United States according to the population quota determined by the Act of Congress.

Pakistan is the only Federal State that has departed from the Federal principle in that it has only one House for its Federal Legislature.

54. President of the Republic

The functioning of a Parliamentary Democracy postulates the existence of a constitutional Head who becomes the guardian of the Constitution in so far as it provides for the control of power-relations between the Executive and the Legislature. It is a *sine qua non* of the high and august office of the President that the holder of it must, like Caesar's wife, be above distrust, suspicion and reproach. This, in terms of practical politics, means that he should transcend the party strifes and conduct the constitutional operations of the State machinery without being animated by any prejudice against or bias for any political party or personality.

The entire scheme of the Constitution presupposes for its orderly implementation, existence of an upright, benevolent and just occupier of the high office of the President of the Republic. He like the King in England is required to represent the executive power of the State, not of course in its *efficient* sense but only in relation to its *dignified aspect*—the expression "efficient" and "dignified" aspects of the political power being

53. Legislature and Executive under our Constitution

Of all the three principal departments within which the sovereign power of our State is distributed, namely the Legislature, Executive and Judiciary, it is the Legislature that is logically *prior* to the *remaining two*. *Considering that our Constitution establishes* a "parliamentary" pattern of democratic Government, treatment of that State-organ of the sovereign power, that is of Legislature, should precede the discussion of the remaining two. After all, there must *be* laws before they could be *acted upon and executed*. The Executive Government must derive its authority from the Constitution and the law and, in fact, the power of Executive to administer is co-extensive with the power of Legislature to make laws, for it is provided in ART. 39 that the executive authority of the Federation shall extend to all matters with respect to which Parliament has power to make laws. This principle is repeated in the sphere of Provincial administration in clause (2) of ART. 73. The executive *authority of the Federation is no doubt vested in the President and is to be* exercised by him directly or through the officials subordinate to him in accordance with the Constitution, but even the President is elected by the National Assembly and Provincial Assemblies in the manner prescribed by the Constitution, and the Civil and the Armed Services and other officers who constitute the agencies through which the executive authority operates, derive their capacity to act as channels of executive power only from the Constitution and the law. Primacy of the Constitution and Law, in fact, follows from the fact that we have a written Constitution. The State itself is the creature of law and its several organs must act in accordance with law. Laws under our Constitution are to be made by Parliament or Provincial Legislatures. And what is more, even the Executive is to be drawn from the Legislature—all this once again confirms the view that Legislature is *logically* prior to the Executive. Priority of Legislative Power

The legislative organ of the Federal Government is the Parliament which under ART. 43 *is to consist of the President and one House to be known as the National Assembly*. The President is not a *Member* of the National Assembly but his relation to that body is practically analogous to the one which the English Crown bears to the Parliament. Laws in England too are made by the *King in Parliament*. This method is also the basis of our Constitution and corresponds to the one employed in the Constitution of India where under ART. 79, the President and two Houses (known respectively as the Council of States and the House of the People) constitute Parliament for the Union. This idea is also repeated in the Provincial set up, for under ART. 76 of our Constitution the Provincial Legislature consists of the Governor and one House to be known as the "Provincial Assembly." The President, therefore, is the constituent part of the Parliament as even the Governor is of the Provincial Legislature although both of them are not *Members* of National or Provincial Assemblies respectively. Parliament of Pakistan

The Government of India Act, 1935, in S. 18, provided for the constitution of the Federal Legislature in the following words:— Federal Legislature under the Government of India Act, 1935 and other Constitutions.

"18(1)—There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor General, and two Chambers, to be known respectively as the Council of State and the House of Assembly. ..."

Similarly, under the Australian Constitution, *it has been provided*:

"The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and

prohibition, issued by the Constitution, as a result of which the courts are to be precluded from questioning the validity of the election of the President, will be dealt with in another place (see the Chapter relating to "Nature, Structure and Reach of Judicial Power"), but in the context of the present considerations it is pertinent to point out the political implications that must flow from a method of election designed by the Constitution whereby a person is to be elected to the high office of the President by the very person who has been appointed by the President himself—and such an election is not even challengeable in a court of law!

Presumably, this immunity was extended to the Presidential election for avoiding controversies with regard to his being a real Muslim or not—a question which may have to be raised in courts of law if the validity of the election of the President could be challenged by means of judicial proceedings. But if this was the intention, sufficient care has not been taken to give to it a precise legal formulation; for the legal attack upon any person who has been elected as President on any of the grounds relating to his lack of qualifications mentioned in *ART.* 32(2) is not saved by the kind of language in which the prohibition has been couched in *ART.* 32(3) of our Constitution. It is the validity of the *election* (i.e. of the several steps in the electioneering process), which is saved, and it is doubtful if the constitutional requirements that go to make up the qualifications of a person to offer himself as President constitute "steps in the electioneering process", the validity of which cannot be enquired into a court of law. If the person is, to take an extreme example, of less than forty years of age or is not qualified for election as a Member of the National Assembly, or he has previously been removed from the office of President by impeachment, he cannot conceivably be elected as President under the Constitution. And it is submitted that *want* of any of these qualifications can validly constitute sufficient ground for a challenge and thus form the subject-matter of adjudication by competent courts, and for an enquiry being instituted into the alleged want of qualifications—and this manner of proceeding is not in any sense within the prohibition mentioned in *ART.* 32(3). A possible argument against this view could be, that no judicial process can change the situation as it cannot reach the President, for in ART. 213 is provided the protection to the President and the Governor. The words of this Article are, "Neither the President nor the Governor of a Province, shall be answerable to any court for the exercise of powers and performance of duties of his office, or for any act done or purported to be done in the exercise of those powers and performance of those duties: Provided that nothing in this Article shall be construed as restricting the right of any person to bring appropriate proceedings against the Federal Government or a Provincial Government." But it is doubtful if a writ of *quo warranto* against a person who was lacking in qualifications prescribed by *ART.* 32 (2) can be resisted by appeal to the language of *ART.* 213. The immunity extended by that Article specifically relates to President being answerable in any court for the exercise of his powers or performance of duties of his office or for acts done or purported to be done in the exercise of those powers and performance of those duties. The immunity does not extend to an action to challenge his status as *President*—for even before the immunity can be claimed under *ART.* 213 it must be shown that the person claiming the protection is a validly elected President.

Relevance of Immunity under ART 213.

His resignation etc.

The President may cease to become President if he *resigns* his office by writing under his hand addressed to the Speaker of the National Assembly [*ART.* 33(3)], or if he holds any office of profit in the service of Pakistan or any other position carrying the right to remuneration for the rendering of service [*ART.* 34(1)], and finally, if he is successfully *impeached* on a charge of violating the Constitution or gross misconduct.

His Impeachment. ART. 35.

The procedure in relation to the impeachment of the President is outlined in *ART.* 35 which is as follows :

English Constitu
, says Bagehot,
fied part, in that
English nation as
l of the dignified
part of the Constitution ... it part Little later he observes, ' the use of the Queen in a dignified capacity is incalculable Without her in England, the present English Government would fail and pass away (p 30)

Within the framework of republican form of government there can be no such thing as hereditary office of Kingship for here all are equal before law every one is equal in every conceivable sense of that term But here too it is the President who becomes, by virtue of his office as the constitutional head, the symbol of a country's national pride, of its dignity, of its honour He is required to play the role of a balance wheel in the total mechanism of State machinery There is nothing expressly affirmed in the Constitution in relation to this aspect of the role of the President but the spirit underlying the Constitution and the scheme and arrangement of its provisions that repose so much of constitutional authority and power in the hand of the President make it perfectly plain that that is the role which the framers of the Constitution have assigned to the President of the Republic Role Pres a Re Con

It is for this reason perhaps that he is to be a Muslim [ART 32(2)] for in a State which lays claim to being called Islamic Republic its constitutional head so runs the argument must be a person who should owe allegiance to the faith and who must reflect the character, which is enjoined by Islam If this argument were valid would it not be strange that our Constitution should permit the Speaker of the National Assembly even though he be a non Muslim, to act as the President in circumstances mentioned in ART 36 Our must Musle

The President has in addition to the above requirement to be a person who must fulfil the following qualification — His qual

(a) He should not be less than forty years of age

(b) He must be qualified for election as a Member of National Assembly and

(c) He must not be a person who has previously been removed from the office of President by impeachment under ART 35 [See ART 32 (2)]

He has to be elected by an electoral college consisting of the members of the National Assembly and the Provincial Assemblies in accordance with the provisions contained in the First Schedule [ART 32(1)] Presi Electi Office

The juristic implications of these provisions will be dealt with in the Chapter relating to *Nature, Structure and Reach of Judicial Power* (see Judiciary and the *Election Law*) but it is sufficient for our present purpose to note that the Chief Election Commissioner is under the Constitution to be the Returning Officer for the election of the President and it should be remembered that the appointment of the Chief Election Commissioner is to be made by the *President in his discretion* [see ARTs 37(7) and 137(4)] When the President acts under the Constitution in his discretion he acts on his own, that is, he is not required to take advice of the *appropriate Minister* Considering that the President has been made eligible for holding office for two terms [ART 33(2)] it is a practical possibility that the same Chief Election Commissioner who has been appointed by the President in ' his discretion'', may have to be the Returning Officer who in his turn, should the President offer himself for the second term for being elected to the same office of the President, is to conduct his election This anomaly in the Constitution acquires some sinister significance if regard is had to the provision which says the validity of the election of the President shall not be called in question in any court [See ART 32(3)] What are the limits of this sweeping Vali Presid Electi not be questi in any ART

prohibition, issued by the Constitution, as a result of which the courts are to be precluded from questioning the validity of the election of the President, will be dealt with in another place (see the Chapter relating to "Nature, Structure and Reach of Judicial Power"), but in the context of the present considerations it is pertinent to point out the political implications that must flow from a method of election designed by the Constitution whereby a person is to be elected to the high office of the President by the very person who has been appointed by the President himself—and such an election is not even challengeable in a court of law!

Presumably, this immunity was extended to the Presidential election for avoiding controversies with regard to his being a real Muslim or not—a question which may have to be raised in courts of law if the validity of the election of the President could be challenged by means of judicial proceedings. But if this was the intention, sufficient care has not been taken to give to it a precise legal formulation; for the legal attack upon any person who has been elected as President on any of the grounds relating to his lack of qualifications mentioned in *ART.* 32(2) is not saved by the kind of language in which the prohibition has been couched in *ART.* 32(3) of our Constitution. It is the validity of the *election* (i.e. of the several steps in the electioneering process), which is saved, and it is doubtful if the constitutional requirements that go to make up the qualifications of a person to offer himself as President constitute "steps in the electioneering process", the validity of which cannot be enquired into a court of law. If the person is, to take an extreme example, of less than forty years of age or is not qualified for election as a Member of the National Assembly, or he has previously been removed from the office of President by impeachment, he cannot conceivably be elected as President under the Constitution. And it is submitted that *want* of any of these qualifications can validly constitute sufficient ground for a challenge and thus form the subject-matter of adjudication by competent courts, and for an enquiry being instituted into the alleged want of qualifications—and this manner of proceeding is not in any sense within the prohibition mentioned in *ART.* 32(3). A possible argument against this view could be, that no judicial process can change the situation as it cannot reach the President, for in ART. 213 is provided the protection to the President and the Governor. The words of this Article are, "Neither the President nor the Governor of a Province, shall be answerable to any court for the exercise of powers and performance of duties of his office, or for any act done or purported to be done in the exercise of those powers and performance of those duties: Provided that nothing in this Article shall be construed as restricting the right of any person to bring appropriate proceedings against the Federal Government or a Provincial Government." But it is doubtful if a writ of *quo warranto* against a person who was lacking in qualifications prescribed by *ART.* 32 (2) can be resisted by appeal to the language of *ART.* 213. The immunity extended by that Article specifically relates to President being answerable in any court for the exercise of his powers or performance of duties of his office or for acts done or purported to be done in the exercise of those powers and performance of those duties. The immunity does not extend to an action to challenge his status as *President*—for even before the immunity can be claimed under *ART.* 213 it must be shown that the person claiming the protection is a validly elected President.

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His resignation etc.

The President may cease to become President if he *resigns his office* by writing under his hand addressed to the Speaker of the National Assembly [*ART.* 33(3)], or if he holds any office of profit in the service of Pakistan or any other position carrying the right to remuneration for the rendering of service [*ART.* 34(1)], and finally, if he is successfully *impeached* on a charge of violating the Constitution or gross misconduct.

His Impeachment. ART. 35.

The procedure in relation to the impeachment of the President is outlined in *ART.* 35 which is as follows :

"(2)—No such charge shall be preferred unless not less than one third of the total number of Members of the National Assembly give to the Speaker of that Assembly notice of their intention to move a resolution for the impeachment of the President, and no such resolution shall be moved in the Assembly unless fourteen days have expired from the date on which notice of such resolution is communicated to the President

(3)—The President shall have the right to appear and be represented during the consideration of the charge

(4)—If, after the consideration of the charge, a resolution is passed by the National Assembly by the votes of not less than *three fourths* of the total number of Members declaring that the charge has been substantiated the President shall vacate his office on the day on which the resolution is passed

(5)—Where the Speaker of the National Assembly is exercising the functions of the President under ART 36 the provisions of this Article shall apply subject to the modification that the reference to the Speaker in clause (2) shall be construed as a reference to the Deputy Speaker and that the reference in clause (4) to the removal from office of the President shall be construed as a reference to the removal of the Speaker from his office as Speaker and on the passing of a resolution such as is referred to in clause (4) the Speaker shall cease to exercise the functions of President

The term of office of the President is five years [*ART* 33(1)] and the term begins from the date on which he enters upon his office and notwithstanding the expiration of his term, he is to continue to hold his office until his successor enters upon the office He is eligible to hold office for *one more term* In this last mentioned respect the constitutional provision in India enables the Indian President to offer himself for re election for any number of terms In the Constitution of the United States there was to begin with no bar against re election and most of the Presidents have been elected for two consecutive terms and President Roosevelt successfully ran for the third term In the 22nd Amendment to the Constitution however which was adopted on 27th February 1951, it is now expressly provided that no person shall be elected for the office of President more than twice, and no person who has held the office of the President or acted as President for more than two years of the term to which some other person was elected President shall be elected to the office of the President more than once The term of President's Office

Our Constitution provides in ART 33(2), " No person shall hold office as President for more than two terms It does not in express terms confer entitlement upon a person to hold office for two *consecutive* terms Comment on ART 33(2)

The principle underlying this restriction to hold the office of President for more than stated number of terms appears to be that the continued exercise of power by a person paves the way for the same person to successfully contest for the ensuing term and prevents, on grounds other than merit, other persons from stepping into the office

When clause (2) of ART 33 enjoins that 'No person shall hold office as President for more than two terms' does it mean that the President can hold office for two successive or consecutive terms? It is submitted that analysis of ARTs 32(2), 33(2), 34(2), and 143 (1) (c) would seem to suggest that there must anyhow be a break between the two terms for which any one person under the Constitution can hold office of President Following argument is submitted in support of this view

(a) Under ART 32(2) it has been clearly provided that a person shall not be qualified for election as President unless he is a Muslim, nor shall he be so qualified if he is *not* qualified for election as a member of the National Assembly ART 32 (2) (b))

(b) Under ART 34(2) the President shall *not be qualified for election as a member of*

the National or a Provincial Assembly; and if a member of any such Assembly is electec President his seat in that Assembly shall become vacant on the day on which he ent upon his office.

The combined effect of the foregoing two provisions is too obvious to need a detailed analysis. Once a person holds office as President, by the sheer force of tl circumstance alone, and so long as he holds that office, he shall not be qualified for electi as a member of the Provincial or a National Assembly. And so long as he is not qualifi to become a member of Provincial or National Assembly he will be disqualified for bei elected under ART. 32(2) (b) as President.

It would seem to follow from this that if a person who is elected to become tl President, means to qualify himself for being re-elected for a *second* term, he must ste down from office at the conclusion of that term and acquire qualification for re-election President. If this view is correct, it must inevitably follow that, as a matter of constitu tional necessity, there has to be a break in between the completion of the first term o Presidential Office held by a person and his re-election to the same office for a second term

One of the qualifications for being elected as President postulated by ART. 32 (2) (b is that the person seeking election to Presidential office must be qualified for election as member of the National or a Provincial Assembly. In order to determine whether or not person is so qualified reference will have to be made to ART. 45 which in terms enjoins tha among other qualifications the person in question must be qualified for being a voter under ART. 143. And strangely enough, both ARTs. 45 and 143 are subject to the considera tion that it is not enough to be so qualified to be a voter; he must not be' further disqualified for being a member by the Constitution or Act of Parliament'. [See ARTs. 45(2) and 143 (1) (c)]. And this limitation on a person's qualification to be re-elected as President would at once attract the provisions of ART. 34(2) already referred to above, with the result that as long as he is in office he is not qualified to be re-elected even for a second term.

There is thus no escape from the conclusion that no person can maintain absolute and unqualified continuity between the two terms of his office as President. Some sort of interruption must take place in order that any one who may have completed his first term be at all qualified for re-election. The policy behind these provisions of our Constitution that make this state of things inevitable may well have been to make the election of the President available only to a person, who is not, on the eve of his election, in office as such President—the constitutional provisions that sanction this course may well have been calculated to avoid the possibility of any one in office exploiting the position which a Presidential Office must confer upon him to his advantage, in the matter of influencing the result of re-election in his favour.

Purpose of achment.

The action of impeaching the President "for the violation of the Constitution or gross misconduct" is designed to operate as a brake on the natural disposition, inclination or desire of the person holding office of the President, to act in a high-handed and unconstitutional manner or to otherwise misconduct himself. The procedure for the commencement of impeachment proceedings has been designedly made difficult, in that one-third of the total number of members of the National Assembly must combine to make a request to the Speaker of the Assembly for the commencement of proceedings, and an additional safeguard is that the resolution impeaching the President can only be moved after the expiration of fourteen days from the date on which notice of such resolution is communicated to the President. At the stage of consideration of the charges against him, President has the right to appear and be represented for making his defence, and there has to be a *three-fourths* majority of the total number of the members of the National Assembly before a declaration that the charges have been substantiated can be constitutionally made.

"(2)—No such charge shall be preferred unless not less than one third of the total number of Members of the National Assembly give to the Speaker of that Assembly notice of their intention to move a resolution for the impeachment of the President, and no such resolution shall be moved in the Assembly unless fourteen days have expired from the date on which *notice of such resolution is communicated to the President*

(3)—The President shall have the right to appear and be represented during the consideration of the charge

(4)—If, after the consideration of the charge a resolution is passed by the National Assembly by the votes of not less than *three fourths* of the total number of Members declaring that the charge has been substantiated the *President* shall vacate his office on the day on which the resolution is passed

(5)—Where the Speaker of the National Assembly is exercising the functions of the President under ART 36 the provisions of this Article shall apply subject to the modification that the reference to the Speaker in clause (2) shall be construed as a reference to the Deputy Speaker and that the reference in clause (4) to the removal from office of the President shall be construed as a reference to the removal of the Speaker from his office as Speaker and on the passing of a resolution such as is referred to in clause (4) the Speaker shall cease to exercise the functions of President

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(b) Under ART 34(2) the President shall *not be qualified for election as a member of*

However, if the move sponsored by them fails in the Legislature, they do not entail the liability to resign on that account. The matter is simply dropped. They have no office of the Prime Minister, and in fact the Federal Council need not have a majority support in the Legislature, and its members are frequently drawn from splinter groups with different political programmes represented in the House. They are able to work together because of the 'political sense' with which Swiss, as a people, are richly endowed.

56. Extent of Executive Authority of the Federation and the Federal Units

Before we study the nature of Parliamentary Executive which our Constitution has established for our country, it is necessary to understand the principle upon which the distribution of Executive power between the Federal and Provincial Governments has been made, as also the meaning of expression 'Executive Authority'.

The structure of executive authority of the State of Pakistan, having regard to the federal principle upon which it has been distributed between Federation and Provinces, is as follows :

The executive authority of the Federation is vested in the President, which he has to exercise upon *advice* of the Ministers, the advice having been declared under ART. 37 as being, except *in certain well defined cases, constitutionally binding upon him.* This sphere of executive authority is coextensive with the sphere of Federal Legislature to make laws, and its details would be found set forth in the entries that are mentioned in the Federal and the Concurrent Lists of the Fifth Schedule of our Constitution. The executive authority in relation to federal units, that is of the two Provinces, is vested in the Governors acting upon advice of the Provincial Ministers. (See *ART.* 71 which is analogous to *ART.* 37). The Governors are to be appointed by the President upon advice, and are to hold office for 5 years from the date they enter upon their office subject of course to President's pleasure (*ART.* 70). The extent of the executive authority of the Provinces is on par with the competence of the Provincial Legislature to make laws, and a reference to the Provincial and the Concurrent Lists would indicate the subjects in regard to which legislation to the Provinces is permissible (*see ART.* 73). Of course, items not mentioned in any of the Lists of the V Schedule, which are called "residuary subjects", are to be administered and legislated upon by the Provinces (*ART.* 109).

As to the relation of the Federation to the Provinces in regard to the concurrent field of administration and legislation, much will be said in the chapter dealing with that subject. Suffice it to say that the provisions governing these relations are contained in Part VI of our Constitution (*ARTs.* 105 *to* 119).

57. The Constitutional Scope of 'Executive Authority' under our Constitution.

What are we to understand by the expression 'executive authority' that has been used in the Constitution?

To begin with, it should be noted that the Executive is charged with the duty of *executing* laws passed by the appropriate Legislature, and, broadly stated, the power to do this would include the power to transact the entire business of the Government. Since there is a rule of law in this country, Executive must act within the permitted range of the authority that is prescribed by the Constitution and the law. The executive action is not above law and must derive its support from law. The two principal functions of the State are : (a) administration of the laws within the State in order to maintain public order and do justice between man and man, and (b) to do all acts necessary to sustain and promote ideals of international community of States. (This in legal phraseology would mean

After the declaration by the National Assembly that the charge has been substantiated, the President "shall vacate his office on the day on which the resolution is passed"

The proceedings in impeachment have not to be lightly commenced there must exist a strong case against the delinquent President before he could be summoned at the bar of National Assembly to answer the charge upon which his impeachment is to be based

Impeachment under the U S Constitution

In *S 4 of Article* 2 of the Constitution of U S A, a provision is made for the impeachment of the President, Vice President and all civil officers of the United States and the grounds on which impeachment could be made include treason, bribery and other high crimes and misdemeanours The House of Representatives has the sole power of initiating *impeachment [ART 1, S 2 cl (5)] and when the President of the United States is tried*, the trial takes place before the Senate with Chief Justice presiding Conviction follows a concurrent vote of two thirds of the members present [*ART 1 S 3 cl* (6)]

The persons liable to impeachment under the American Constitution include civil officers of the United States and it would appear that all officers, excluding Military officers, are liable to impeachment It would have been wise for the Pakistan Constitution framers to have made a similar provision in the Constitution so as to have included in it not only the President but all persons holding office in any capacity whatsoever This is the more so, because the punishment is not merely the removal from office which the person impeached may be holding at the time of his conviction but it also operates as disqualification for the holding of any public office in future

The constitutional history of the United States shows that there have been very few impeachments indeed So far down these 170 years that the U S Constitution has endured, *only one President has been impeached but he too was acquitted This was the* case in which President Johnson was tried in 1868 It would appear that the utility of the provision relating to impeachment lies in its *existence* and the resort to it can only be made in very grave and serious cases of deriliction of official duty—for the object is not so much to punish the delinquent holder of the public office as to make an example out of him for the purpose of purifying public life in the country

55. Types of Executive

Regarded from the point of view of political principle the 'Executive' may be looked at from the following perspective

(1) *Single or Plural Executive*—Executive is single or plural according as the final control of it rests with one individual or a plurality of them, as in a Council or Cabinet The United States Constitution presents a single individual as being the sole repository of its Executive Power and the British System *shows that the executive power is vested* in an Executive Committee of the House of Commons

(2) *Removable or Irremovable Executive*—Parliamentary Executive is removable by the Legislature at any time it loses the confidence of the majority in the House, whereas Presidential Executive is irremovable in the sense that it is appointed for a fixed term Apart from the question of the proved misbehaviour of American President, he is irremovable from his office for the term of years which is fixed by the Constitution

Swiss Constitution—a compromise between the Removable & Irremovable Executive

The Swiss Constitution makes for a compromise between these two types of Executive and combines the merits of both the systems and avoids their corresponding disadvantages Under the Swiss Constitution supreme executive power is vested in the Federal Council, which is composed of 7 Members who are elected by the joint session of the two Houses The following provisions make the constitutional position of Swiss Executive plain

58. Rules of Business

The President has the power to make rules for the allocation and transaction of the business of the Federal Government [*see ART.* 41 (3)]. These rules are technically called *Rules of Business*, and they provide for the establishment of various ministries and the inter-departmental procedures. The Rules of Business invariably are embodied in a confidential document which is not available to the public, nor can evidence be led in a court of law for showing that a particular administrative action was not taken in accordance with the Rules of Business prescribed by the Government.

Machinery of Govt: Report of Haldane Committee quoted.

In a report submitted by the Machinery of Government Committee, which had been set up in England in 1918, to enquire into the responsibility of the various departments of the Central Executive Government, and to advise in what manner the exercise and distribution by the Government of its functions should be improved, we have furnished to us some instructive observations on the subject of "governmental functions", and the report is relevant for our purposes in Pakistan, since the scheme underlying the functioning of the Secretariat in our country has been borrowed from the English practice.

The Cabinet, according to the Report, "is the main spring of all the mechanism of Government. Its constitution and the methods of its procedure must depend to a large extent on the circumstances of the time, on the personality of the Prime Minister and on the capacities of his principal Colleagues". The main functions of the Cabinet are stated in the report to be the following :—

(a) the final determination of the policy to be submitted to Parliament;

(b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and

(c) the continuous co-ordination and delimitation of the activities of the several Departments of State.

For the due performance of these functions the following *conditions* are considered as essential, (or, at least, desirable) :—

"(i) The Cabinet should be small in number—preferably ten or, at the most, twelve;

(ii) it should meet frequently;

(iii) it should be supplied in the most convenient form with all the information and material necessary to enable it to arrive at expeditious decisions;

(iv) it should make a point of consulting personally all the Ministers whose work is likely to be affected by its decisions; and

(v) it should have a systematic method of securing that its decisions are effectively carried out by the several Departments concerned."

With regard to the formulation of policy the following remarks were made :—

"12.—We have come to the conclusion that in the sphere of civil government the duty of investigation and thought, as preliminary to action, might with great advantage be more definitely recognised . . . .

"14.—(We) urge strongly :—

(a) that in all Departments better provision should be made for enquiry, research, and reflection before policy is defined and put into operation;

(b) that for some purposes the necessary research and enquiry should be carried out or supervised by a Department of Government specially charged with these duties, but working in the closest collaboration with the administrative Departments concerned with its activities . . . . ."

obedience to treaty obligations and implementation of the articles of international con ventions to which a given State is a party All civilized States endeavour to play an honourable role in maintaining international peace and this is sought to be achieved by securing just relations between the States that compose the international community)

All these functions primarily devolve upon the Executive Organ of the Govern ment Of course there must
ment, if the executive action i
the citizens more particularly
individuals living within or subject to its jurisdiction to penalties or of depriving them of their lives, liberties or properties

But in the matters affecting foreign policy for instance the Executive has full initiative and if and when with the organised public opinion as it is bound to be a severe criticism of i vernment sponsoring it The result of this can be that the Government may fall Thus the only sanction to secure conformity of the policy of Government in relation to its conduct of foreign relations with the politically organised public opinion is political in character

From the foregoing account it would be noticed that the Executive is practically indistinguishable from Government and may well be regarded as a sort of short and convenient term within which are to be subsumed all those functions the performance of which is necessary for the carrying on of the business of managing the affairs of the country It is for this reason that in Halsbury s Laws of England Vol 7 p 187 (3rd Ed) we find Government described as the exercise of certain powers and the performance of certain duties by public authorities or officers together with certain private persons or Corporations exercising public functions The structure of the machi nery of government and the regulation of the power and duties which belong to the different parts of this structure are defined by the law which also prescribes to some extent the mode in which these powers are to be exercised or these duties are to be performed As to these executive functions we find at p 192 of the same volume the following Executive functions are incapable of comprehensive definition for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away They include in addition to the execution of laws the maintenance of public order the management of Crown property and nationalised industries and services the direction of *foreign policy the conduct of military operations and the provision or supervision of such* services as education public health transport and state assistance the insurance

Difference between Executive and Administrative Power

Political scientists also draw a distinction between executive and administrative action The scope of the executive power, it is said is wider than that of the mere ad ministrative power—the latter being construed as involving merely the execution of laws and the general administration of the affairs of the Government The other species of the executive power are —

(a) the power to conduct foreign affairs

(b) the power to organize armed forces and conduct war,

(c) the power to summon prorogue or dissolve the legislature, etc

But when all is said and done broadly considered the administrative power really is the same thing as the executive power of the State Our Constitution does not seem to make any such distinction and from the legal stand point the making of such a distinction at any rate does not appear to be necessary or relevant

Power to appoint Advisory Boards and Commissions etc.

6. The President has the power :

(a) to appoint Advisory Boards for the Post and Telegraph Department (*see ART.* 200);

(b) to constitute National Economic Council to review the overall economic position of the country, to formulate plans in respect of financial, commercial and economic policies of the Federal and Provincial Governments with a view to ensuring that uniform standards of economic development are attained in all the parts of the country. (*ART.* 199) ;

(c) to appoint a Commission to investigate the conditions of *Schedule Castes and backward classes* in Pakistan and make recommendations as to the steps to be taken and the grants to be made by the Federal or Provincial Governments with a view to improving their conditions (*see ART.* 206);

(d) to appoint a Special Officer for Schedule Castes and backward classes in Pakistan who is to report upon the extent to which recommendations of the Commission appointed under *ART.* 206 are carried out and to report his findings to the President etc. (*see ART.* 207).

(e) to appoint Islamic Law Commission (ART. 198), and to set up Organisation for Islamic Research and Instruction in Advanced Studies (ART. 197).

7. Power of the President to award decorations in recognition of Military or Public services (*see* ART. 208).

Pardoning Power (A Comment on ART. 209).

8. The *pardoning power* of the President conferred on him by the Constitution is in the following terms :

"The President shall have power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or authority established by law." (*see* ART. 209).

The American Constitution bestows (*Section 2 of ART.* II) an identical power upon the President in the following terms :

". . . he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

The Governor of a Province has no pardoning power under our Constitution analogous to the power of the Indian Governor of a State (see *ART.* 161 *of the Indian Constitution*).

S. 401 CR. PC.

The power given by *S.* 401 of the Code of Criminal Procedure is in the following terms :

"When any person has been sentenced to punishment for an offence, the Provincial Government may at any time without conditions or upon any conditions which the person sentenced accepts, *suspend the execution of his sentence* or *remit* the whole or any part of the *punishment* to which he has been sentenced."

The same power is vested in Governor-General (now the President) under *S.* 402-A. Similarly, in *S.* 402, the Provincial Government and under S. 402-*A*, the Governor-General (now the President), have the power, without the consent of the person sentenced to commute the sentence from death to transportation or from either to rigorous imprisonment for a stated term etc.

It would thus appear that the power under Criminal Procedure Code strictly relates to the competence of the Provincial Government or the President to *remit* or to *wipe out* a sentence pronounced by a criminal Court either unconditionally or upon any conditions which the person affected thereby accepts.

59 Summary Statement of President's Powers

Following are some of the important executive and administrative powers which under the Constitution are to be exercised by the President —

Appointment and dismissal of Prime Minister—in his discretion

1 He *appoints the Prime Minister in his discretion* He terminates his appointment [illegible]

the case of his dismissal, that the Prime Minister no longer enjoys the confidence of the majority of members in the National Assembly (*ART* 37)

All Federal Executive Authority is vested in the President

2 He *exercises the executive powers of the Federation* upon advice which is binding on him [ART 37(7)], in the language of the Constitution "the executive authority of the Federation shall vest in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution" [*ART* 39(1)] The executive authority of the Federation extends to all matters with respect to which Parliament has power to make laws [*ART* 39(2)] The executive action of the Government shall be expressed to be taken in the name of the President [*ART* 41(1)] The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated The courts are precluded from questioning the validity of any order or instrument so authenticated on the ground that it was not made or executed by the President

Supreme Command of the Armed Forces

3. In him is *vested the supreme command* of the armed forces and the exercise thereof by him shall be regulated by law Until Parliament makes a provision by law in regard to the exercise of the supreme command of the armed forces vested in the President, he *shall have the power to raise and maintain the Naval Military and Air Forces of Pakistan* and Reserves of such forces, to grant commissions in the Army, Navy and Air Forces and to determine their salaries and allowances It would be noticed that this power is exercisable by him on *advice* from the relevant Ministers (*ART* 40)

President's Right to be informed

4 It is the right of the President to be informed (and corresponding duty of the Prime Minister, to keep the former informed) about the decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation, to furnish him such information relating to the administration of the affairs of the Federation and proposals for legislation as the former may call for, and, if the President so requires, to submit for the consideration of the Cabinet any matter on which a decision has been taken by a Minister but which has not been considered by the Cabinet (*ART* 42)

Power to issue Proclamations of Emergency

5 His power to declare, by a Proclamation, that a grave emergency exists in the country by reason of which the security or economic life of Pakistan or any part thereof is threatened by war or external aggression or by internal disturbances beyond the power of the Provincial Government to control, and while such proclamation is in operation, to have and exercise the powers mentioned in *ART* 191 Similarly, he has the power to issue Proclamation on receipt of a report from the Governor of a Province on being satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the Constitution, to assume to himself or to direct the Governor of the Province to assume on his behalf the powers and functions under ART 193 of the Constitution He has also the power to revoke these Proclamations of emergencies (*see ART* 195) It may be noted that the validity of any Proclamation issued or order made pursuant to the provisions of Part XI of our Constitution cannot be questioned in any court

person who had neither been prosecuted nor punished for the offence in respect of whi the pardon had been extended to him.

9. President's power to administer Federal Capital (*see ART.* 211).

10. The power of the President to constitute Election Commissions or Delimit tion Commissions is exercisable by him in *his discretion* (*see ARTs.* 137 *and* 142

11. Power to appoint and dismiss or recall Provincial Governors and to deal wi Provincial Administration in cases that are reported by the Governors f action. (*See ARTs.* 70 & 193).

12. Power to appoint

(*a*) The Judges of the Supreme and the High Courts (*see ARTs.* 149 *and* 166).

(*b*) Comptroller and Auditor-General of Pakistan (*see ART.* 120).

(*c*) Members of the Pakistan Public Services Commission (*see ART.* 186). Th power is exercised by the President in his *discretion* (see *ART.* 186).

(*d*) Attorney-General (*see ART.* 38).

A general Review of the Nature of Presidential Authority.

We have reviewed so far the powers which are exercisable by the President und the Constitution, and we have indicated earlier that although the Constitution refers t these powers as powers of the President, in fact, by reason of a clear injunction of the Cor stitution contained in 7th clause of ART. 37, they are the powers of Cabinet for, in th exercise of these functions, the President *shall* act in accordance with the advice of th Cabinet or appropriate Minister, or Minister of State, as the case may be, except in case where he is empowered by the Constitution to act in his discretion and except as respect the exercise of this power under clause (6) of the same Article, namely, the power of ter minating his pleasure during the continuance of which the Prime Minister holds office an the Constitution directs that this termination of his pleasure will not take place arbitraril but is contingent upon *his* satisfaction that the Prime Minister does not command the con fidence of the majority of the members of the National Assembly. Of this situation he i the sole judge and the only restraint on the possible abuse of this abnormal power is hi conscience, and his loyalty to the oath of his office.

Quite apart from the fact that the power of appointing and removing the Prim Minister is by itself a power of considerable political importance, the *normal* exercise o Executive power by the President must be exercised by him under ministerial advice whicl has been declared, except in matters specifically provided for in the Constitution, as being binding on him. [*See ART.* 37(7)].

The Constitutional position in England.

The binding value of ministerial advice can also be seen in the conventions of the English Constitution which prescribe that the Crown cannot act except upon advice of his Ministers and, as a careful study of the constitutional history of modern Britain will show, for the last two hundred years or so the Crown has, as a matter of fact, acted *only* upon advice in the matter of taking such important decisions as the dismissal of Government or the dissolution of Parliament.

By thus surrendering itself at the altar of the advice of his Ministers in the matter of exercising its prerogative, the Crown has withdrawn itself from the pale of political controversies in which it is liable to be involved in case there is no responsible Minister upon whose advice the course that the Crown might wi [illegible] could be justi[illegible]

There may be situations in which, however, th [illegible] f the Cı [illegible] ve to be exercised contrary to or in the absence of advice a [illegible] situa crown *could* act on its own and its action would [illegible]

The power to *commute* under the Criminal Procedure is absolute and unqualified and takes effect regardless of the consent of the person sentenced

The power of the President, however, under the Constitution is much wider and includes the power to grant *pardon*, *reprieves* and *respites* in addition to the power of *remitting*, *suspending* or *commuting* any sentence passed by any court, tribunal or authority established by law As to the distinction between commutation and remission it is sufficient to say that remission is reduction in the quantum of punishment without the character of the punishment being changed Sentence of death is commuted to one of life imprisonment whereas a sentence of ten years imprisonment may be reduced to five in which case what has taken place is the remission of a sentence Reprieve is the temporary postponement of the execution of a sentence imposed by court till such time as the decision either to commute or to remit is taken or if taken, till such time, as a formal document is drawn up to give effect to the decision It really means no more and no less than the suspension of the sentence temporarily as a first step towards the goal of exercising the prerogative of mercy

As to the nature of this pardoning power reference could usefully be made to a case decided in 1833 by the Supreme Court of the United States (*United States v Wilson 7 Pet page* 150) Chief Justice Marshall, speaking on behalf of the Court found it permissible to understand the nature of this pardoning power by appeal to the English system of jurisprudence and said

> 'As this power had been exercised from time immemorial by the executive of that Nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it '

He then proceeded to observe

> "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court

Justice Marshall felt that pardon is a deed to the validity of which delivery is essential and delivery is not complete without acceptance "It may then be rejected by the person to whom it is tendered, and if it be rejected, we have discovered no power in a Court to force it on him " The basis of his reasoning was that "A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance A subsequent decision, however, of the United States Supreme Court, has taken a contrary view and has maintained that the right of the President to commute a sentence of death to one of life imprisonment cannot be defeated by the obdurate will of the prisoner The argument in this case was "A pardon in our days is not a private act of grace from an individual happening to possess power It is a part of the Constitutional scheme When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed ' [See *Biddle v Perovich*, (1927) 274 *U S* 480]

The last mentioned case was decided by no less a jurist of eminence than Holmes J, but he appears to have lost sight of an important distinction that exists between the power of tendering an absolute and unqualified pardon to an offender and the power to commute a sentence inflicted on him, with respect to the first, the assent or acceptance of the pardon is not material, but with respect to the second, where the question involved

with outside the judicial forum—presumably, in the legislative chamber during impeachment proceedings against the President.

60. The President, the Prime Minister and the Cabinet

ART. 37 is a self-contained Code which tells us all the Constitution has to say about :—

(a) the Cabinet,

(b) the position of the Prime Minister who is to be its Head;

(c) the choice or the selection of the Prime Minister by the President, the *change* of the Prime Minister when he, in the opinion of the President, "no longer commands the confidence of the majority of the members of the National Assembly", in short the power of the President in the matter of choosing and dismissing the Prime Minister, and finally

(d) the relationship that the personnel of the Cabinet sustains to the National Assembly whose members they have to be and to which they owe responsibility and on whose continued goodwill their very survival as ministers, in the last resort, depends.

With the possible exception of ARTs. 22 and 170, which mention the powers of the Superior Courts in this country, like the Supreme and High Courts "to issue high prerogative writs" and enforce other remedies provided therein, there is no other Article of comparable importance in the whole Constitution of Pakistan. It is necessary, therefore, that the Article be appreciated in that perspective: the Article, as has been remarked above, enunciates the relationship which is to subsist between the President, the Prime Minister and the Parliament. A few words by way of preface, however, are necessary to throw the substance of this Article into bold relief.

Role of Cabinet in a Parliamentary Democracy.

It was Walter Bagehot who was the first constitutional analyst to point out the important role that *Cabinet* plays in the management of political affairs in England. He found in the English Cabinet that connecting link between the executive and the Legislature in which lay that efficient secret of the English Constitution on which he has expatiated a great deal: Cabinet, says he, shows the close union, the complete fusion of the Executive and Legislative Powers of Government. He characterised Cabinet as the knuckle-joint of the Constitution. In the same strain, Mr. Gladstone describes the Cabinet:

> "Like a stout buffer-spring it receives all shocks, and within it their opposing elements neutralise one another. It is perhaps the most curious formation in the political world of modern times, not for its dignity, but for its subtlety, its elasticity and its many-sided diversity of power . . . it lives and acts simply by understanding, without a single line of written law or constitution to determine its relation to the monarch, or to the Parliament, or to the nation; or the relations of its members to one another or to their head."

Prime Minister

Prime Minister is the pivot of the whole system of Parliamentary Government.

As a leader of the majority party in the Legislature he is responsible for much of what the Legislature does by way of making laws or in the matter of exerting financial control over the administration of the country. And as the Captain of the Cabinet he is responsible for taking important political decisions affecting the country. He, *in short*, is the *Head* of what Bagehot would term the *efficient part of the executive*. Sir Ivor Jennings in his book "*Cabinet Government*" characterises him as the *keystone of the arch of the constitution.* He is in our Constitutional System the *link* between the *Cabinet and the President on the one hand and the Cabinet and the Legislature on the other.*

Prime Minister has to be keenly responsive to the public opinion as it manifests itself in the party alignments in the Legislature, and he is by his personality and initiative to

existence of Crown initiative in the exercise of this prerogative power by itself ensures the orderly working of parliamentary System of Government

As a matter of *law* the power of the Crown to dismiss a Government or to dissolve the House is unlimited and though, as a matter of fact, the Crown has down these last two hundred years disdained to exercise this power, the power to do so exists and is available for exercise should appropriate situation ever arise for the Crown to act for the good of the country Due to the non exercise of this personal power or authority by the occupants of the Throne of England, the foundations of constitutional monarchy in England have been strengthened, and increasingly the Crown has tended to become a venerable symbol and an invaluable safeguard for the continuity of the constitutional processes in England

Ministerial Advice binding under ART 37 (7) of Constitution

The framers of our Constitution have, for reasons that are totally irrelevant from the point of view of the analytic study of the provisions of our Constitution reduced this indefinable sort of convention of the English Constitution to the form of an express statutory proposition But the impact of the existence of this provision on the fabric of the rest of the Constitution has not, so it seems to the present writer been fully realised by the Framers of our Constitution Should however the President act despite or apart from or in the absence of advice in the sphere of the constitutional power vested in him in cases where he is bound to take advice, there is nothing that the *courts of law can do* about it for "the question whether any and if so what advice has been tendered by the Cabinet or a Minister or a Minister of State shall not be enquired into in any court (ART 37(2)) The saving is *prima facie* sufficiently comprehensive not only to put a mantle of secrecy for the purposes of court proceedings over the content of the advice but even over the factum of any advice at all having been tendered the court of law is thus constitutionally prohibited from prying into this affair

Sanction for the violation of ART 37 (7) is not legal—but political

The only sanction which must be presumed to operate upon the President to submit to ministerial advice is the fear that in the event of his violating the Constitution he may be summoned at the Bar of the Legislature for being impeached But this fear in the world of political intrigues that are incidental to the game of power politics is not after all such an effective brake upon the designs of an irresponsible President

In England, of course, the necessity to obtain advice is practically unavoidable for many actions in the matter of exercising Crown Prerogatives cannot even be initiated except by the acquiescence of the Ministers For example, for a dissolution to be ordered in England there must issue an Order in Council and it is the Lord President who must accept the responsibility for summoning the Council Similarly, a proclamation to that effect as also the *writs* of summons for the meeting of Parliament under the Great Seal must issue and it is the Lord Chancellor who must accept responsibility for same (See *Keith's British Cabinet System*, p 297) That is why it is said that a King in England cannot directly bring about a dissolution without advice, and if the Ministers refuse to give such advice he cannot do more than dismiss them but then, he should get some other Ministers in their place who must take the responsibility of advising him accordingly

There is, however, no such safeguard so far as our Constitution is concerned for an instrument declaring that Government have taken a certain decision to be constitutionally valid it is not necessary that it should bear the counter signature of the relevant Minister, and under ART 41 all executive actions of the Federal Government "shall be expressed to be taken in the name of the President" There is thus no constitutional requirement that for any decisions to be valid the same must be taken under a seal or sanction of a Minister who is responsible to Parliament and through it to the people Besides, the President is not amenable to court for anything done in his official capacity It is, therefore, clear that the disregard of ART 37(7) by the President can only be dealt

provide creative leadership to the Nation *In no single person does the Constitution of our country vest so much power and, therefore, responsibility as it does in the Prime Minister.* He is the Leader of the House, Captain of the Cabinet and man at the wheel of the ship of the State In fact, prestige and influence of the office of the Prime Minister depend so much on his personality that virtually it is the *man* and not the *office* that ultimately becomes decisive in the conduct of the affairs of the country's administration In the words of Harold J. Laski, "Obviously indeed, the office of Prime Minister varies enormously in the character of the man who holds it "

If the Prime Minister has the support of the Parliament he can virtually enjoy the

confronting the Government before the public in a telling, clear cut and forceful manner, will stand him in good stead and will enable him to secure the support of his party and the confidence of the people at large outside the House But it should not be forgotten that in the world of power politics, personal ambitions of his scheming colleagues, as even the designs of those who constitute the "official opposition", are some out of the many factors which he must always be ready to reckon with and be perpetually vigilant about He should have the capacity to sense the least treachery in the political atmosphere His ear should be on the ground He must know how to re act to the pulse beat of the body politic He should be imaginative enough to design decisive action for combating political mischief Above all he must have the courage to take prompt decisions—before others take the decision to replace him

In these days, when the means of disseminating one's views, thanks to the advancement of modern science, are so effective, it is possible for a wise leader to put across without much difficulty his point of view to the teeming millions the press, the wireless, the television and such other media of audio visual publicity are capable of being used as serviceable weapons for counteracting any adverse political move that should come from any quarter

The Prime Minister in this age of democracy should learn to look at the public questions as they present themselves to the ordinary man in the street And if he is satisfied that the man in the street should look at these problems in the way in which, consistently with the interest of the country, they ought to be looked at, he should have the tact, the talent and the tenacity to work up the mass emotion in support of his viewpoint Because he is the *Leader* he must learn to *follow* the direction which public opinion might give in relation to the decision of those political questions that are confronting his government *But this is not to say that he must slavishly submit to the demands of the opinion of the vulgar* For to do that would mean substitution of Mobo cracy for the Rule by the Democratic method Democracy requires creative leadership and the Prime Minister must supply that leadership

The management of the Party is the most important task which falls to the lot of the Prime Minister. It is not only during the electioneering campaign that his powers of conducting party propaganda are sorely tested He is throughout the term of his office to keep the party well in hand For

". . . in the last resort", says Sir Ivor Jennings, "his power depends upon his party For he goes to the country not as an individual but as the leader of his party. His personal prestige is one of the elements that make for party cohesion Loyalty is

their public life, i.e. sphere of the policy of the entire Cabinet and the sphere of individual responsibility for personal actions. It is quite conceivable then that in French National Assembly there can be moved a vote of 'no confidence' in an individual Minister, provided it is sought to be substantiated on the basis of *personal misconduct of an individual Minister.* In *ART.* 50, again, some safeguards are provided before the motion of censure by French National Assembly can *automatically result in the collective resignation of the Cabinet.* These safeguards include the following :—

(1) The motion of censure cannot be taken until one full day after it has been made.

(2) It must be taken by a roll call.

(3) It can be adopted only if there is a support for it from an *absolute majority* of the Deputies in the Assembly.

Under *ART.* 49 of the *French Constitution*, the Government, i.e. the Council of Ministers, can ask for a vote of *confidence* which can only be put in through the President of the Council. Such a vote is subject to the same limitations as a vote on motion of censure, namely :—

(a) that one day must elapse after it has been put before the Assembly;

(b) it has to be taken by roll-call, and

(c) the vote can be *refused* only by absolute majority of the Deputies in that Assembly.

When the refusal takes place after compliance with these conditions it results *automatically* in the collective resignation of the Cabinet.

These provisions, it would appear, are calculated to minimise the possibility of the proverbial frequency with which the French Cabinets fall.

Minister's Oath of Secrecy.

With regard to the *oath of secrecy*, which a Cabinet Minister has to take before he enters upon the duties of his office, the *Indian Constitution* makes an express provision in *clause* (4) *of ART.* 75, and provides in its Third Schedule the form of the oath which he is required to take. There is no parallel provision in our *Constitution*, and it is presumed that the oath of secrecy will continue to be administered under the provisions of the *Official Secrets Act*, much in the manner in which such oath used to be taken in the *pre-Constitution* days under the Government established by the *Government of India Act*, 1935.

Ministers of State and Deputy Ministers.

Over and above the Ministers who have, what is called Cabinet rank, our Constitution recognises the office of the *Ministers of State* and the *Deputy Ministers*. It is not clear whether the Minister of State or Deputy Minister is a member of the Cabinet, but having regard to the ordinary usage, Cabinet may be regarded as being composed of full fledged Ministers, and the Ministers of State and Deputy Ministers taken along with other members of the Cabinet may be said to form the *Ministry*. Ministry is wider than Cabinet. If this opinion is correct, the title to *ART.* 37 should have been "Ministry" and not "Cabinet". Having regard to *clause* (2) of *ART.* 37, it is the Cabinet, or a Minister, or Minister of State whose advice, if tendered to the President, shall not be enquired into in any court. From this it is possible to infer that a Deputy Minister *cannot* directly advise the President but a Minister of State can; and yet curiously enough *clause* (1) of *ART.* 37 talks of 'Cabinet of Ministers with the Prime Minister as its head': in other words it expressly excludes Minister of State from being considered as Cabinet Minister. Similarly *clause* (5) mentions that the Cabinet together with the Minister of State shall be collectively responsible to the National Assembly, obviously implying thereby that Cabinet consists of full fledged Ministers and yet, curiously enough, the collective responsibility is predicated not only of the Cabinet Ministers but also in respect of Cabinet plus the Ministers of State. It is difficult to comprehend why a Minister of State was included in the group of Cabinet Ministers (that is

gives its advice as a single whole, both in royal closet and in the hereditary or representative Chambers ... The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility."

The Cabinet thus must stand united as though it were one individual. A Cabinet, like a house divided against itself, cannot stand for long. Every Minister is pledged to maintain the solidarity of the Cabinet and the secrecy of its proceedings and decisions.

Position under the Govt. of India Act 35

The *Government of India Act*, 1935, did not use the word *Cabinet* in its Ninth Section; it, instead, used the expression, "Council of Ministers to aid and advise the Governor-General in the discharge of his functions". The framers of the *Indian Constitution* have retained this expression [See ART. 75(3), which says, "The Council of Ministers shall be collectively responsible to the House of the People."]. But even there the fact remains that collective responsibility is enjoined by the Indian Constitution and the expression "Council of Ministers" virtually becomes synonymous with, if not indistinguishable from, the "Cabinet".

Meaning of Collective Cabinet Responsibility

There is yet another aspect of the doctrine of collective responsibility which needs some explanation. Here, of course, the emphasis is on the word *responsibility*, rather than on *collective*.

A government is bound to resign in case there is a vote of 'no confidence' passed against it in the House, or while introducing or piloting a Bill as a party measure it finds that the Bill is thrown out. Sometimes the Bill, or what might be called 'proposed measure', is deliberately, at the time of its introduction in the Legislature, described as being one with respect to which every member of the House is free, regardless of his party loyalty, to vote as he likes. In such a case, the rejection of the proposed measure by the House does not amount to a declaration by the House that the Government have lost its confidence.

As a matter of practice, however, it has been observed that in all Parliamentary Democracies, *rejection of every and any measure sponsored by the Cabinet does not entail* any necessity for it to resign, for much depends on the *nature of the issue* that is presented in the proposed measure. If the Bill is *vital* or of substantial importance, in that, let us say, it contains a measure without which Government cannot hope to carry on its duty of administering the Country, it must follow, in such a case, that the Government *ought to resign*. Sometimes again there is, what is called a *snap vote* decision, which goes against the Government. But in such cases it cannot be said that the Government is duty bound to resign. It might be that due to lack of vigilance by the party whips or due to the neglect of individual party members to be present in the House, the Bill has not had the majority support in the House, but that situation cannot be construed to mean that Government has lost the majority support in the House. In these circumstances, the Government is entitled to ask for a resolution of confidence being passed by the House, and if it has a majority in the House it will have no difficulty in securing a declaration to that effect in its favour.

When the Government resigns it resigns as a *whole* and the resignation of the Prime Minister is construed as a resignation for and on behalf of the whole of the Cabinet.

Doctrine of Collective Responsibility and the French Constitution

But the doctrine of 'collective responsibility' is not one of universal application. There are Constitutions which also provide for "individual responsibility" of a Minister. A reference to *ART.* 48 of *the French Constitution of* 1946 in this context would appear to be instructive. It provides, "The Ministers shall be *collectively responsible* to the National Assembly for the *general policy* of the Cabinet and *individually responsible for their personal actions*. They shall not be responsible to the Council of the Republic". It thus combines individual and collective responsibility of the Ministers in, of course, diverse spheres of

This consideration would seem also to govern the case of dissolution of the House by reason of efflux of time. The Prime Minister, who, after the dissolution of the Assembly, becomes the Captain of care-taker Government is not disqualified from continuing as such Prime Minister, and any indirect method of replacing him by another nominee of the President would be unconstitutional, for the simple reason that such an appointment under the power given by *ART*. 37(9) would itself be bereft of a democratic basis—for how shall the President at all decide to appoint such a person—and on what consideration?

61. Dismissal of Cabinet and Cabinet Ministers and their Resignations

The English Practice upon the question of dissolution.

In England the Crown in the exercise of its prerogative power can dismiss the Cabinet or any one of the Cabinet Ministers, but in actual practice the power to remove an individual Minister is now exercised by the Prime Minister who in the case of any of his colleagues, on being convinced that his continuance in office is not in the interest of the country, may ask him to resign—in which case, the Minister is duty bound to resign.

Position under our Constitution.

Under our Constitution it would appear that Ministers, Ministers of State and Deputy Ministers shall be appointed and removed from the office by the President on advice. [See ART. 37(4)]. Thus, virtually, it is the Prime Minister's advice which is constitutionally binding upon the President in the matter of appointment of Cabinet Ministers, Ministers of State and Deputy Minister.

The Cabinet Ministers can resign their office under a writing addressed to Prime Minister who would then advise the President to accept the same. There is no provision under our Constitution for the right of the Minister to resign but it is to be presumed that he is entitled to resign whenever he feels inclined to do so.

Every Government must resign immediately after the general election in case it is not able to secure the support of majority of the members of the new Parliament. It is not necessary for it to wait till the actual meeting of the Legislature if the results at the poll establish that result. It must also resign after its Parliamentary defeat. Of course, the defeated Government must carry on till the Leader of the Opposition is called upon to take over the duties of the Government and form a Cabinet. If the official Opposition succeeds in defeating the Government and thus bringing about its resignation, it is its duty to provide alternative Government or to advise the President as to the alternative course of conduct that should be pursued in order to secure the formation of alternative Ministry. Similarly the Prime Minister by his resignation can precipitate a situation in which the Government is automatically thrown out of office: this can happen even though, as a matter of fact, the Prime Minister enjoys the confidence of the majority members in the Legislature. His resignation *ipso facto* has the effect of dissolving the Cabinet.

Caretaker Governments.

Sometimes it becomes necessary for some one to form a Government till such time as the House may be reconstituted after its dissolution or after the completion of the period of its office. Such Governments are called "Caretaker Governments", and it is expected of such Governments that they should not initiate any important policies or make commitments of a broad and sweeping nature during the period they have undertaken to take *care* of the affairs of the Government. Invariably, the Prime Minister in office at the time of the dissolution of the Legislature or the termination of its constitutional life, carries on the administration of the Country as Head of the Caretaker Government.

62. Role of the President Vis-a-Vis Legislature

The study of the Constitutional relationship which the President, as the repository

Ministers sitting in the Cabinet) as being collectively responsible to the National Assembly

The Minister of State and the Deputy Minister must at all times be members of the National Assembly when such Assembly is in existence [See *ART* 37(4)] It is only the Ministers of the Cabin six months even though they are not, at th he National Assembly [See *ART* 37(8)] Minister of State or Deputy Minister come to be made at the time when the National Assembly is non existent, the position is governed by *ART* 37(9) *ART* 37(9) says

"Nothing in this Article shall be construed as disqualifying the Prime Minister or any other Minister, or a Minister of State or Deputy Minister for *continuing* in office during any period during which the National Assembly stands dissolved or as preventing the appointment of any person as Prime Minister or other Minister or as Minister of State or Deputy Minister, during any such period"

Clause (9) thus talks of certain persons not being disqualified for continuing in office during any length of time when the National Assembly stands dissolved or *preventing* the President or the Prime Minister as the case may be from making or advising the appointment of any person to the office of Prime Minister Minister of State or Deputy Minister during any such period The net result is that when National Assembly has been dissolved Prime Minister, Minister of State and Deputy Minister can continue being in office, or can be appointed during that period

Can President appoint a Prime Minister during the period when Assembly is dissolved

The question that arises for consideration is whether the President would be justified in appointing some one as the Prime Minister after the dissolution of the Legislature in place of one who was Prime Minister on the eve of dissolution and who by reason of what is contained in ART 37(9) is not disqualified for continuing in office during such period as the Assembly stands dissolved The only situation in which this would be done would be when the Prime Minister has fallen ill and cannot carry on his duties or resigns or dies 37 is that any person can desp dissolved be appointed as the esident will have in such a situation, the power to dismiss the Prime Minister in his *discretion* This is because the basis of his action of dismissal, namely that in his opinion the Prime Minister no longer enjoys the support of the majority of members in the House, would be unavailable it would be, in effect, a conclusion which he cannot validly reach if the House itself is not in existence *ART* 37(9) over rides other clauses of *ART* 37 only in so far as they are inconsistent with the question of *appointment* of Prime Minister, Deputy Minister or Ministers of State and it cannot be regarded as, by any means, widening the power of the President to dismiss the Prime Minister when the House itself is dissolved and of appointing another at his sweet will and pleasure That power remains subject to the fetters imposed upon it by the 6th *clause of ART* 37 The power of dismissal is a specific power available to the President in certain specified circumstances and there is nothing in *ART* 37(9) which derogates from that power—so that to the extent of conflict, the content of the *proviso*—and 9th clause is a *Proviso*—should prevail The possible argument viz that by reason of an unfettered power having been vested in the President to appoint any one during the period of dissolution of the National Assembly as Prime Minister, the Constitution might be construed as indirectly giving him a power to displace the Prime Minister, who has advised dissolution, by the very act of making an appointment in his place, would appear to be misconceived in so much as the dissolution being in itself in the nature of an appeal to the political sovereign, the Prime Minister who advised dissolution would be denied his right to appeal to the people in case he be removed by another nominee of the President

securing the passage of appropriate legislation in the Parliament. The relations between the two Houses of Parliament in the matter of passing the legislation are to-day controlled by the *Parliament Act of 1911 as amended in 1949.* The Royal assent would be given as a matter of course once the measure is passed by the Parliament and the exercise of the Prerogative of the Crown to veto the measure although legal would be unconstitutional.

Veto-Power—The Position in India.

In India the position is governed by ART. 111, which provides as follows :—

"When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare *either that he assents to the Bill, or that he withholds assent therefrom* :

Provided that the President *may*, as soon as possible, after the presentation to him of a Bill for assent, *return* the Bill if it is not a money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the House shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom."

It would be noticed that although the power to withhold assent from a Bill passed by the two Houses of Parliament is given to the President, should he be so advised as to return the Bill, the Parliament can compel him to give the assent by passing the Bill a second time by ordinary majority. Thus the veto-power of the Indian President is *absolute* and not qualified one as that of our President—but if he should choose to *return* the Bill and the same is passed by the Parliament he has not then the power to withhold assent therefrom. No time-limit is prescribed in the Indian Constitution within which the President must act, that is either declare that he gives assent or withholds it. He can keep the Bill in a state of suspended animation and for his consideration for as long a period as he likes. This is his Pocket-veto.

Veto-Power—The Position in the United States.

In the United States the President, who represents the executive power of that State, has a power of veto given to him under Para 2 of s.7 of ART. 1, of the Constitution:—

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by *Yeas* and *Nays*, and the names of the persons voting for and against the Bill shall be entered on the journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevents its return, in which case it shall not be a law."

The analysis of this section shall show that when the Bill is presented to the President:—

(a) *if he approves it he shall sign it,*

(b) If he does not approve it he shall return it with his objections to that House in which it shall have originated who will then reconsider it,

of Executive Power, sustains with the Legislature, can be studied under the following scheme —

(a) His power to *give or withhold assent* to the bills duly passed by the National Assembly or *to return* certain *bills* (ART 57)

(b) His power to address National Assembly or to send messages to it (ART 52)

(c) His power to appoint Election Commission and Delimitation Committee for constituting Legislative Bodies, that is, the National and Provincial Assemblies (ART 137 (2) and 142(2)

(d) His power to summon prorogue or dissolve the National Assembly (ART 50)

63 President's Power to give or withhold assent to bills and his power to return certain bills

In the first place under ART 57 when the Bill has been passed by the National Assembly it shall be presented to the President who shall within 90 days — ART 57

(a) *assent* to the Bill, or

(b) declare that he *withholds his assent* therefrom or

(c) in the case of a Bill other than the Money Bill *return* the Bill to the Assembly with a message requesting that the Bill or any specified provision thereof, be reconsidered, and that any amendments specified by him in the message be considered

Upon the assent being withheld as in (b) above the National Assembly may recon sider the Bill and it may pass the same with or without amendments but this time, the requirement of the Constitution is that the Bill can only be passed by votes of not less than 2/3rds of the members present and voting When this happens the President is bound to give his assent to the Bill (ART 57 (2))

The procedure, in the event of the President *returning the Bill* to the National Assembly, is somewhat different in that if the same is passed by majority of the *total* members of the Assembly, the President is bound to give his assent thereto

It would thus appear that with the sole exception of Money Bills the President has the right of qualified veto, he can overrule the majority and by declaring that he withholds the assent, he puts the National Assembly to the necessity of giving to the Bill a support of two thirds of the members present and voting, and in the event of the bill being *returned* a support of majority of the total members of the Assembly (i e not a simple majority of the persons present and voting but an absolute majority, i e more than half of the total strength of the National Assembly) before it can become law

It should be noted that President can return a Bill, or withhold assent only upon advice in other words, *the power of the President to veto the Legislation is really the* power of the Cabinet This is then how Executive can control the fate of legislation in the National Assembly

In England, once the bill is passed by the Parliament the King assents to it *as a matter of course* This he does in obedience to the conventions of the English Constitutional prac tice He does not withhold the asser [illegible] which extraordinary majority of the [illegible] become a law In law, however, th [illegible] can veto the legislation But this [illegible] necessity of refusing the Royal assent", says E May, "is removed by the strict observance of the constitutional principle, that the Crown has no will but that of its Ministers, who only continue to serve in that capacity so long as they retain the Confidence of Parliament " (See His Par Practice p 569, 15 Ed) It is the Cabinet which tackles the problem of Veto-Power—The Position in England

Right to send message: The Position in England.

This provision in ART. 52 is based on the *English Parliamentary Practice*: in England, "in every Sessions but the first of a Parliament as there is no election of a Speaker, nor any general swearing of Members, the Sessions is opened at once by the King's Speech, without any preliminary proceedings in either House." (*May's Parliamentary Practice* p. 275, *Fifth Edition*). And when the King is not personally present, opening is made by Commission and the *Royal Speech* is read by the *Lord Chancellor* to both the Houses.

After the King's Speech is read an address in answer thereto is moved in both the Houses to which His Majesty makes an answer.

Right to address or send message: The Position in India.

In ARTs. 86 and 87 of the Indian Constitution we have the same provision:—

"86(1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration."

"87(1) At the Commencement of the first Session after each general election to the House of the People and at the commencement of the first Session of each year the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address . . . . "

Under ART.87, it is obligatory for the Indian President at the commencement of the first session after each general election to the House of People and at the commencement of the first session of each year to address both the Houses of Parliament assembled together whereas under ART.86 the matter is optional.

President's Power to send Message: The position in U.S. Constitution

In the Constitution of United States in section 3 of ART. II, the President has the power from time to time to give to the Congress information of the state of Union and commend to their consideration such measures as he shall judge necessary and expedient. He has no right to attend or to address the Legislature.

65. The President and the Appointment of Election Commission for Organising and Conducting Elections to National and Provincial Assemblies.

Appointment of Election Commission and Delimitation Commission—Discretion of the President.

The President in the exercise of his functions under the Constitution is bound to act upon the advice received from the Prime Minister and the Cabinet, except in cases where he is required under the Constitution to act in his discretion or when he is appointing or dismissing the Prime Minister. [ART.37(6)]. When the President acts in his discretion he acts all on his own and the only constraining influence, if any such exists in the world of practical politics, is his loyalty to the oath of the office which requires of him to maintain and defend the Constitution. This power to act in his discretion has been given to the President *inter alia* in respect of:—

(a) the formation of Election Commission which is to consist of a Chief Election Commissioner who shall be the Chairman of the Commission and such other number of Election Commissioners as the President may determine [ART. 137 (1)], and

(b) the constitution of Delimitation Commission, consisting of a Chairman, who is or has been a Judge of High Court and 2 other members who shall not be members of the National or Provincial Assemblies with powers "to delimit territorial constituencies for election to the National and Provincial Assemblies." [See ART. 142(3)].

(c) if after reconsideration, two thirds of that House pass the Bill it shall be sent together with the President's objections to the other House,

(d) after it is reconsidered by the *other* House and if approved by the two thirds of the House it shall become law,

(e) if, however, the Bill is *not* returned by the President within ten days, Sundays excepted, after it shall have been presented to him, it shall become law in the manner as if he had signed it unless the Congress by their adjournment prevent its return in which case it shall not be a law

In ART 36 of the *Constitution of* the *Fourth French Republic* we have the following — The Position under the French Constitution

"The President of the Republic shall promulgate the laws within 10 days after *the text, as finally adopted has been sent to the Government This interval may be* reduced to 5 days if the National Assembly declares an emergency

Within the time limit fixed for promulgation of a law the President of the Republic may, in a message, stating his reasons ask that it be reconsidered by both Chambers, this reconsideration may not be refused

If the President of the Republic does not promulgate a law within the time limit fixed by the present Constitution, the President of the National Assembly shall promulgate it"

It would be noticed that the French Constitution provides that the President shall promulgate the law within ten days, after its text, as finally adopted has been sent to the Government, and within this time limit, which can further be reduced if National Assembly declares an emergency to five days the President of the Republic in a message, stating his reasons, may ask that it may be reconsidered When this request is received the reconsideration would take place, but if the President of the Republic does not promulgate the law within the time limit fixed by the Constitution, the President of the National Assembly shall promulgate it The only power therefore, the President has is what may be called power of suspensory veto' for ten days but if the Parliament upon reconsideration passes the Bill, the President must promulgate it

Under ART 58 of the *Constitution of Burma*, the President is obliged to sign every Bill passed by the two *Chambers of Parliament* He has no option in the matter He can however, withhold his signature only for seven days after the date of presentation, after the expiry of which period the Bill becomes law despite the fact that it has not been signed by him (See ARTs 58 and 111) The Position in Burma.

The foregoing review of the provisions contained in the Constitutions of various countries referred to above shows that power of veto is invariably given to the President in a parliamentary democracy although the kind of the veto power, whether it is merely of a suspensory nature or absolute or again one which compels reconsideration by the legislature and the passing of the relevant Bill with either two thirds or absolute majority, is a mere matter of detail

64 President's Power to send Messages to or address the Assembly

The President can send messages or himself address the National Assembly (See ART 52) The object of this provision is to enable the executive to make a policy statement through the Head of the State, and this opportunity is usually taken at the commencement of the Parliamentary session immediately after the general elections The making of the policy statement is a useful device of focusing the attention of the people upon the main targets that the Government, which has taken office immediately after the general election, proposes to pursue ART 52

The power of appointment to these important bodies does appear to be *decisive* and the likelihood of its being abused is very great indeed. The appointment of persons to these bodies, being within the gift of the President, the conferment of this power virtually tantamounts to giving to the President the power of showing patronage. Men appointed by him are least likely to be independent of his influence, and if such should turn out to be the case, there would be no method of calling the President to order; for, if by the mere abuse of this extra-ordinary power he should succeed in bringing any party, in which he is interested, to power he would not even be impeached by the Assembly. But if he does not succeed in getting his party to power he would not any longer be the President for the next term—in which case too he would escape being impeached. To make the entire phenomenon of the formation of National and Provincial Assemblies, a matter entirely within the special care of Election Commission, the appointment to which is controlled by one man, is not the way to ensure a fair and impartial election in a country where democratic traditions are as yet not so far firmly laid. Even the constitution of the Election Tribunals for the decisions as to the validity of elections, which is to be provided by an *Act of Parliament*, cannot be construed as providing any effective means of counteracting the possibility of abuse of the abnormal powers vested in the President in relation to the appointment of the Election Commission and Delimitation Commission. Election Tribunal can interfere only *post facto*, that is, after the mischief is done, and from the nature of the case the party that emerges triumphant at the polls, thanks to the widespread and large-scale indulgence in corrupt practices by it, is least likely to appoint men of independent character to decide questions relating to the validity of those elections.

If the Election Commission had been brought directly under the control of the government of the day, the possibility of the Ministry responsible for its upkeep and maintenance prejudicially influencing its decisions in its own favour would undoubtedly have been the e—but then the Minister or the Cabinet responsible for the conduct or misconduct of the commission would have been accountable in the Legislature in that behalf; and questions could have been asked from the responsible Minister to explain the conduct or misconduct of the Members of the Election Commission.

Besides all this, it is a grave defect in the Constitution that no qualifications have been prescribed in the Constitution which ought to be fulfilled before a person could be appointed to those high and responsible posts. As it is, now almost any one could be appointed to be a member of election commission by the President in his discretion.

Election Commission is an Independent and Autonomous Body.

The framers of the Constitution, in order to ensure that elections shall be conducted freely and fairly, have set up an independent and autonomous body called the Election Commission and, as has been pointed out earlier, charged it with the duty of :—

(a) preparing electoral rolls for elections to the National Assembly and the Provincial Assemblies and revising such rolls annually; and

(b) organising and conducting elections to the National Assembly and the Provincial Asssemblies. (See ART. 140).

The expression "organizing and conducting elections" would seem to include the taking of all steps that might be deemed necessary for securing the return of the candidates from constituencies.

The Constitution further requires that a general election for the re-constitution of the Provincial and National Assemblies shall be held not later than six months from the date of dissolution, and any casual vacancy occurring in any of these Assemblies would be filled in by means of a by-election which would be held to fill the said vacancy within three months from the date of the occurrence of the vacancy. In suitable cases, particularly

The President and the appointment of Election Commission for organising and conducting Elections to National and Provincial Assemblies

He may after consultation with the Election Commission appoint such Regional Election Commissioners as he may consider necessary, to assist the Election Commission in the discharge of its functions stated in Part VIII of our Constitution [ART 137(3)] The duties of the Election Commission are mentioned in ART 140 and these include, *inter alia*, *preparing* electoral rolls for elections to the National and Provincial Assemblies, and *revising* such rolls *annually*, and *organising and conducting elections to the National and the Provincial Assemblies*

The President also, as remarked earlier, acts in his *discretion* in constituting a *Delimitation Commission*, which is to consist of Chairman, who is or has been a Judge of a High Court, and two other members who shall not be members of the National Assembly or of a Provincial Assembly The Chairman and other members of the Delimitation Com [illegible]

[illegible] tion Commission has the duty cast upon it of delimiting territorial constituencies, and anything done by the Delimitation Commission is sacrosanct in the sense that anything done by it or anything done under its authority cannot be called in question in any court (see provisions of ART 142)

The power of the President to act in his *discretion* in the foregoing matters appears to have been vested in him upon the basis of a belief that if such a power were to be given to the Executive, i e to the *President acting on advice*, there is every likelihood of that power being abused by Government in office for the purpose of advancing its own ends The President is expected under the Constitution to act impartially, and be above party politics since he represents, as has been stressed earlier, the *dignified* aspect of the executive power He is not supposed to take sides with any one party It would be noticed that the President has this power not merely in respect of Federal but also in respect of Provincial Elections

The position in India

The framers of the Indian Constitution in Part XV thereof, have also vested the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice President of India, including the appointments of election Tribunals for the decision of doubts and disputes arising out of election to Parliament and the Legislatures of the State, in the Election Commission, but the appointment of the Election Commission is, however, made by the President *not* in his discretion but upon *advice* which, under the conventions of the English Constitution that are being followed in [illegible]

[illegible] party politics, is authorised to make appointments to it, so as to give an impression that there would be free and impartial elections held in the country, that the electors shall not be influenced by any threat or coercion or beguiled by direct or indirect corrupt inducement into helping the party in power in retaining its office for another term

Wisdom of Conferring Power of appointment in the discretion of the President.

How far the decision taken is correct is a question which it is for the future historian of this country to deal with in the light of experience which the working of the Election Commission may have to provide to him But, on the face of it, does it not look somewhat unusual that this crucial power to appoint Election Commission and Delimitation Commission should have been given to *one* man who, human nature being what it is, could not, for all times to come, invariably be a person "immune from the corrupting taint of favouritism and intrigue"

finds himself deserted by a majority of National Assembly Members would *necessarily* desire that the House be dissolved and appeal allowed to be made by him to the electors in the country, with a view to obtaining a majority support in the new Legislature for the proposed measure or programme.

Our Constitution is silent on this most momentous of all constitutional questions and it is to be presumed that the conventions of the English Constitution and the well-established practices that prevail in the Parliamentary Democracy of the civilised countries of the world would be followed in this country.

The Position in England.

In England it is the prerogative of the Crown to dissolve the Parliament at any time; but the exercise of this prerogative like any other, has come to be *regulated by certain well established conventions*. It is necessary, therefore, that the principles on which, having regard to the English constitutional precedents the Crown may be said to be within the rule of constitutional propriety in refusing a dissolution to a defeated Ministry, should be carefully borne in view. A standard text book on the "Constitutional Law" has this to say on the point :

Chalmers and Hood Phillips quoted.

"Though the King can dissolve Parliament when he likes, his conduct though *legal would be unconstitutional* if he did so without the consent of his Ministers. It has been the uniform practice for more than a century that the sovereign should not refuse a dissolution when advised by his Ministers to dissolve." (*Chalmers and Hood Phillips on Constitutional Law, page 51, 1946 Edition*).

The prerogative is thus exercised upon advice. The question, however, is one of unusual difficulty and may be formulated thus: Since the defeated Cabinet or the Prime Minister is invariably disposed to advising the Crown to dissolve the Parliament, what are the circumstances in which, the advice when tendered, may be considered as an improper advice ?

Anson quoted.

Anson in his book '*Law and Custom of the Constitution*' appears to be of the opinion that in cases when advice to dissolve Parliament is found to be *improper*, the Crown would be justified in refusing to accept that advice. (See *Anson's Law and Custom of the Constitution, Vol. I. p. 325 to 328, 1922 Ed. Oxford*).

For instance, it would be a clear case of advice tendered to the Crown to dissolve Parliament being considered as improper, if a defeated Ministry, whose advice to dissolve the Parliament having been accepted finds itself in a minority in the newly constituted Parliament and then proceeds to advise that the House be dissolved a second time. Of course, so far in England no such preposterous advice has been tendered but the extreme case is visualised to illustrate the principle that is involved in the constitutional propriety of the Crown accepting or rejecting the ministerial advice.

Controversy on the Home Rule Bill.

In Appendix IV of his book on *Cabinet Government*, Sir Ivor Jennings has collected useful material from the pages of the *Times* for September, 1913, on the question of the prerogative of dissolution. The discussion in the Press took place before the *Home Rule Bill* became Law under the *Parliament Act of* 1911. It would be recalled that earlier, *Home Rule Bill* had been passed by the *House of Commons* in two successive sessions but each time it was rejected by the *House of Lords* in those sessions. Following extracts will assist comprehension of the principles in terms of which the theory and practice concerning the question relating to the constitutional relation between the executive and the Parliament could be contemplated.

George Cave's Views.

(1) Mr. George Cave in his letter to the *Times* of 6th of September, 1913, suggested that the way out of the constitutional crisis "if Ministers prove obdurate" was that "the Sovereign will exercise his undoubted right and dissolve Parliament before the com-

where climatic conditions so require, this period of 3 months can be extended by three additional months by the Chief Election Commissioner (See ART 141) It would appear that it is for the Election Commission not only to prepare electoral rolls but also to take all the steps to see that elections are held within the specified time And in all cases where the Election Commission fails to perform these constitutional duties, a writ of *mandamus* would lie against it compelling it to carry out the mandate of the Constitution

The autonomous character of the Election Commission is secured not only by means of conferring power on the President to make appointments to the Commission in his discretion, but also by making the salaries and other remuneration payable to the members of the Election Commission a charge upon the Federal Consolidated Fund Similarly, the administrative expenses, including the remuneration payable to the officers and servants of the Election Commission, have also been declared to be expenditure charged upon the Federal Consolidated Fund (See ART 64) And the implication of this is that although so much of the Financial Statement as relates to the expenditure charged upon the Federal Consolidated Fund could be *discussed* in the National Assembly, the same is not to be submitted to the vote of that Assembly It forms thus a non votable item of expenditure

Similarly, under ART 139 it has been enjoined that all executive authorities in the Federation and in the Provinces are to assist the Election Commission in the discharge of its functions, and for this purpose the President may after consultation with the Election Commission, issue such directions as he may consider necessary The Election Commission could ask the Federal or Provincial Government for such staff as it may consider necessary for the discharge of its functions, and it shall be the duty of the Federal Government and of each Provincial Government to make such staff available for the purpose, and in the event of any disagreement as to *what staff is necessary for this purpose* the question is to be referred to the President who is required under the Constitution to decide it *in his discretion* (See ART 139)

From the foregoing provisions it would appear that the Election Commission is not an attached department of the Government but has a constitutional status which makes it an autonomous and an independent body, a body which is in no sense subservient to the demands or dictates of any responsible minister It is the ministers who are charged with the duty of extending assistance to the Election Commission and any wilful non compliance with this requirement would amount to a breach of constitutional duty and is liable to involve *the Government to be indicted by means of a censure motion*

66 President's Power to dissolve the National Assembly

ART 50 expressly confers upon the President the power to *summon*, *prorogue* or *dissolve* the National Assembly and, when summoning the Assembly to fix the *time* and *place* of its meetings ARTs. 50 & 37

Under ART 37(7), the President in the exercise of his functions "shall act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State, as the case may be" There are two exceptions to this rule when the President can act in his discretion but they are not relevant in this context Considering, therefore, that it is virtually the Prime Minister and his Cabinet who will advise the dissolution, a question of considerable constitutional importance remains to be discussed That question may be formulated as follows *Would the Prime Minister's advice to dissolve the Parliament in each case be considered by the President as constitutionally binding?*

The question acquires some importance for the reason that any Prime Minister who

"The King's negative to Bills is one of the most undisputed of the Royal prerogatives, and it extends to all cases whatsoever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would have had a very heavy loss. But it is not the propriety of the exercise which is in question. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth."

Asquith quoted.

On this problem of the powers of the English Crown to dissolve Parliament it would be useful to reproduce an extract from a speech delivered by Mr. H. H. Asquith at the *National Liberal Club* on 18th December, 1923. (See *Selected Speeches on the Constitution by C. S. Emden, p. 53*). Mr. Asquith claimed to speak 'with some experience on this matter'. He said :

"And now let me say here, by way of parenthesis, there seems to be a great deal of confusion in the public mind on the subject of the power of dissolution. I may claim to speak, I won't say with authority, but with some experience, on this matter, for I am the only person now living who has felt it his duty to advise the Crown to dissolve Parliament twice in a single year—the year 1910 . . . I need hardly tell you there is absolutely no analogy between that case and the circumstances of the present time. The dissolution of Parliament is in this country one of the prerogatives of the Crown. It is not a mere feudal survival, but it is part, and I think a useful part, of our constitutional system, for which there is no counter-part in any other country . . . It does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give it a trial. The notion that a Minister—a Minister who cannot command a majority in the House of Commons, but who is in minority of 31 per cent.—the notion that a Minister in those circumstances is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large . . ."

Reference to Viscount Haldane's Views.

Viscount Haldane speaking in the *House of Lords* on 8th August 1911 (9 H. L. Debates, 5 s., 849 ff.) speaking in defence of *Asquith Ministry* in regard to the advice it had tendered to the Sovereign to create more *Peers* made observations on the relation of the Sovereign and his Ministers that may be usefully referred to in this context :

" . . . there were two ways only of dealing with the problem. One was for Ministers to resign and leave the Sovereign to choose other Ministers, who would go to the country. That would be a very proper and natural course under certain circumstances; but it was neither a proper nor natural course in the circumstances which occurred here. We were desirous throughout to keep the Crown out of this controversy. There is a great deal of confusion about the position of the Crown in this matter. The Crown is not a mere piece of machinery. The Crown is a very important element in the Constitution; but the Crown always acts upon the advice of Ministers, and always will so act as long as our Constitution remains what it is. If that be so, the Crown must have Ministers who have a reasonable chance of possessing the confidence of the country, and, if the Crown has Ministers who could not hold their office for a week and who, if they went to the country, would be defeated—it is not advisable that the Crown should be placed in that position.

"The other alternative was the alternative which has actually been adopted. It was to tender advice to the Crown, and that advice was tendered only on the footing that

mencement of the next session" This course was to be preferred to the alternative course, namely the refusal of Royal assent to the *Home Rule Bill* for such refusal "might, no doubt, be represented as a challenge to democracy, but no such reproach could be levelled against a decision of the sovereign to satisfy himself, before the House of Commons is finally committed to a decision which must change the history of his kingdom that that House does indeed represent the democracy of to day"

The editorial comment of the *Times* of 8th September, 1913, was as follows

"The author of the suggestion admits that his proposal is hardly constitutional, but he falls back on *the 'undoubted right'* of the Sovereign to dissolve Parliament before the next session begins Legally there is no question that under the Constitution there are certain reserved rights of the Crown, but they are atrophied by long disuse In spite of this, Mr Cave thinks that the policy of the Government justifies their re assertion after the lapse of centuries It is, however, in our judgment, inconceivable that the Sovereign should contemplate a step which might lead to an apparent disagreement be tween the occupant of the Throne and the majority of his people "

The reason in support of this view was a dissolution of Parliament by an exercise of a Royal prerogative, *proprio motu regis*, might be followed by a vindication at the polls of those very Ministers whose advice had been set aside The proposal, in fact, has only to be stated with its implications for its constitutional absurdity to be revealed *It is the first principle of our Constitution that the King acts solely on the advice of his Ministers Ministers, therefore, must bear on their own shoulders complete responsibility for the* advice they give "

(2) Sir William Anson, the author of the *Law and Custom of the Constitution*, in his letter which was published in the *Times* of 10th September, 1913, summed up the position — Sir William Anson

"It really comes to this, that if the King should determine, in the interests of the people, to take a course which his Ministers disapprove he must either convert his Ministers to his point of view, or, before taking action must find other Ministers who agree with him "

(3) While accepting 'the undisputed rule of Constitution that the sovereign must never act upon his own responsibility" but must have advisers who will bear the respon sibility of his acts, Lord Hugh Cecil, in his letter of the same day remarked — Hugh Cecil's Views

"But this does not mean that he must always automatically accept the advice of those who are his Ministers at a given moment What is constitutional is determined in our country by *precedent* and by *authority*, and the theory that the Sovereign must act automatically will find no support in precedent nor I think from any authority of acknowledged weight The doctrine—sustained, I believe both by precedent and authority—is that the Sovereign may refuse the advice of his Ministers, though that refusal should involve their resignation, and may even (in an extreme case) dismiss his Ministers, but that these powers are in practice closely restricted by the condition that he must find advisers to bear the responsibility of his action who have the confidence of the *House of Commons*, or can obtain that confidence after a general election "

(4) Professor Dicey's letter to the *Times* published on 15th of September, contains the reiteration of the views expressed by him in his 7th edition of the *Law of the Constitution*, *pages* 428 434 And he claimed that the constitutional doctrine therein expounded "has been repeated and defended during the last 28 years in every edition of my book " He was of the opinion "The safety and prosperity of the United Kingdom absolutely demand a speedy dissolution" With regard to the refusal to give Royal assent to the bill, he quoted with approval the language of Burke — Professor Dicey's Views

shelving of the problem of whether he would accept the consequences of the *Home Rule Bill*. The precedent, however, is of outstanding importance, if only because, in an ultimate way, it is indecisive upon the matter."

An Appraisal and a Summing up of Constitutional Position in England.

From what has been stated above it would be apparent that the subject of the dissolution of Parliament, as it is known to the English Constitution, is highly complex: as one recent writer has complained, 'any adequate examination of the historical side of the problem is likely to lead one into labyrinths of confusion and in some of the dark caverns of disagreement, and no path which leads inexorably to one definite conclusion may be found'. (See *The Office of the Prime Minister* by Byren E. Carter-Faber, p. 273). Although the power to dissolve the Parliament flows undoubtedly from Crown Prerogative, several questions not of law, but of constitutional morality, do raise the dust of controversies. Can the Crown refuse dissolution to his responsible Ministers? If so under what circumstances may he do so. When can the Crown force a dissolution—should his undoubted power to 'warn' and to 'persuade' fail him.

The answers to these questions are incapable of being satisfactorily furnished, and even amongst the well known constitutional writers of the fame of B. Kieth, Evatt, Wade, Jennings, Anson and others there is no unanimity in regard to even some of the most important aspects of these vexed questions.

The theoretical side of the problem posed by the power of dissolution has reference to the peculiar nature of the institution of "Parliamentary Democracy". To begin with, it is the Parliament, or to be more precise the House of Commons, that is the repository of all Legislative and in a sense even of the Executive power. It reflects the general will of the people of England as that will manifest itself periodically, each time the general election is held: and of the representatives who are returned to take their seats in the House of Commons, the majority in the House of Commons has a right to form Government on the view that it represents the feeling in the country upon the questions that are confronting the administration of the day. Prime Minister and his colleagues in the Cabinet are, after all, a committee of the House of Commons that administer the country in the name of the majority party in the House; and the moment either the Cabinet or the House of Commons gets out of touch with the public opinion in the country, the reason for their being in office vanishes. Each time, therefore, it is the question of sacrificing either the Cabinet or the Legislature in order to secure the conformity of either the one or the other to the wishes of the political sovereign, the electorate.

The consideration which is practically decisive of the choice which the Crown must make in this behalf is the appreciation by the Crown of the political situation in regard to the measure of public support which is available or may be forthcoming for the policies of the Government. That the Government is to be responsible to the House of Commons, is no doubt the most important factor involved in the decision upon the question whether the Government be dismissed—but what if, the House itself does not reflect the opinion in the country in regard to some important policy or legislative measure which the government intends pursuing or implementing. If such should turn out to be the case, must not the House itself he dissolved? The rule that Crown would not act except upon the advice of responsible Minister in the matter of ordering dissolution of the House is calculated to create the impression that the King is above party-politics, and this procedure in itself prevents any public controversy being set afoot in that behalf.

The foregoing statement of the theory and practice of Parliamentary Governments in so far as it makes intelligible to us the principles underlying the, constitutionally speak-

there was to be a reference to the country and a reference is the only constitutional way" (*See Selected Speeches on the Constitution P 50*)

Similarly, the observation of Harold Laski in his book on *Parliamentary Government in England, pp 409 to 412, 1952 Ed*, may be referred to in this context with considerable advantage — **Harold Laski's Views**

"The problem of the prerogative of dissolution is more complicated It is agreed that the Monarch should not dissolve, or refuse to dissolve, save on the advice of Ministers, the problem is, however, whether the King may refuse a dissolution that is asked for, or insist upon one that his Ministers do not desire Though the books are emphatic that the decision must rest with the Crown, that this prerogative is therefore, a living thing, it is difficult to share this view For, in the first place it is well over a hundred years since a dissolution was refused, the revival of so rusty a precedent would be a very delicate operation And, secondly, if the Government which asked for a dissolution and was refused was a majority government it would obviously resign because its advice was disregarded Its successor, being in a minority would sooner, rather than later, *be forced to ask for a dissolution, and the King would then be in the delicate position of* refusing to one Prime Minister what he agreed to grant to his successor The precedents, indeed, make it clear that no government which wishes to consult the electorate will be prevented from doing so if, at the time of its request it has a majority in the *House of Commons* Were it otherwise, the *Crown* would inevitably subject itself to the accusation of discriminating between parties

"Is the situation different where the Government is in a minority in the *House of Commons*? Mr Asquith, in 1923, took the view that it was *The Labour Government of* 1924 was in a large minority in the *House of Commons*, it held only 191 out of 615 seats and, were it to be defeated, Mr Asquith as *Liberal Leader* was prepared to take office in *his turn When, however the Labour Government was defeated and the Prime Minister*, Mr Ramsay MacDonald asked for a dissolution, the King agreed to his request And it is difficult to see how it could well be otherwise For had the *King* refused and invited Mr Asquith to form a Government the latter, being head of a party even smaller than that of Mr MacDonald would have been bound, in course of time, to be defeated also, and to have requested a dissolution To have granted it would have evoked once more, the accusation that the *King* was discriminating between parties To grant a dissolution automatically is to place the responsibility for the government squarely upon the shoulders of the electorate, where, in the circumstances, it ought to lie The emphasis upon the automatism of this prerogative is the surest way to the preservation of royal neutrality

"The right to compel a dissolution is on a different footing There have been two occasions in the last thirty years in which a Government dissolved at the express desire of the *King* over the Budget in 1910, at the desire of Edward VII, and over the power of the Lords in the same year, at the desire of George V In each case, however, the Minister, however, reluctantly, acquiesced in the King's desire, and the dissolution was, accordingly, amply surrounded by the cloak of ministerial responsibility, though the *King* took the initiative in pressing a dissolution upon the Government, in each case, also, the Government accepted the advice What would be the position if the *King* urged a dissolution and the *Ministry* refused to agree? Clearly, I think, if the King insisted, the Government would have no alternative but to resign, a new Government would be formed and would at once go to the country We know, from the memoirs of the time, that George V was constantly pressed to compel a dissolution in this way during the *Ulster* crisis of 1913 14 He refused, and the onset of the War led to the

National Assembly is concerned, is the somewhat unusual step which the framers of th Constitution took in reducing some of the conventions of the English Constitution to th forms of express statutory provisions. The present case will illustrate the difficult with which the judiciary in this country is likely to be confronted.

By enumerating only *some* of the conventions of English Constitution and not others the framers of the Constitution have lost sight of the argument well known to lawyers in th matter of interpreting the statutory or enacted law, namely, that matters that shoul have been but are not provided for in the written statutory instrument are deemed to hav been deliberately excluded from the pale of Legislative recognition. Besides, *convention of the Constitution* that were being followed under the administration established by th *Government of India Act*, not being *Law*, are not even saved by ART. 224, which provide for the continuance of the "existing laws" despite the repeal of the *Government of Indi Act*, the *Indian Independence Act* and the several Acts amending the same.

In *ART.* 37 the rule of the convention of the English Constitution concerning th advice of the Ministry being binding on the Crown has been reduced to the form of a express declaration, namely, "in the exercise of his functions the President shall act i accordance with the advice of the Cabinet or the appropriate Minister . . ." That th provision is unequivocally clear and express, is further borne out by the fact that onl two express exceptions to the rule have been stated—that is, cases when the advice woul neither be sought, nor if forthcoming, be followed by the President. These cases are (a) where he is required under the Constitution to act in his discretion, or (b) when he pro ceeds to appoint the Prime Minister or terminate his pleasure during the continuance o which the Prime Minister is to hold office. In other words, quite apart from these two ex- ceptions, the rule of our Constitution is that the President *must* act under advice. This rul read in conjunction with the power given to him under ART. 50 of ordering the dissolution of the National Assembly, in effect, means in theory at least, the absolute power of the Prime Minister to insist, whenever he feels inclined so to do, that the National Assembly which is obdurate, or where he does not have a clear majority, should be disbanded. To take an extreme case, the same Prime Minister can advise dissolution, not *once*, but as many times over, as he likes. The constitutional requirement contained in *clause* (2) *of ART.* 50, namely, "Whenever a Prime Minister is appointed, the National Assembly, if, at the time of the appointment, it is not sitting and does not stand dissolved, shall be summoned so as to meet within two months thereafter", is irrelevant to the present constitutional question posed here for comprehension, since that clause relates merely to compelling the Cabinet that is in office to summon the National Assembly in the circumstances mentioned therein.

The constitutional doctrine on the basis of which the power of dissolution, at the instance of the Cabinet, is justified, may be briefly stated as follows: When the Prime Minister, who has been in office as a Leader of the majority party in the Parliament, is confronted with a situation where, let us say, because of his support for a policy which he thinks is in the interest of the country, he has precipitated a crisis and lost the support of the majority party in the Parliament, it is in complete conformity with the principle of democracy (which enjoins that the ultimate court of appeal is the will of the people) for him to insist that the Parliament be dissolved and he be allowed to appeal to the country.

"In fact", says Anson in his *Law and Custom of the Constitution* at p. 327, "the power of dissolution is a formidable disciplinary weapon in the hands of the Prime Minister and becomes more formidable as the rapidly changing opinions of the modern electorate make the prospect of a general election more unwelcome to the member who values his seat. The Prime Minister can always use this power as a threat and thus influence 'waverers' in an approaching party division or followers who are slack in attendance and support."

ing, wise exercise of the power of dissolution, may be stated in the words of Burke which are as follows — Burke quoted

"It is the undoubted prerogative of the Crown to dissolve Parliament, but it is, of all the trusts vested in his majesty, the most critical and delicate, and that in which this House has the most reason to require, not only the good faith but the favour of the Crown We are to inquire and accuse, and the object of our inquiry and charge will be for most part persons of wealth, power and extensive connections If we should see a House of Commons the criticism of its zeal and fidelity sacrificed by his Ministers to those very popular discontents excited by our dutiful endeavours no other consequence can result but, in future the House of Commons consulting its safety at the expense of its duties and suffering the whole energy of the State to be relaxed will shrink from every service which however necessary is of a great and arduous nature—or will exchange independence for protection and will court a subservient existence through the favour of those Ministers who ought themselves to stand in awe of the Commons of this realm A House of Commons respected by his Ministers is essential to his majesty s service, it is fit that they should yield to Parliament, and not that Parliament should be new modelled until it is fitted to their purposes If our authority is to be held up when we coincide in opinion with his majesty's advisors, but is to be set at nought the moment it differs from them the House of Commons will shrink into a mere appendage of administration and would lose that independent character which enables us to afford a real effective and substantial support to his government (*Burke Little Brown* (1901) Vol II p 554)

The conventions of the English Constitution have one thing for their ultimate object The object is to see that the Parliament or the Cabinet shall in the long run give effect to the will of that power which in modern England is the true political sovereign in the State—viz , the majority of the electors or the nation

A ministry placed in a minority by a vote of the Commons has in accordance with received doctrine, the right to demand a dissolution of Parliament On the other hand, there are certainly combinations of circumstances under which the Crown has a right to dismiss a ministry despite the fact that it is able to command a Parliamentary majority and to dissolve the Parliament by which the ministry are supported

A dissolution is in its essence an appeal from the legal to the political sovereign A dissolution is allowable or necessary, whenever the wishes of the Legislature are or may fairly be presumed to be, different from the wishes of the people

No modern constitutionalist will dispute that the authority of the House of Commons is derived from the philosophy which maintains that it represents the will of the Nation and that the chief object of a dissolution is to ascertain whether or not the will of Parliament coincides with the will of the Nation

Sufficient has been said to indicate the theory and practice, as it prevails in England, on this vexed question of the proper and improper exercise of the power of the Crown to dissolve the Parliament It would be noticed that in the last resort the whole matter is regulated by that fragile and ill defined something called the *Conventions of the English Constitution* Dissolution of Assembly—Constitutional Position in Pakistan

With these observations as an introduction, we are now in a position to look at the combined effect of ARTS 50 and 37(7) to see what is the constitutional position in our Country on this question

What complicates the constitutional problem in so far as the interpretation of the relevant provisions of our Constitution relating to the President's power to dissolve

refusal to accede to his request for dissolution. His contention was not that there were no powers with the Governor-General to refuse dissolution, but only that, in view of the fact that Mr. Meighen had no majority in the Commons wherewith to carry on the work of running the administration of the country, the Governor-General ought not to have refused his request for dissolution. He further said :

> "As to my right to dissolution, all I wish to say is that not for over one hundred years in Great Britain, and never since Confederation in Canada, has a dissolution been denied a Prime Minister who has requested it. It is true the prerogative of dissolution is a royal prerogative, and as such is rightly assumed to attach to the sovereign's representative in a self-governing Dominion. But as with other royal prerogatives, the discretionary power of the Crown, with respect to dissolution, is supposed to be exercised upon the advice of a responsible ministry, and the Sovereign who would be unwilling to accept advice so tendered him would, unless he wished to place his crown and throne in jeopardy, have to be very certain of finding to a Prime Minister who could not only be willing, but also would be able to take the responsibility for his refusal of the advice tendered. That would mean, in the case of a refusal of dissolution, a Prime Minister who not only was willing, but who was able to demonstrate his ability when Parliament was in session to carry on its proceedings. As Prime Minister, Mr. Meighen, was unable to carry on the proceedings of the late Parliament for the space of three days. The moment the right to existence of his ministry was challenged, that moment its every member foresaw its inevitable doom."

Mr. Mackenzie admitted in this speech that there might be circumstances in which a Governor-General might find subsequent justification for a refusal to grant a dissolution of Parliament. In his words :

> "Such might be the case, where Parliament is in session and the leader of another party having accepted the responsibility of a refusal of dissolution demonstrates after compliance with all constitutional obligations that he is able to carry on the business of Parliament by the majority he is in a position to command in the House of Commons."

(b) Illustrations from written Constitution—

Position under the Australian Constitution.

Under the Australian Constitution the language of Ss. 62 and 63 makes it clear that Federal Executive Council advises the Governor-General in the conduct of the affairs of the Government of the Commonwealth and that, reference in the Constitution to the Governor-General would be construed as reference to the Governor-General-in-Council. Thus the Australian Governor-General is, in effect, to act on the advice of the Federal Executive Council. Upon a plain interpretation of these two provisions then, it is clear that Governor-General must under the Constitution only act in accordance with advice. Despite this, cases have occurred when in the matter of dissolution of the Legislature the Governor-General has acted in the exercise of his independent discretion. The one exception to this rule (that is the rule which enjoins the Governor-General to act in all matters on the advice of his Ministers) arises, says Nicholas in his book, *the Australian Constitution, 1952 Edition*, "when the Prime Minister refuses to give advice, as Mr. Hughes refused in 1918 when he resigned after the defeat of a conscription referendum in accordance with a pledge given before the referendum was taken, or, when the Prime Minister was too ill to give advice, as was Mr. Lyons at the time of his fatal illness. There are three instances prior to 1914 of the refusal by a Governor-General of his Minister's request for a dissolution of the *House of Representatives*. In 1904 Lord Northcote refused a dissolution to Mr. Watson and in 1905 to Mr. Reid. In 1909 Lord Dudley refused a dissolution to Mr. Fisher (*Evatt, The King and His Dominion Governors, page 50*)."

It would be noted that the language used in the Australian Constitution does not import the idea of advice being compulsorily followed by the Governor-General, but in our

In practice, this power operates as a brake on the designs of those elements in the Parliament who desire to be negative and reactionary and who keep up on that account, throwing overboard Ministry after Ministry, just for the sake of creating a situation in which the orderly working of the Parliamentary Democracy might become well nigh impossible But since in all the Parliamentary Democracies this right of the Prime Minister to advise the Head of the State to dissolve the Parliament is controlled not by any express provision of the Constitution but by conventional constitutional morality, the Prime Minister would never advise a dissolution unless he knew that the same would be accepted

The difficulties that beset the making of a satisfactory statement concerning the Constitutional principles that govern the grant or refusal of dissolution can be illustrated from a recent case that arose from the working of the *British North America Act* a case which shows, by way of contrast with our Constitution how even where the frame work of the *Constitution of a Parliamentary Democracy* has been reduced to writing, its provisions can afford room for the operation of conventional political morality in much the same way as in England Section 11 of the *British North America Act* contains provisions with regard to the establishment of a Council of Ministers to aid and advise Governor General in the government of Canada and enjoins that the persons who are to be the members of that Council shall be from time to time chosen and summoned by the Governor General, and may also be removed by him There is not a word in that Act with regard to the advice of the Ministers being binding on the Governor General and not even in regard to their being responsible to the Legislature But in *practice* the advice is ordinarily followed and the Ministers are responsible to the Legislature This is so because the *British North America Act* was the creature of an Act of British Parliament and in its preamble it was expressly stated to be a Constitution similar in principle to that of the United Kingdom" In Section 50 of the *British North America Act* the power of the Canadian Governor General to dissolve the Parliament is mentioned The text is as follows —

(a) Written Constitution—Illustration of the Principle from Canada

"Every *House of Commons* shall continue for five years from the day of the return of the writs for choosing the House (subject to be sooner dissolved by the Governor General) and no longer

The language is reminiscent of the *British Septennial Act* 1715 (1 *Geo* 1 *Stat* 2 C 38) *as amended by S 7 of the Parliament Act of* 1911 (1 *and* 2 *Geo* 5 *c* 13) where it is provided that a Parliament ' shall at any time hereafter be called, assembled, or held shall and may respectively have continuance for *five* years and, no longer, to be accounted from the day on which by the writ of summons (such Parliament) shall be appointed to meet unless (such Parliament) shall be sooner dissolved by His Majesty, his heirs or successors

In 1926, Mr Mackenzie King advised the Governor General to dissolve the House of Commons The Governor General refused to accede to this request to dissolve the House and called upon the Leader of the Opposition to form a Ministry It was another matter that Mr Meighen, who was called to form a Ministry, failed to secure the necessary majority support with the ultimate result that the Governor General was obliged to dissolve the House The refusal of the Governor General to accede to the request of Mr Mackenzie King to dissolve the House could be constitutionally defended on the ground that it is the duty of the Constitutional authority charged with the duty of working Parliamentary Democracy as its Constitutional Head, to explore avenues of forming alternate Ministry and not readily grant request for dissolution if the formation of alternative government is a practicable possibility This is so because the Parliament being the legal sovereign should be given a reasonable opportunity of presenting an alternative government

The Canadian Controversy of 1926

W L Mackenzie King in his speech at Ottawa delivered on July 23, 1926, exposed the hollowness of the arguments that had been advanced to defend the Governor General's

rights' guaranteed by the Constitution; but, as a matter of convention, he does not and, indeed, will not, do those things, as he is, in fact, a mere head of the State, as opposed to the head of the executive, a symbol of the Nation, in short, a nominal figure head with no discretionary powers whatever. His discretionary powers, if at all, lie in a very restricted field. He appoints the Prime Minister under *ART.* 75(1), and the cases when such an appointment would take place in his discretion are conceivable—as when, for instance, after the general elections on the eve of the formation of the new Government he so appoints him. Similarly, the President can call for information relating to administration of the Union, and it is the duty of the Prime Minister to supply such information under *ART.* 78. The Prime Minister holds his office during the President's pleasure, and the pleasure can be terminated at the pleasure of the President. The executive power of the Union is vested in the President and under the Constitution this power is exercisable by him either directly or through officers subordinate to him in accordance with the Constitution. (*See ART.* 53). The Constitution merely says: There shall be a Council of Ministers....to aid and advise the President in the exercise of his functions (*see ART.* 74). This advice is not declared by the Constitution to be binding on the President.

To-day in India, with a powerful Congress Party in the saddle, the President of India has to submit to the advice of the Cabinet but to-morrow, with the change in the climate of political opinion, this docility may give way to a more aggressive outlook and at least one of the well known Commentators on the Indian Constitution, of the fame of *Alan Gledhill*, has little difficulty in contemplating the possibility of the Indian President becoming a dictator by disregarding the very convention of constitution which makes the advice of his Ministers binding on him and thus succeed in bringing about within the letter of the Constitution a *Coup-d'etat*. In his words :

> "It is possible to contend that the Constitution does not sufficiently guard against the President becoming a dictator. The best protection against this possibility is the method of election. If the members of the electoral college are sufficiently vigilant to reject a candidate who is not clearly to be trusted to observe the spirit as well as the letter of the Constitution, no such contingency can arise, but let us suppose the election of a President who has successfully concealed his ambition to establish an authoritarian system of government, and examine how far he can proceed towards achieving this ambition without violating the Constitution. Let us assume that one-fourth of the members of a House of Parliament, suddenly aware of the danger, have given notice of a resolution to impeach the President. The resolution cannot be moved until fourteen days have elapsed, and in the meantime, the President may dissolve Parliament. A new House of the People must be elected, but it need not meet for six months. He may dismiss the Ministers, and appoint others of his own choice; for six months it is not necessary that they should be members of Parliament. The President may issue Ordinances, which will be as valid as Acts of Parliament for six months. The situation would probably be such as to justify a Proclamation of Emergency, which the courts would find difficult to hold invalid, so that he could legislate on any subject, and deprive the States of the right to their share in Income Tax and other distributable sources of revenue. He could suspend the Fundamental Rights, and their remedies. He could issue directions to States of a kind calculated to provoke disobedience, and then suspend the States' constitutions. He could proclaim a financial emergency; he could promulgate Ordinances giving himself extensive powers of preventive detention, and imprison his political opponents. As Commander-in-Chief, he could use the armed forces 'in support of the civil power.' He might ensure the election of a House of the People who would support him. The preservation of the Constitution might depend on the

Constitution, *ART* 37(7) makes the advice absolutely binding upon the President

How the breach of this provision would be *actionable* is an altogether different and difficult matter to resolve "What advice, if any, was tendered to the President, shall not be enquired into in a court of law", [*ART* 37(2)] constitutes an absolute prohibition—not only in regard to the content but the very fact of advice—and the matter cannot be, therefore, adjudged in courts There are numerous difficulties that beset the interpretation of the scope and implications of this prohibition for it is conceivable that, upon the legal argument being submitted to court namely that *it is only in cases where the President acts within the Constitution* that the immunity contained in ART 37(2) is afforded to the secrecy of the advice tendered, and that where he has acted completely *outside* the Constitution the prohibition loses all its force, a court of law might be confronted with a somewhat unusual problem for its adjudication At any rate, a disregard of the advice assuming it is not actionable in a court of law would constitute a ground for the *impeachment of the President provided the necessary support for such an action is forthcoming from the Legislature* Sanction for the enforcement of advice is thus not legal but political in nature A comment on Art 37 (1)

The Irish Constitution on this question has been very wisely framed The President under *Article* 13(11) is bound to exercise his powers only on the advice of the Government, but *ART* 13(2) provides for the *absolute discretion* of the President to refuse to dissolve *D ail Eireann* on the advice of *Taoiseach* (the Head of Government or Prime Minister) who has ceased to retain the support of a majority in the *D ail Eireann* This absolute discretion has been vested in the President because the Prime Minister in Ireland must be directly nominated by the lower House of Legislature and the President has no discretion in the matter but to appoint the person so nominated as the Prime Minister Even other Ministers though selected by the Prime Minister must get the approval of the lower House before they are appointed [See *ART* 13(1) of the *Constitution of Ireland* 1937] (c) The case of Irish Constitution

The constitutional position in India may now be briefly adverted to *ART* 74 of the *Indian Constitution provides* for a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions *There is no provision corresponding to ART 37(7) of our Constitution which makes that advice constitutionally binding upon the President* The fact, however, remains that the rules of the English convention that make it absolutely imperative for the Crown to act in accordance with advice would be and in fact are being followed in India The only sanction for the disregard of this convention is the probability, if not the certainty, of the constitutional deadlock in case the convention is disregarded—if the Prime Minister, who enjoys the confidence of the majority party in the House of the people, is not listened to and his advice is not accepted by the President, *he is likely to resign in protest* and the President will then be put to the necessity of having to secure an alternative Ministry which would necessarily involve his falling back on the wishes of the majority party in the Legislature The Indian Constitution enjoins that the President cannot act except on *advice* and he, therefore cannot stay within the frame work of constitutional arrangements established by the *Indian Constitution* even for a moment without getting some Ministers to carry on the work of administration The resignation of a popular Minister may create a situation in which no such alternative Ministry can be formed by the President, or if formed it may not be able to carry a majority support in the Legislature [The dissolution of the House of the People in the Indian Constitution is controlled by ART 85(2) (b)] (d) The Constitutional position in India

There is thus, in India a glaring disparity between the position as it is reflected in the letter of the Constitution, on the one hand and the actual working of that Constitution, on the other The President of India has the legal power to do what he likes to the Cabinet, to the Parliament, to impose emergency rule, to suspend the operation of 'fundamental

(e) If no such person is forthcoming the advice of the Prime Minister to dissolve the Legislature would be followed by the President as a matter of constitutional necessity.

It would thus appear that the President is in a position, under the Constitution, to apply to one and the same situation different provisions of the Constitution: whether he will grant dissolution under *Article* 50, or dismiss the Ministry under *ART.* 37(6), appears to be a matter solely within his discretion—a power that may well tempt its owner to use it tyrannically—and be it noted, this unhappy and anomalous predicament results from the conflict between the power of the Prime Minister to *advise* dissolution of the Assembly and the power of the President to dismiss the Prime Minister, if he is of the opinion that he no longer enjoys the confidence of the majority of Members in the House. Our Constitution does not contain any express provision by resort to which the problem posed by the encounter between two constitutional situations before the President as being presented by an identical state of facts—clash, for instance, between his duty to act under advice to dissolve the House and his duty to act in his discretion to dismiss the Prime Minister who no longer enjoys the confidence of the House he is asking the President to dissolve—could be resolved. If ART. 37(7) were strictly construed, the right of the President to be kept informed about the Cabinet decisions, for instance, about "the administration of the affairs of the Federation and proposals for legislation" as the President may call for under ART. 42, cannot avail him unless he is advised to do so by his Prime Minister. This power of the President is not declared exercisable by the Constitution in his discretion nor is it a power under ART. 37(6)—hence the President must be deemed bound to exercise it under advice. But it would seem that the actual working of the Constitution will have something to do with the personal equation between the President and the Prime Minister, and rigid adherence to the letter of the Constitution would not be demanded by the dictates of practical politics.

The foregoing analysis of *ARTs. 50 and 37* represents the strict requirements of the Constitution: but the all-important question, whether party alignments would not be radically revolutionised, subsequent to the unconstitutional and arbitrary exercise of power by the President relating to the dismissal of the Prime Minister, is one which is incapable of being settled in the abstract. Constitutional safeguards are important, but they are no proof against the possibility of their abuse by scheming and unscrupulous autocrats or irresponsible politicians. The possibility of the abuse of power is inherent in the scheme of things and that is why it is said, no constitutional safeguards are an effective guarantee that the power will not be abused or that the constitution itself will not be thrown overboard by resort to revolutionary methods on the part of those who do not believe in the philosophy of Constitutionalism.

President's Power to summon, prorogue National Assembly.

Power to summon and prorogue the National Assembly may now be considered.

The Legislature cannot meet *qua* Legislature for the exercise of its constitutional authority and power reserved to it under the Constitution unless it is summoned by the President to do so. The House is the master of its own Procedure and the members by a majority vote can adjourn their meetings from time to time during the continuance of the Sessions. The President has, however, the power to *prorogue* the House, that is, terminate its right to transact *business*. The prorogation takes place on *advice*.

It would thus appear that the Executive i.e. the Prime Minister and his Cabinet has considerable control of the Legislature—for it can neither meet nor continue to transact business after it is summoned to meet, without their approval.

"Session of Parliament" connotes the idea of the period of time between the meeting of a Parliament—whether after dissolution or prorogation—and the termination of its meetings by an order of prorogation or dissolution. The *interval*

fortitude of the Council of States, but that is half the size of the House of the People, and, in case of conflict between the Houses, it would not be necessary to subject many members of the Council of States to preventive detention in order to secure a majority for the President at a joint sitting

"This may seem a nightmare, but it is not dissimilar to the way in which the Weimar Constitution was destroyed It is possible to set out a list of things the King of England could constitutionally do, things which would have ruinous consequences, and dismiss them with the comment that, as matters of practical politics they could not be done Can the same be said of what has been set out in the last paragraph? Possibly the danger is averted by recognising it, but one must remember that the personal ambitions of an English King would always be controlled by devotion to the dynasty and the monarchial principle, factors not available to curb a President Again, the English people have been conditioned by their history to recognise and combat attacks upon their liberty, and the flexibility of the British Constitution gives larger ground for manoeuvre in resisting attacks upon it The vast Indian electorate will have to develop a proper regard for the sanctity of the Constitution before its stability can be assured" *(See Vol 6 Republic of India in the British Commonwealth Series pp* 108 109)

Should the Indian President thus wreck the Constitution he cannot even be successfully impeached The Courts cannot intervene in the matter since all his actions would be strictly legal—although unconstitutional and undemocratic If ever he should be summoned at the bar of the Legislature to be impeached he could well defend himself by asking a simple question of his accusers, "What provision of the Constitution have I violated?" He may well contend that an infringement of the convention of the Constitution is not "violation of the Constitution" within the meaning of ART 61 of the Constitution

Power of dissolution in Pakistan—Summary and, Conclusion

Although the President under the *Pakistan Constitution* is bound by the advice of the Prime Minister to dissolve the House he could, if he be so minded effectively circumvent the difficulty by falling back on his powers of dismissal under *ART* 37(6), and *instead of dissolving the Legislature he can dismiss the Prime Minister, since, in effect, by such an advice, the Prime Minister would be furnishing to him just the sort of ground which is visualised by ART* 37(6), *for his own exit from office*

The combined effect of these provisions, namely *ART* 37(6), 37(7), *and* 50, may now be summed up as follows

(a) The President is ordinarily bound to act in accordance with the *advice* of the Prime Minister before he can dissolve the Legislature [*ART* 37(7) *and* 50]

(b) But it is optional with the President, if he is so satisfied, to dismiss the Prime Minister instead of dissolving the House on the ground that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, [*ART.* 37(6)] This, he would ordinarily do, in case he believes that alternative government can be constituted and would be such as can face the National Assembly within two months next after the date of the appointment of the new Prime Minister. [ART. 50(2)]

(c) But in the event of his following the course as in (b) above, he must have some one to form the Government, for the President cannot exercise his functions, unless he is aided and advised by the Cabinet (Art 37 (1))

(d) The person to be called upon to form the Government must be one who has, at the time of his appointment, in the opinion of the President, the support of the majority of the members of the National Assembly—unless of course such a person is called upon to form a Government during the period the House stands dissolved [*ART.* 37(9)]

disqualification, the Speaker of the National Assembly shall obtain the opinion of the Election Commission; and if the opinion is that the member has incurred any disqualification, his seat shall become vacant. If any person sits or votes in the National Assembly knowing that he is not qualified for, or is disqualified for membership thereof, he shall for every day he so sits or votes be liable to a penalty of Rs. 500 which will be recoverable from him as a debt due to the Federation. (See ART. 45).

ART. 46. Bar against double membership. *ART.* 46 imposes a bar against double membership: no person can be a member from two or more constituencies in the National Assembly, although he can offer himself and can be elected for any number of constituencies, more than one, provided he, within 30 days of the declaration of result in respect of the constituencies by which he has been elected last, makes a declaration in writing addressed to the Speaker specifying the constituency which he wishes to represent. Failing this all his seats shall become vacant and as long as he has not sent in the declaration intimating what constituency in particular he wishes to represent, he shall not be entitled to sit and vote in the Assembly. If, however, he is already a member of National Assembly for one constituency and then permits himself to be nominated as a candidate for election from another constituency for a seat to the Assembly, his first seat shall become vacant.

ART. 47. Under *ART.* 47, if a member of National Assembly is absent from the Assembly, without leave of the Assembly, for 60 consecutive sitting days, his seat shall become vacant.

ART. 79. Under *ART.* 79, there is a prohibition against double membership of one and the same person in the National Assembly as well as in the Provincial Assembly. If a person is elected at the same time as a member both of National Assembly and of a Provincial Assembly and does not within 30 days of his election to the Assembly, to which he has been elected last, resign one of his seats, his seat in the Provincial Assembly shall become vacant. Similarly, if a person has been elected to both the Provincial Assemblies and does not within 30 days of his election to the second Assembly resign one of his seats, both of his seats in the two Assemblies shall become vacant.

ART. 48. Under *ART.* 48, a member of the National Assembly is required to make and subscribe an oath or affirmation in the form prescribed in the second Schedule within the period of six months from the date of the first meeting of the Assembly after the election. Failure to do so shall render his seat vacant unless the Speaker, before the expiration of that period for a good cause shown, extends the period.

ART. 49. Under *ART.* 49, a member of the National Assembly may resign his seat by notice in writing under his hand addressed to the Speaker. The resignation will become effective upon the Speaker receiving the resignation.

68. Constitution of the Provincial Assemblies

The Provincial Assemblies have been fashioned upon the model of National Assembly, a model the outline of which, has already been delineated while dealing with the *Constitution of National Assembly*. The relevant provisions in this behalf are to be found in *ARTs. 76 to 82*. The Provincial Assembly comprises of one House which taken together with the Governor of the Province becomes the Provincial Legislature for the Federal Unit. Like the strength of the National Assembly, its strength consists of 300 members and there are analogous provisions with regard to the reservation of ten seats for women members for a period of ten years immediately after the Constitution Day. *ART.* 77, which describes the composition of Provincial Assembly, in its 5th clause, makes a reference to the number of seats from the former Province of Punjab (i.e. Punjab of the pre-Establishment of *West Pakistan* province complexion) namely, that they shall not be more than two-fifths of the total number of members of that Assembly till 14th day of October, 1965. This has been done because

between the prorogation of Parliament and its reassembly in a new session is termed a "recess"

ART 50 gives to the President the power to summon, prorogue or dissolve the Assembly, and while summoning the Assembly it is he, of course under advice, who has to fix the time and place of the meeting Constitution requires that at least one of the Sessions of the National Assembly in each year shall be held at Dacca [See the Proviso to ART 50(1)] But this requirement is subject to the power of the President expressly mentioned in ART 192(2) to suspend the operation of the proviso to Cl (1) of ART 50, during the period of proclamation of ' grave emergency under *ART* 191

Under ART 51, it has been provided that there shall be at least two sessions of the National Assembly in every year and six months shall not intervene between the last sitting of the Assembly in one session and its first sitting in the next session

Under ART 141 it has been provided that whenever National or a Provincial Assembly *is dissolved*, a general election for the reconstitution of the new Assembly shall be held not later than six months from the date of dissolution There are indications that *during atleast the period when the proclamation of grave emergency is in force, the strict* obedience to these requirements may be relaxed for it is provided in the sixth clause of ART 191 that the proclamation issued under that Article shall be laid before the National Assembly "as soon as conditions make it practicable for the President to summon the Assembly "

67. Constitution of the National Assembly

Article 44 lays down the composition of National Assembly It shall consist of 300 Members, half of whom shall be elected by constituencies in East Pakistan and the other half by constituencies in West Pakistan Over and above these seats for a period of ten years from the *Constitution Day* ten seats will be reserved for women members only, five from each Province of Pakistan These constituencies are called Women s Territorial Constituencies" The period of ten years refers to the period of election to the Assembly so that if a woman is a member at the expiration of the ten years for which extra seats have been reserved for women she will not cease to be a member until the Assembly of which she is a member is itself dissolved ART 44

The *number* of members of the National Assembly is a matter that can be determined by Parliament by means of ordinary legislation—subject, however, to the conformity of such law with the overriding principle of parity which enjoins that the equality of representation between the two provinces of Pakistan is anyhow preserved Similarly, Parliament is entitled to pass a law providing for the representation in the National Assembly of any territory, which is included in the province after the Constitution Day subject to the Constitutional limitation that thereby the number of members to be elected by the constituencies in that province cannot be altered to disturb the principle of parity of representation between the two provinces Obviously this has reference to internal adjustment of territorial constituencies

ART 45 prescribes the qualifications of a person to be elected to the National Assembly and the disqualifications for membership For a person to be elected to the *National Assembly, he shall not be less than 25 years of age and must have the qualifications* prescribed under *Article* 143 for being an elector, namely, that he should be a citizen of Pakistan he is not declared by a competent court to be of unsound mind he has been resident in the constituency for a period of not less than six months immediately preceding the 1st day of January in the year in which the preparation for revision of electoral roll commences, and he is not otherwise disqualified under a law passed by the Parliament If a question should arise whether a member has after his election become subject to any

ART 45 Qualifications and disqualifications of persons to be elected to National Assembly

(b) if he is an undischarged insolvent;

Provided that this disqualification shall cease after the expiration of ten years from the date on which he has been adjudged insolvent;

(c) if he holds any office of profit in the service of Pakistan;

(d) if he has been convicted or has, in proceedings for questioning the validity or regularity of an election, been found guilty of any offence or corrupt or illegal practice relating to elections which has been declared by law to be an offence or practice entailing disqualification for membership of the National Assembly or a Provincial Assembly, unless such period has elapsed as may be specified in that behalf by the provisions of that law;

(e) if having been nominated as a candidate for election to the National Assembly or a Provincial Assembly, or having acted as election agent to any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by law:

Provided that this disqualification shall not take effect until one month after the date on which the return ought to have been lodged, or until such time as the President in the case of a return relating to an election to the National Assembly, and the Governor, in the case of a return relating to an election to a Provincial Assembly, may allow;

Provided further that this disqualification shall cease when—

(i) five years have elapsed from the date on which the return ought to have been lodged; or

(ii) the disqualification is removed by the President, in the case of a return relating to an election to the National Assembly, and by the Governor, in the case of a return relating to an election to a Provincial Assembly;

(f) if he has been convicted of any offence before the date of the establishment of the Federation by a court in British India, or on or after that date by a court in Pakistan, and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the President in the case of election to the National Assembly, and the Governor in the case of election to a Provincial Assembly may allow in any particular case, has elapsed since his release;

(g) if he has been dismissed for misconduct from the service of Pakistan on the recommendation of the Supreme Court, or a Public Service Commission;

Provided that this disqualification shall cease after the expiry of five years from the date of the dismissal, or may, at any time within that period be removed by the Governor in the case of dismissal from a service of a Province, and by the President in any other case;

(h) if he has ceased to be a citizen, or has voluntarily acquired the citizenship of a foreign State, or has made a declaration of allegiance or adherence to a foreign State.

(2) For the purpose of clause (c) of sub-paragraph (1) of this paragraph, the Judges of the Supreme and High Courts, and the Comptroller and Auditor-General shall be deemed to be holding offices of profit in the service of Pakistan.

Power of Parliament to legislate in respect of matters mentioned in ART. 144.

In Article 144 is provided the power of the Parliament to make laws for :—

(a) the delimitation of constituencies, the preparation of electoral rolls, the determination of objections and the commencement of electoral rolls;

(b) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;

(c) matters relating to corrupt practices and other offences in connection with elections; and

on the eve of the merger of Punjab, Sind, N W.F P., and Baluchistan, in October 1955, an assurance was given by the political leaders of the Punjab that they will not, by reason of their overwhelming numbers, bring about a domination of the *Punjabis* in the administration of West Pakistan An assurance was also given that for ten years immediately after the establishment of One Unit to be called "The Province of West Pakistan", they will claim only 40 per cent of the seats reserved to its Provincial Assembly—although their claim to the number of the seats according to their population quota should have been 56 per cent

The qualifications and disqualifications for membership to the Provincial Assembly are set out in *ART*. 78 and they are in terms identical with what is contained in *ART* 45

69. Franchise

ART 143 describes the qualifications of an elector—that is of a person qualified to vote—and these are :— Qualification of an elector

(1) that he is a citizen of Pakistan,

(2) that he is not less than twenty one years of age on the first day of January in the year in which the preparation or revision of the electoral roll commences,

(3) that he is not declared by a competent court to be of unsound mind,

(4) that he has been resident in the constituency for a period of not less than six months immediately preceding the first day of January in the year in which the preparation or revision of the electoral roll commences ,

(5) that he is not subject to any disqualification imposed by the Constitution or Act of Parliament

Some additional provisions relating to elections are also contained in the Fourth Schedule but they are temporary and transitional provisions in the sense that they are liable to be amended by an Act of Parliament In Part II of the Fourth Schedule are set forth the qualifications in respect of a person who shall be "deemed to be a resident in a constituency". if a person ordinarily resides in that constituency, or owns or is in possession of a dwelling house therein, he will be deemed to be a resident for the purpose of being considered an elector The words "ordinarily resides", appearing in the second paragraph of the Fourth Schedule may be compared and contrasted with the words "actually and voluntarily resides", appearing in *Ss 16 and 20 of the Code of Civil Procedure* There are, however, two provisos mentioned in this paragraph that create exceptions in favour of any person who holds the office of Minister of the Federal or Provincial Government, or Speaker or Deputy Speaker of the National or a Provincial Assembly, or a person who holds a public office or is in the service of Pakistan, such person shall be *deemed*, during any period in which such an office is held, to be resident in the constituency in which he would have been resident if he had not held such office The benefit of these exceptions is also given to his wife if she be otherwise qualified, with the result that upon a person being qualified to have his *name entered in the electoral roll of a constituency under proviso to para 2*, his wife automatically becomes so qualified (See the second sub para) Art. 217 and the Fourth Schedule

The right of a person to be elected to the National Assembly or a Provincial Assembly is dependent upon his name appearing on the electoral roll of any constituency of that Assembly [see paragraph 3 of the Fourth Schedule], and his being of 25 years of age [see *ART*. 45(*a*), *and* 78(*a*)]—unless such a p [illegible] member of any of these two Assemblies [illegible] read in conjunction with *ART* 217, for [illegible] otherwise, takes us to the provisions of the fourth paragraph of the said Schedule These disqualifications are — Fourth Paragraph of Fourth Schedule

(a) if he is of unsound mind, and stands so declared by a competent court,

vote for the list he likes as opposed to his voting for a given candidate, and after this is done, the seats are divided among the rival parties in proportion to the number of votes secured at the polls in support of each list.

The chief merit of the proportional representation is that it ensures a just measure of representation to every group in the Legislature in proportion to the strength of that group according to population figures. But the chief *vice* of the system is that it fails to secure on the part of elected representatives homogenity of outlook on questions of common concern to the nation—an outlook which, as any one can see, it is essential to have before Legislature could be expected to provide a homogenous team of representatives who could form the personnel of a Cabinet which may then efficiently operate as an instrument for handling the affairs of Government. Certain isolated interests, no doubt, get reflected if elections are held in accordance with the principle of proportional representation, but that overall unified outlook, which ought to characterise the elected representatives before they could be expected to function as Government, is often seen to be conspicuous by its absence.

The other alternative is to secure what is called *communal representation* through the adoption of the system of separate electorate where the voters belonging to different minority communities vote separately only for the candidates of their own group.

Separate or what is called compartmental electorates have been designed by political theorists to enable the minorities to secure their due share of representation in the Legislatures of the country. Under this system separate electoral rolls are maintained for separate racial, religious or ethenic communities, and there are separate constituencies allotted for the purpose of giving full scope to the members of different communities to contest the seats reserved for them. The result of this arrangement invariably is that the differences between the several communities get accentuated and become more pronounced. A Muslim, for instance, would like to exploit the religious susceptibilities of his voters and with that end in view subscribe to a manifesto of political programme which would be such as would exclude from its purview any programme which would help the members belonging to the other group or denomination. Thus it is that under separate electorate the overall interest of the country does not become a predominent feature in the manifestoes of the various political parties: instead, we have undue emphasis laid upon accidental attributes of public policy, if only because thereby, the needs of a given religious group or denomination of people as opposed to those of the rival group would be brought into the forefront.

Now the basic thing to remember about separate electorate is that, being the machinery improvised for the purpose of safeguarding the interests of the minorities, it cannot conceivably be *imposed* upon them by a majority, should the minority itself declare its unwillingness to take advantage of this device. The religious minorities that do not find themselves as an altogether insignificant element in the country, as happens for instance to be the case in respect of the minorities in East Pakistan, feel advised to have *joint electorate instead of separate electorate* for they know that they would thereby be in a better position to effectively influence politically the administration of public affairs in the country. They will be, at all material times, in a position to tilt the balance between the two contending groups within the majority community and thus use their vote as a bargaining counter for getting their demands in matters of policy or legislation conceded. This in fact has been the thinking of the representatives of the minorities in East Pakistan. They have for this very reason been all the time crusading for the recognition of the principle of joint electorate. The minorities in West Pakistan, however, are so much scattered about and constitute such an insignificant proportion to the total population of West Pakistan that, with the imposition of joint electorate upon them, there is no possibility of any of these communities

(d) all other matters necessary for the due constitution of the National Assembly and Provincial Assemblies.

It would thus appear that the Provincial Legislature has no power to make provision with regard to any of the foregoing matters and that the electoral laws can only be made by the Parliament. Thus the entirety of the law relating to franchise, (even in respect of franchise as affecting Provincial Legislatures,) is taken out of the legislative competence of Provincial Legislature and has been made an exclusive preserve of the Parliament.

70. Principle of Franchise—Joint and Separate Electorates

In ART. 145, the principle of electorate (namely whether it would be separate or joint), is left to be determined by Parliament. The Article provides, "Parliament may, after ascertaining the views of the Provincial Assemblies and taking them into consideration, by Act provide whether elections to the National Assembly and Provincial Assemblies shall be held on the principle of joint electorate or separate electorate, and may in any such Act provide for all matters incidental and consequential thereto". It is a matter of controversy whether this power which has been conferred by the Constituent Assembly on the Parliament is such as may be construed as empowering the latter to provide for separate electorate for one Provincial Assembly and joint for another, or that even in respect of the Parliament itself it is competent for the Parliament to pass a law enabling one Province to return representatives on the basis of joint electorate and the other on the basis of separate electorate. The Parliament, in fact, did pass legislation making provision for separate electorate in respect of West Pakistan and joint electorate in respect of East Pakistan (see Act *XXXVI* of 1956). Considering that it is a power which has been expressly conferred upon the Parliament by the framers of the Constitution to decide the principle of electorate after ascertaining the views of the Provincial Assemblies and taking them into consideration, the exercise of that power must be shown to be strictly in accordance with the directions contained in ART. 145. (The case of A. K. M. Fazl ul-Quader Chowdhry v. The State which upholds the constitutionality of Act XXXVI of 1956 may be seen in *PLD 1957 Dacca, page 342*. It may, however, be noted that this Act was later on amended by Act XIX of 1957, and a uniform principle of electorate has been now provided. The elections to the two Provincial and the National Assemblies would now take place on the principle of joint electorate.) ART. 145

At this stage, it is necessary to briefly refer to some political aspects of the principle of joint and separate electorates so that the resulting implications can be seen by the student in their true perspective. Political implications of the Principle of Electorate

Minorities in a State may be of various kinds: national, racial, religious, etc. In any State that professes to be democratic, minorities have to be allowed their proper share in the making of laws, as also they have to be allowed a full voice in the management of the affairs of the State. These denominational minorities may thus participate at the time of elections in returning their representatives and when the legislatures are fully recruited, to have, through these representatives, their opinion articulated and counted in the making of laws. The one way of giving them adequate share in the number of seats fixed for a given legislature is to provide for the election of the minority representatives on the basis of *proportional representation*. This proportional representation may be designed to take effect, either by means of a *single transferable vote* or by means of, what is called, the *list system*. The technique invariably adopted in either case is to form multi member constituencies: but whereas under the system of single transferable vote the voter is given his right to vote for certain number of candidates in order of his preference, under the list system each party prepares a list of names and the voter is called upon at the time of election to

unlike the latter institution, the personnel of government is secured by means of representatives elected by the people during the periodic elections.

In most of the modern governments *adult suffrage* is regarded as an adequate foundation upon which the political processes must work. Every adult citizen is entitled to record his preference during the elections in favour of a particular party or candidate. In this respect the doctrine of *political equality* is satisfied in so much as all persons of a certain age irrespective of any other considerations, e.g. wealth, educational qualifications etc., are entitled to have their viewpoint counted and their voice reckoned in the management of public affairs. They are, in fact, given a chance of selecting their rulers. If a citizen is at all to be rendered liable to pay the taxes, to be conscripted during the time of war, if he is justly and fairly to be required to obey laws passed by the State, he is entitled to have his opinion counted in the making of a government. And the only effective way to do this in modern times, when most of the States are composed of several millions of people, is to give to each adult a periodic chance of showing his support for, or condemnation of, a given political programme by means of the exercise of his power of vote. However, there are many critics of the political theory that advocates the system of adult suffrage, and several arguments have been advanced by them to show that this method of recruiting government is unsatisfactory, if not dangerous in the extreme. Even J. S. Mill, it would be recalled, emphasised that the universal education should precede universal franchise. Sir James Stephen thought that universal suffrage inverted the true and natural relation between wisdom and folly. It is argued by these critics that complicated questions of state-craft, affecting the conduct of intricate and highly controversial issues like the economic policies of a modern State or the management of its foreign affairs, cannot be understood by the "vulgar multitude". It is futile to make these issues as the subject-matter of election campaigns—for the average man, as opposed to the microscopic minority who compose the aristocracy of talent or the intellectual proletariat, could not be expected to be in a fit position to record his views by indicating preferences one way or the other in relation to these questions. Some manner of check, it is suggested, in the form of a minimum educational qualification and experience, would seem to be an indispensable pre-requisite before the right to vote can be safely conferred. Some have even suggested the importance of imposing minimum property qualification, upon the view that a person who has property has some manner of vested inerest or stake in society and is likely, on that account alone, to exercise his right of vote in a responsible and judicial manner.

72. Women's Right to Vote

Similarly, whether or not franchise be extended to women is another controversial matter. The legal and social status of women in most of the countries very much depends upon the conferment of this political right to vote, and in all highly advanced industrial countries the woman has already begun claiming equality with man in the matter of political rights. The early pioneers who advocated the enfranchisement of women, like J. S. Mill and Charles Bradlaugh, felt that it was essential for the successful working of democratic institutions that the woman should be entitled to vote at the elections, and further that it was not enough that they should be represented in this respect merely by their husbands or by their brothers or fathers, as the case may be. The battle for the *Women's Right* to vote on the same terms as men ended *in U.S.A.* with the passing of 19th *Amendment on 26th August*, 1926, and by the *Act of* 1928 *in England*. Of course, New Zealand was the first country that recognised Women's Right to vote (1895), and by now about 15 Nations or so still remain to acknowledge the right of women to vote and a country like Switzerland is one of them.

successfully sending in even a single representative to take a seat in the Legislatures of the country The result of this predicament in which the minorities in West Pakistan find themselves is that they have been opposing the joint electorate principle tooth and nail

The unequal distribution of the population of minorities in Pakistan does create a very unusual problem indeed, and it is difficult to offer a satisfactory solution to the political problem posed by the demographic factors that are involved in the determination of this major constitutional issue of our time

The majority community in Pakistan, however, has been insisting upon the recognition of the principle of separate electorate for an altogether another reason The argument they have advanced is that Pakistan itself being an offspring of the phenomenon of separate electorate upon which the Musalmans of undivided India took their stand, cannot be now suffered to provide in its Constitution the principle of joint electorate, for to do this would be to deny to the minorities what the Muslims themselves, when in minority in undivided India, had claimed as their political right

Besides all this, emphasis upon the principle of separate electorate is placed by the majority community also with a view to supporting the claim of Pakistan as being an Islamic Republic It is urged that the representatives, who will sit in the Legislatures and form governments, cannot adequately represent the ideological standpoint of the Muslim State if they *represent* not only the Muslims but also other non Muslim religious minorities The [illegible]

elected by *all* the members (Muslims and non Muslims alike) sitting in the Provincial and the National Assemblies, and what is more, even the Leader of the Party in power could, under our Constitution, become a Head of a Coalition between some of the splinter groups within the majority community, on the one hand, and the group of representatives of the minority community, who have been returned to the Legislatures on the basis of separate electorate, on the other

Joint electorate emphasises the political importance of and the need for admitting the religious minorities fully within the political life of the State Separate electorate recognises the existence of the plurality of religious groups with their inalienable right to return representatives in the Legislature but does not provide for the growth of healthy national consciousness It keeps minorities in a state of perpetual separate hood, makes no contribution to the problem of absorbing the minorities in the body politic of the State Under a system of separate electorate the viewpoints of the various religious groups will, from the nature of the case, continue to be irreconcilable

The argument in favour of separate electorate is that in countries where religious minorities are so very much divided in outlook on the problems connected with the management of affairs of the State as to be unable to consider the interests of any but their own, it is in keeping with the dictates of prudence and common sense that they be allowed to secure their representation through candidates who belong to their own religious faith Where there is distrust between the religious groups, it is impossible to expect that representatives elected on the basis of joint electorate would be able to do justice to the interests of the community to which they do not belong

71. Adult Suffrage and Representative Government

Representative government is a modern device of organizing popular control over [illegible]

as the President in the case of Federal Assembly, and the Governor in the case of a Provincial Assembly, may appoint for the purpose. During the absence of the Speaker from any sitting of the Assembly, the Deputy Speaker, and if he is also absent, such person as may be determined by the rules of Assembly, shall act as Speaker. [See *ARTs.* 54(3) *and* 87(3)].

Importance of the Office of the Speaker.

The office of the Speaker is of considerable constitutional importance and this would be borne out fully if the powers which he enjoys under the Constitution, as also the privileges that are attached to his office, are appreciated. He is the officer who is empowered to certify whether or not a bill is a money bill and such *certificate shall be conclusive for all purposes and shall not be called in question in any Court.* [See *ARTs.* 58(3) and 91(3)]. He has several duties cast on him which flow from the English Parliamentary usage. It is his duty to see that the House is properly constituted before it proceeds to business. Following is the statement of the duties of Speaker as given by May in his "Parliamentary Practice":—

"*Duties of the Speaker under Usage.*—It is the duty of the Speaker to see that the House is properly constituted before it proceeds to business. He preserves the orderly conduct of debate by repressing disorder when it arises, by refusing to propose the question upon motions and amendments which are irregular, and by calling the attention of the House to bills which are out of order (and securing their withdrawal). He rules on points of order submitted to him by Members on questions either as they arise or in anticipation, but any notice of a question seeking a ruling must be notified to him privately and not placed upon the paper. The opinion of the Speaker cannot be sought in the House about any matter arising or likely to arise in a Committee. The Speaker is always ready to advise Members of all parties who consult him privately whether upon any action which they propose to take in the House or upon any questions of order which are likely to arise in its proceedings. Such private rulings of the Speaker generally settle the questions at issue, but they may, if necessary, be supplemented by rulings given from the Chair."

"The Speaker's rulings, whether given in public or in private, constitute precedents by which subsequent Speakers, Members, and Officers are guided. Such precedents are collected and in course of time may be formulated as principles, or 'ancient usage'. It is largely by this method that the modern practice of the House of Commons has been developed.

"A few examples may be given of motions and bills which for some irregularity the Speaker has not allowed to proceed.

Motions.—A motion which would create a charge upon the people and is not recommended by the Crown; a motion touching the rights of the Crown, which has not received the royal consent; a motion which anticipates a matter which stands for the future consideration of the House, or which raises afresh a matter already decided during the current session—these are examples of motions upon which the Speaker refuses to propose a question.

Bills.—The Speaker has ruled a private bill out of order on the ground that it should have been introduced as a public bill, and has directed the withdrawal of a public bill which should have been introduced on the report of a resolution of a Committee of the whole House, or which has gone beyond its title. Similarly he has directed the recommittal of a bill to a standing committee when clauses affecting public money have been introduced without the necessary authority."

[May's Parliamentary Practice (XV Ed.) p. 235.]

The Speaker of the National Assembly by virtue of his office acts as the President of the Republic of Pakistan if a vacancy occurs in the office of the President or if the President is absent from Pakistan or is unable to discharge the duties of his office owing to *illness*

In Pakistan, of course, the right to vote has been conceded *in favour of the woman* as much as it has been in favour of man—and if there is a discrimination at all it is in favour of the woman, in that for a period of ten years from the Constitution Day ten additional seats in the National Assembly have been reserved for women members only of whom five shall be elected by constituencies in East Pakistan and five by constituencies in West Pakistan [see *ART* 44(2)] Likewise, in the Provincial Assemblies similar provision of reservation of ten additional seats for women has been made in *ART* 77(2) It goes without saying that, in every general constituency, a woman is entitled to vote and subject to the disqualifications mentioned in paragraph 4 of Fourth Schedule she is entitled to offer her self as a candidate at the election Experience of the working of the several Legislatures in modern democratic countries shows that women members have everywhere shown special interest in health housing temperance social security education equality of economic conditions for the two sexes international peace and the abolition of white slave traffic " The framers of our Constitution have thus taken a step in the right direction

It may be noted that the Framers of the Constitution of Pakistan have established a proper example of progressive and scientific outlook in the matter of securing suffrage for the women Some time back to be precise on 12th June 1952, a Fatwa was issued by the 'Al Azhar University in Cairo
of which the present author is not guilty—to be
educational centre of the Muslim World to the
to vote or to sit in the Legislatures the grounds in support of this view are that women are likely to be swayed more by emotion than men and that they would thus be of an unstable judgment And further that women if they are allowed the right to vote will have to attend public meetings speak in public and engage themselves in constant journeys which would be unseemly and undignified and finally that their right to participate in political processes was inconsistent with the authority of the Islamic law (*Keesing's Contemporary Archives* 1952 54, pages 123 131 quoted by *Appadorai* in his *Substance of Politics* p 506 8th Edition) The faulty psychology of women depicted in this Fatwa ought to be obvious to any one who knows anything of that science and as to the allegation that the giving of 'the Right to vote to a woman is inconsistent with the authority of Moslem Law' something will be said in the *Final Chapter* of this Book Suffice it to say that the present author does not consider this Fatwa to be of any importance upon the question it so pretentiously professes to settle

73 Officers of the National and Provincial Assemblies

In *ARTs* 54 *and* 87 we have provisions for the election of the Speaker and the Deputy Speaker for the National and a Provincial Assembly respectively The election takes place immediately after these Assemblies are formed or as often as these offices fall vacant These officers shall vacate the office if they cease to be members of their respective Assemblies or if they resign their office by writing in their hand addressed to the President in the case of Federal, and to the Governor in the case of Provincial, Assembly They can be removed from office if a resolution in that behalf is passed by a majority of the total members thereof No such resolution can be moved unless at least 14 days notice has been given of the intention to move the resolution The Speakers of the two Assemblies, that is National and Provincial, do not by virtue of the dissolution cease to be the holders of the office of the Speaker and they do not vacate their office until immediately before the first meeting of their respective Assemblies after the dissolution There are elaborate provisions made in regard to the capacity of the Deputy Speaker to perform the duties of the Speaker when the office of the Speaker is vacant or the Speaker is acting as President, and in the event of the office of the Deputy Speaker also lying vacant, by such member of the Assembly

Speaker and Deputy Speaker

It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each House is the privilege of the whole Parliament. In one sense I agree to this: because whatever impedes the proper action of either impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order before it can work at all. But it by no means follows that the opinion that either House may entertain of the extent of its own privileges is correct, or its declaration of them binding . . ."

And further at page 851, it was observed :—

"That Parliament enjoys privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both Houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in *aulia regia*, they rest on the stronger ground of a necessity which became apparent at least as soon as the two Houses took their present position in the State.

"Thus the privilege of having their debates unquestioned, though denied when members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that Princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. But it is said that the courts of law must be excluded from all interference with transactions in which the name of privilege has been mentioned because they have no means of informing themselves what these privileges are. They are well known, it seems to the two Houses, and to every member of them, as long as he continues a Member; but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumption to ask how this knowledge may be obtained, had not the Attorney-General read to us all he had to urge on the subject from works accessible to all, and familiar to every man of education. The argument here seems to run in a circle. The Courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual, because the law has taken such matters out of their cognizance. The old text-book writers, indeed, affirm the law and custom of Parliament, although a part of the *lex terrae*, to be *ab omnibus quaesita, a multis ignorata.* This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense."

The case of *Stockdale v. Hansard* as even the earlier case *Burdett v. Abbott* decided in (1811), 14 *East* p. 1: 104 *English Reports*, p. 501 (this last mentioned case provides one of the principal authorities for the power of the House of Commons to commit for contempt as the *case of Lord Shefisbury* does for *Lords*, see 6 *State Trials* 1269 (1677), made it clear that some of the claims to jurisdiction made by the House of Commons in the name of privilege were untenable in courts of law. The position taken up by the courts was that the law of the Parliament was a part of the general law and that its principles were not beyond the judicial knowledge of Judges and that it was the duty of the common law courts to define its limits. There was, however, a counter-claim acknowledged by the courts themselves that there was a certain sphere within which the jurisdiction of the House exercised in the name of privilege was absolute and exclusive.

Bradlaugh vs. Gossett.

In the case of *Bradlaugh v. Gossett* (1884), 12 *Q.B.D.* 271), it was decided that the House of Commons is not subject to the control of the courts in the administration of that part of law which relates to its internal proceedings only and that even if its interpretation

or any other cause (*See ART* 36) When presiding the sessions of the Legislature the Speaker does not vote He does so only when there is equality of votes and that is called the right of the Speaker to exercise a casting vote [See *ARTs* 55(*b*) *and* 88(*b*)]

74. Privileges of the Members of the National and Provincial Assemblies

ARTs 56 and 89

ARTs 56 *and* 89 set forth the privileges of the members of the National and Provincial Assemblies respectively There are certain well defined rights which the members of the Legislature exercise and some of these are expressed in statutes or enacted laws and others are inherent in their status as members of the Legislature Similarly the Legislature as a whole or its committees enjoy certain privileges The English Parliament for instance, has the power to commit for its own contempt and in the exercise of its privileges has complete control over its *internal* proceedings

The Position in England

In England the privileges of the Parliament can be discovered not only from the enacted law but also from immemorial customs and the usages of Parliament Parliamentary Privilege is part of the common law and therefore neither House can create any new privilege but must justify its claim on the authority of precedent The Courts, while reluctant to enquire into the exercise of privilege so far as it concerns the internal proceedings of either House or their relation with one another will not admit of its extension at the expense of the rights of the subject For to do so would involve recognising that one House could change the law by its own resolution (*Constitutional Law*, *p* 119 *by Wade and Phillips*) Parliamentary Privilege is to some extent", we read in another book, analogous to royal prerogative except that the prerogative is part of the Common Law while Privilege is the law and custom of Parliament " (*Chalmers and Hood Phillip's Constitutional Law of Great Britain British Empire and Commonwealth p* 98 *6th Edition*)

Stockdale vs. Hansard

There is a long and eventful history of the clash of the jurisdiction of courts on the one hand and authority of the Parliament claimed by it for the exercise of its privileges on the other The outstanding of the earlier cases, a case which throws considerable light on the nature of the privilege is that of *Stockdale v Hansard* (1839), 9 *Ad* & *L* 1, 8 *L J Q B* 294, 3 *St Tr* (N S) 723

The facts of that case were that in a certain report printed and sold by the firm of Hansard under the order of the House of Commons, a certain medical book published by Stockdale, was described as "disgusting and obscene" An action for libel was brought by Stockdale against Hansard who, in defence, urged that the alleged libel could not form subject matter of an action in that having been published under the authority of House of Commons it became part of its proceedings and could not validly form the subject of action in a court of law Repelling this contention Lord Denman, C J, observed (at p 850) —

"The supremacy of Parliament the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not Parliament, but only a co ordinate and component part of the Parliament That sovereign power can make and unmake the laws, but the concurrence of the three legislative estates is necessary, the resolution of any one of them cannot alter the law, or place anyone beyond its control The proposition is, therefore, wholly untenable, and abhorrent to the first principles of the Constitution of England

"The next defence involved in this plea is, that the defendants committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges ..

"Parliament is said to be supreme, I most fully acknowledge its supremacy

It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each House is the privilege of the whole Parliament. In one sense I agree to this: because whatever impedes the proper action of either impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order before it can work at all. But it by no means follows that the opinion that either House may entertain of the extent of its own privileges is correct, or its declaration of them binding . . . "

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of a statute prescribing rights within its walls is erroneous, the court has no power to interfere The facts of this case were as follows Charles Bradlaugh who had been elected as a member of the Parliament was not being allowed by the House to take the oath and a *resolution was passed by the House in the following terms* —

"That the *Serjeant at Arms* do exclude *Mr Bradlaugh* from the House until he shall engage not further to disturb the proceedings of the House

Mr Bradlaugh agreed to give this undertaking but was *further told that he would* be excluded until he engaged not to attempt to take the oath in disregard of the resolution of the House Mr Bradlaugh tried to enter the House but was forcibly ejected by *Serjeant at Arms (Gossett)* Bradlaugh approached the court for an injunction to prevent Mr Gossett from enforcing the order of the House and for a declaration that the order was void On behalf of the defendant it was pleaded that the plaintiff s case was not founded on any cause of action known to law The legal question that arose in the case was formulated by Stephen J as follows —

"Suppose that the House of Commons forbids one of its members to do that which an *Act of Parliament* requires him to do, and in order to enforce its prohibition directs its executive officer to exclude him from the House by force if necessary is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out?"

The Court held that it had no such power and observed I think that the House of Commons is not subject to the control of Her Majesty s Courts in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable

The real point of controversy in the above mentioned case that arose for determination was, whether a resolution passed by the House of Commons could be allowed to abrogate the Act passed by the Parliament—that is the Parliamentary Oaths Act 1866 which prescribes the course of proceedings to be followed on the occasion of the election of members of the Parliament The court dealt with this argument in the following words

"In order to raise the question now before us it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act for if the resolution and the Act are not inconsistent *the plaintiff has obviously no grievance* We must, of course, face this supposition and give our decision upon the hypothesis of its truth, but it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute law The more decent, and, I may add, the more natural and probable supposition is that, for reasons which are not before us, and which we are therefore unable to judge the *House of Commons* considers that there is no inconsistency between the Act and the Resolution They may think there is some implied exception to the Act They may think that what the plaintiff proposes to do is not in compliance with its directions With this we have nothing to do, but whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and *considering those reasons*, but it would be equally impossible for the House with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of law in preference to its own It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the *regulation of its own proceedings* within its own walls is concerned, and that even if that interpretation should be erroneous this Court has no power to

"More than that, with the greatest respect to the observations of my illustrious predecessor, *Lord Russel of Killowen, C.J.*, in *Williamson v. Norris*, (1899) 1 Q.B. 7, 12) it appears to me that the bulk of the provisions of the Licensing *Acts* are quite inapplicable to the *House* of Commons. It was conceded candidly enough by counsel that if there were no jurisdiction to adjudicate in a case brought against the Members of the Kitchen Committee it followed there was no jurisdiction to adjudicate in a case against the Manager of the Refreshment Department.

"For these reasons, I am clearly of the opinion that these rules ought to be discharged."

Privileges of the Members of the English Parliament.

Having considered the attitude of the English Courts to the question relating to the privileges of the Parliament in England, it now remains, briefly, to notice the content or the substance of the actual privileges that are enjoyed by the members individually and the Parliament collectively.

The Bill of Rights, 1689, guarantees to the members of the Parliament absolute freedom of speech for debates and proceedings in the House. Similarly, disclosures made in Parliament which amount to violation of *Official Secrets Act* 1911-39, cannot be a subject-matter of prosecution. It is possible by law to provide that the violation of any secret even during the course of parliamentary proceedings would not be immune from becoming the subject-matter of an action in the court of law, for, in such cases the Parliamentary privilege becomes expressly subservient to the law of the land. Within these limits words spoken in connection with the performance of the duties as a member of the House are protected. Similarly, there is the right of the House to *publish* its own proceedings and also to restrain others to undertake publication of its proceedings. This right was recognised in England by the *Parliamentary Papers Acts*, 1840 to undo the effect of the decision in the case of *Stockdale v. Hansard* (9 *A* & *E*.1), wherein it was decided that the publication of the proceedings of the parliament under its own authority did not save a publisher from common law actions relating to libel etc.

Then there is a privilege of freedom from arrest which a member of the Parliament enjoys. This privilege is available only in the case of civil proceedings for a period extending from a point of time 40 days before the meeting of the parliament until the expiry of 40 days period after the last meeting. The criminal charges for indictable offences are not saved by this privilege nor can the orders relating to the detention of the members by competent authorities passed in pursuance of its powers, be rendered ineffective in the face of such privilege.

75. Privileges of the Members of the Assemblies: The Constitutional Position in our Country.

For the proper understanding of the provisions of our Constitution relating to the privileges of the members of the legislature—National and Provincial—as also the privileges of the Houses themselves and of their officers, it is necessary to carefully examine the text of the two articles mentioned earlier as also to bear in view the legislative history of these provisions.

Under ART. 56 (5), we have the following :

"Subject to this Article, the privileges of the National Assembly, the committees and members thereof, and the persons entitled to speak therein, may be determined by Act of Parliament."

In other words, Article 56 does not give exhaustive enumeration of the privileges of the persons and authorities mentioned therein but it only contains what might be called the

of a statute prescribing rights within its walls is erroneous, the court has no power to interfere. The facts of this case were as follows: Charles Bradlaugh who had been elected as a member of the Parliament was not being allowed by the House to take the oath and a resolution was passed by the House in the following terms:—

"That the *Serjeant-at-Arms* do exclude *Mr Bradlaugh* from the House until he shall engage not further to disturb the proceedings of the House."

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Suppose that the House of Commons forbids one of its members to do that which an *Act of Parliament* requires him to do and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out?

The Court held that it had no such power and observed: "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable."

The real point of controversy in the above mentioned case that arose for determination was whether a resolution passed by the House of Commons could be allowed to abrogate the Act passed by the Parliament—that is the Parliamentary Oaths Act, 1866 *which prescribes the course of proceedings to be followed on the occasion of the election of* members of the Parliament. The court dealt with this argument in the following words:

"In order to raise the question now before us it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act, for if the resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must, of course, face this supposition and give our decision upon the hypothesis of its truth, but it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute law. The more decent, and I may add, the more natural and probable supposition is that for reasons which are not before us, and which we are therefore unable to judge, the *House of Commons* considers that there is no inconsistency between the Act and the Resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do; but whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of law in preference to its own. It

place in the Assembly, was a *proceeding* of the *protected category*, would be to rob it of the whole of its content. With all respect to the learned Judge, it is submitted that upon a plain construction of that Article there is no room for an argument that a Court of Law is at all competent to go behind the proceedings just to be able to determine whether or not by reason of the existence of fraud, *mala fides* and coercion, proceedings in the Assembly have been vitiated. *ART.* 170 is confined to remedies and has nothing to do with the *rights* that have to be enforced. It is *ART.* 89 that had to be interpreted to see the full effect of prohibition contained in it.

Following observation of the learned Judge needs careful consideration, for it sets forth the basis of his approach to the principles of interpretation of our Constitution (p. 821) :

"Let our fondness for drawing parallels be subdued for once we cannot conscientiously compare our democratic institutions and their privileges to countries like England and America. Our growth has not been natural. We have had winters, when there was no growth at all; and we have had rainy seasons, with plenty of mushroom growth. The people in their very wise wisdom have chosen to give their institutions only a few limited privileges, and in their wisdom they have thought it fit to invest the High Court to issue directions 'for any... purpose.' It is, therefore, proper that we should not allow these privileges to exceed their purpose."

It is submitted with respect that expression "any other purpose" appearing in ART. 170 can only be read *ejusdem generis* and has reference to the enforcement of rights. There must be a right of some sort before its invasion can be made the subject matter of complaint in a court of law and *ART.* 89 has been expressly designed to say that no such right exists. The appeal, if any, must therefore lie in a forum other than a court of law. It is submitted that the approach to the interpretation of Constitutional instruments adopted in the words just quoted is *not* in accord with the previous state of the law on the subject and for this reference should be made to the Chapter, "*Nature, structure and reach of judicial power*".

No study of the case would be complete without making a reference to the following observation of Justice Shabbir Ahmad (p. 828): "What is protected is the proceedings of the Assembly and to say that all that is done in the Assembly Chamber is the proceeding of the Assembly is an interpretation which no one will accept."

The learned Judge then proceeded to observe:

"Now clause (b) of ART. 88 of the Constitution enjoins that the decisions of the Provincial Assembly shall be taken by the majority of the persons present and voting. If a Bill had been declared by the Speaker to have been passed by the Assembly not because there had been voting on it but because the members present had agreed to the matter being decided by the result of a boxing bout between the Leader of the House and the Leader of the Opposition and this fact were established, will the Court of Law be powerless and be bound to accept the proceedings as valid though they were in contravention of the procedure of the Constitutional itself?"

In the opinion of the present writer even in the case visualised by the learned Judge the Court would not have the power to enquire into the validity of the proceedings. There is no provision in our law which enables the Courts to enforce the Constitution in the teeth of prohibitions contained in the Constitution itself debarring them from doing so. *ART.* 170 does not confer a general power upon the Courts to become the *Grand Inquest* of the *Nation*: remedies sanctioned by it are available subject to the express provisions of the Constitution to the contrary effect. And ART. 89, is only one such provision.

'fundamental privileges' and leaves the matter of providing the remaining privileges to be consumated by means of an *Act of Parliament*

Under ART 224 of our Constitution all existing laws save those that have been repealed under ART 221, have been continued with the result that the provisions of *Constituent Assembly (Proceedings and Privileges) Act*, 1955, are still valid law S 4 of this Act (which received the assent of the Governor General on the 28th July 1955 and was published for general information in the *Gazette Extraordinary*, dated the 6th August 1955), provided as follows — Constituent Assembly Powers and Privileges Act 1955

"(1) Subject to the provisions of the Government of India Act 1935 in its application to the Federal Legislature and to the rules of procedure of the Assembly there shall be freedom of speech in the Assembly [illegible]

(2) No member of the Assembly shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Assembly or in any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of the Assembly of any report, paper, votes or proceedings

(3) The validity of any proceedings in the Assembly shall not be called in question on the ground of any alleged irregularity of procedure

(4) No officer or other member of the Assembly in whom powers are vested by or under any law for regulating procedure or the conduct of business or for maintaining order, in the Assembly shall be subject to the jurisdiction of any court in respect of the exercise by him of these powers

(5) *In other respects* the powers privileges and immunities of the Assembly and of the members and committees thereof *shall be those of the Commons House of the Parliament of the United Kingdom of Great Britain and Northern Ireland and of its members and committees at the date of commencement of this Act*

(6) The provisions of this section shall apply to persons who have the right to speak in, and otherwise to take part in the proceedings of the Federal Legislature or any committee thereof as they apply to members of the Assembly

(7) This section shall apply to the Assembly when functioning under sub-section (1) of *S 8 of the Indian Independence Act 1947* and when *functioning as Federal Legislature* and Ss 28 and 41 of the *Government of India Act*, 1935, shall be repealed

It will be seen from the 7th clause of the above quoted section that the privileges mentioned in the section were available to the Federal Legislature as well as to the Constituent Assembly and that the previous statement of privileges which was contained in sections 28 and 41 of the Government of India Act 1935, had been repealed by it Prior to the coming into force of the *Constituent Assembly (Proceedings and Privileges) Act*, 1955, sections 28 and 41 of the *Government of India Act* 1935, contained the law relating to the privileges of the Federal Legislature In the 5th clause of this section reference was made to the application of the powers, privileges and immunities of the Assembly of its members and committees "in other respects shall be similar to those of the House of Commons of the Parliament of the *United Kingdom of Great Britain and Northern Ireland* and of its members and committees at the date of the commencement of this Act

In view of the fact that the present legal position with regard to the privileges of the National Assembly and its members would be deducible from the combined operation of *ART 56 of our Constitution* and *S 4 of the Constituent Assembly (Proceedings and Privileges) Act*, 1955, it would seem to follow that the law relating to the privileges powers and immunities of the Assembly its members and its committees, would be the same as was in

Colonial Legislatures, in the absence of express grant, could not claim a power which belonged to the Parliament as a result of immemorial usages, customs and prescription. The point, however, is now academic because the powers of the National Assembly, and its privileges and immunities are the same as those of the *House of Commons of the United Kingdom Parliament* and it would necessarily have the power to commit for contempts committed outside the House. It should be remembered that the power of the Provincial Assembly to punish contempts would be controlled by the provisions of ART.89(5), which is in the following terms:—

"Subject to this Article, the privileges of a Provincial Assembly, the committees and members thereof, and the persons entitled to speak therein, may be determined by *Act of the Provincial Legislature*; but such privileges may not exceed those conferred on the National Assembly, its committees and members, and the persons entitled to speak therein."

Consequently, Provincial Assemblies by an *Act of Provincial Legislature* would be able to confer upon themselves the powers analogous to those enjoyed by the National Assembly. As far as the writer is aware, no such legislation so far has been passed by any of the two Provincial Assemblies of Pakistan. Whatever be the state of the enacted law, all non-sovereign *Legislative Bodies* at least have the power of removing obstruction offered by any one who obstructs the deliberation or proper action by it during the course of transacting official business.

In the case of *Thomas William Doyle and otheis* v. *George Cherles Falcouer* (1866), 4 *Moore's P.C. cases (N.S.)* 203, their Lordships of the Privy Council dealt with the question whether in the absence of an express grant, the British Colonial Legislature set up by an Act of Imperial Parliament had the power to punish and commit for contempts, acts committed in its presence upon the ground that the existence of such a power is necessary for the proper functioning of legislative bodies. Their Lordships distinguished between a power to punish for a contempt which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sittings, which last power is necessary for its self-preservation, and observed:—

"If a *Member of a Colonial House of* Assembly is guilty of disorderly conduct in the *House* whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in Their Lordships' judgment, all that is warranted by the legal maxim that has been cited (*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipso esse non potest*), but the latter is not its legitimate consequence."

o Mandamus lies against Legislature.

No statement of the relationship of the courts to the powers, privileges and immunities of the National and Provincial Assemblies, of their members and committees would be complete without making reference to the total lack of power on the part of the courts of law in this country to direct the legislature by way of *mandamus* to perform its statutory duties. Courts have no power to issue *mandamus*, any writ or direction either under ART. 22 or 170, or S. 45 of the *Specific Relief Act* to the Legislature. All they can do is, subject, of course, to the express prohibitions imposed upon Courts' power to enquire into certain proceedings and acts, to declare its acts as void if they are not in accordance with the Constitution. In the case of *Chotey Lal v. The State of Uttar Pradesh*, reported in 1951 *Allahabad, page* 228, *para.* 13, equivalent to ILR (1951) 2 Allahabad, p. 505, it was observed:

"It is necessary to understand exactly how and in what circumstances Courts declare laws invalid or unconstitutional. Until a bill has become law, the legislative

National Assembly—and its Power to commit for contempt

It now remains to be considered whether and, if so, to what extent, the National Assembly has the power to commit persons for contempt of its authority. It should be remembered that ART. 218 expressly declares that "Court" does not include the National or a Provincial Assembly or any committee of such Assembly clearly suggesting that the Assemblies set up under the Constitution are not Courts—and therefore have not the powers of Courts to punish contempts of their authority. *The Government of India Act, 1935,* in the 3rd and 4th clauses of S. 28 had provided as follows: —

"(3) Nothing in any existing Indian Act, and notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring or empowering the Federal Legislature to confer, on either Chamber or on both the Chambers sitting together or on any Committee or Officer of the Legislature the status of a Court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders or otherwise behaving in a disorderly manner.

"(4) *Provision may be made by an Act of Federal Legislature for the punishment,* on conviction before a court of persons who refuse to give evidence or produce documents before a Committee of a Chamber when duly required by the Chairman of the Committee so to do,

Provided that any such Act shall have effect subject to such rules regulating the attendance before such Committees of persons who are, or have been in the service of the Crown in India and safeguarding confidential matter from disclosure as may be made by the Governor General exercising his individual judgment.

This clear prohibition which was contained in the *Government of India Act* excluded the possibility of the exercise of any powers for punishing contempts being assumed by the Federal Legislature (or by the Provincial Legislature for which see the 3rd and 4th clauses of S. 71). Upon the creation of Pakistan as a result of the coming into force of the provision of *Indian Independence Act, 1947* the *Government of India Act* was adapted by the then *Governor General* and considerable number of modifications of a rather far reaching character were made in its text in order to make it serve as the *Provisional Constitution* of the new *Dominion of Pakistan*. The 3rd and 4th clauses of S. 28 and their counterparts in section 71 were eliminated in 1947 at the time the Act was adapted, but it would appear that right up to the passing of *Pakistan Constituent Assembly (Proceedings and Privileges) Act*, 1955 no provision had been made to invest *the Federal Legislature with any powers by resort to which it could* punish contempts. As has been remarked earlier in the 5th clause of S. 4 of the said Act, this provision was made and the powers, privileges and immunities of the Federal Legislature and even of the Constituent Assembly that passed this law, were placed on par with those enjoyed at the commencement of that *Act* by the *House of Commons* of the *Parliament of the United Kingdom of Great Britain and Northern Ireland* and of its members and committees. Presumably, this provision was copied from ART. 105 of the Indian Constitution which by then had been passed, for, the language employed in the 3rd clause of that Article is practically the same as the one employed in the 4th clause of S. 4 of the *Pakistan Act*.

The result, therefore, is that by reason of the continuance of this law by virtue of ART. 217 read with 6th para of the Fourth schedule and ART. 224, the National Assembly has now the power to punish contempt much in the manner in which the Parliament in England would have been able to do on the day of the commencement of that Act, namely on 28th July, 1955.

Could it be validly argued that the power to punish contempts cannot be affirmed in favour of the National Assembly since that Power being a judicial power (and the enjoyment of which power even by Parliament in England belongs to it by reason of its being a

If any acts of the executive that take away people's life, liberty, property, or the acts of the Federal Government imposing taxes, or of a Provincial Government imposing taxes are at all to withstand an attack in courts of law they must be such as can be justified as being those for which legal authority exists in the shape of some provision of the Constitution or the law passed by appropriate legislative organ of the State.

Moti Lal vs. U. P. Govt.

A very interesting problem concerning the constitutional limits of the executive power came up for consideration before a *Full Bench of Allahabad High Court* in the case *Moti Lal and others v. U.P. Government*, reported in (1951) *Allahabad, p.* 257. The question therein raised was whether the Government of a State under the Indian Constitution had the power to carry on trade or business like running a Government Bus Service in the total absence of a legislative enactment authorising the said Government to engage itself in such trade or business. There was a minority judgment that held that the State Government, in the absence of some law enabling it so to do, *had not* the power to carry on trade or business. The majority decision proceeded upon the view which in the words of Malik C. J., was the following p. (266):

"As regards the right of the State to carry on business or trade without legislative sanction it must be remembered that the State is entitled to hold property and business can mean management of the property or putting it to such use as might yield an income. There is no reason why the State should not have the right to manage its own property and carry on such trade or business as a citizen has right to carry on so long as such activity does not encroach upon the rights of others or is not contrary to law. If money is needed for such an enterprise and the legislature provides funds for it by passing the *Appropriation Act* and *the Finance Act*, there is no reason why the State should not be allowed to buy buses and put them on public roads and ply them for hire. If in the interest of the general public and to provide them with transport amenities the Government decides to run transport buses, it would only be discharging one of its primary duties."

The case of *Blackpool Corporation v. Locker*, (reported in (1948) *All E. R. p.* 85,: (1948) 1 *King's Bench, p.* 349,) was held not to be contrary to this principle since in that case the action of the public authority affected prejudically the right of the citizens which could only be done under the sanction of law.

"It is difficult", said Malik C. J. "to define what is 'Executive Power'. The easiest definition is to say that what is not legislative power or judicial power is executive power, though even this definition is imperfect as the executive can have even judicial and legislative powers. Where there is no written Constitution what is 'executive power' must always depend upon the form of the State and with the change in the form the concept of executive power must also change. In a written Constitution the executive power must be such power as is given to the executive or is amplified, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution."

The expression 'Executive Authority' was also attempted to be explained in the common judgment delivered by Mootham and Wanchoo, JJ., who observed (at p. 281):

"The expression 'executive authority' which is used in the Government of India Act, 1935, is also not there defined, but there can, we think, be no doubt that by that expression was meant those powers which by Section 33 of the earlier Government of India Act, 1915, were conferred on the Governor-General, namely, 'the superintendence, direction and control of the civil and military Government of India.' The question is, as we have said, by no means free from difficulty, but upon the whole we think that we may reasonably infer that the words 'executive power' in the Constitution have

process not being complete, courts do not come into the picture at all It is not the function of any Court or Judge to declare void or directly annul a law the moment it has been promulgated Courts are not a supervisory body over the legislature Their approval or disapproval is not needed for an act passed by the legislature to have the force of law Their function is interpretative In other words upon any particular case coming before them in which the right of any party is involved they decide whether the Act or any part of it is to be disregarded on the ground of its incompatibility with the Constitution '

ART 175(2) lays down that Subject to ART 151 the conduct of a Judge of a Supreme Court or of a High Court shall not be discussed in the National or a Provincial Assembly " This is a clear prohibition on the privilege of the members of these Houses and if they proceed to adversely comment upon the conduct of the judges of these superior courts in this country they will be contravening the Constitution and would not be in a position to invoke the aid of the provisions relating to the privileges of the members to express themselves freely in the Assembly

76 The Limits on the Executive Power

Our Constitution is not based on any rigid adherence to the principle of separation of powers but nevertheless the language employed in its several Articles shows that the powers of the executive legislature and judiciary have been more or less clearly defined Our Constitution talks of the executive authority of the Federation the executive authority of a Province (see ARTs 39 and 73), and vests these authorities in the President of the Republic and the Governor of a Province respectively

What is the nature of this executive power or authority? There is no definition of executive power or authority in the Constitution itself and it is to be presumed that the framers of the Constitution used it in its ordinary political sense According to the *Wharton's Law Lexicon* Executive is that branch of Government which puts the laws into execution as distinguished from the legislative and judicial branches The body that deliberates and enacts the law is legislative The body that judges and applies the laws in particular cases is judicial and the body that carries the laws into effect or superintends the enforcement of them is executive

Considering that the power of the Federal executive shall extend to all matters with respect to which Parliament has power to make laws it would not be wrong to say that the business of the executive is not merely to carry out the laws made by the Legislature but that it also extends to such matters as are within the competence of the Legislature to make laws Thus it would seem the *executive* can do all that is not forbidden by the Constitution and law The difficulty will arise only when any of its actions is challenged as being violative of any of the rights which have been conferred upon the individuals either by the Constitution or by the law The executive is not above law and it must when called upon to defend its action show the legal authority whence it derives the source of its power If, however it is not able to show this its acts, in so far as they conflict with legally protected interests of individuals or groups must be declared by courts as being beyond its jurisdiction and authority The Execut and the Law

To illustrate this constitutional position we might refer to some of the provisions that impose limitations on the State action Nobody can be deprived of his life liberty or property, says the Constitution save in accordance with law (See ARTs 5 and 15) Similarly, no taxes could be imposed for the purpose of Federation except by or under the authority of an *Act of Parliament* (see ART 60) nor can a tax be levied for the purpose of Province except by or under the authority of the *Act of Provincial Legislature (see ART 93)*

exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the Legislature . . . . .

"The limits within which the executive government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though Federal in its structure, is modelled on the British Parliamentary System where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law, though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.

"The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."

Thus while the Court upheld the right of Government to do business without there being any law passed by the Legislature expressly authorising it so to do, the Court added:

"Specific Legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the government to carry on their business, a specific legislation sanctioning such course would have to be passed."

The Steel Seizure case (1951)

We may, in this connection notice the case of *Youngstown Sheet and Tube Co. vs. Sawyer* (1951) 343, U.S. 579 (also called the Steel Seizure case) where the nature of executive power which the President of U.S. could exercise consistently with the Constitution came in for consideration at the hands of the Supreme Court of that country. The case arose out of an Executive Order passed by President Truman directing the Secretary of Commerce to take possession of and to operate, most of the steel mills throughout the country and to promulgate additional rules and regulations consistent with the policy proclaimed therein. The President claimed that he had the power to act in the way he did in order to avoid national catastrophe which in his judgment must result from carrying into effect the threat of strike that had been given by the Union of the employees of the Steel Industry. Admittedly, there was no statutory authority for the President to seize public property in this fashion, and the question that arose for adjudication was whether an American President had any inherent executive authority to act in the way Truman did in order to meet the emergency.

The Court rejected the contention that the President had any such authority.

"The President's Power", said Mr. Justice Black who wrote the Opinion of the Court, "if any, to issue the order must stem either from an Act of Congress or from the Constitution itself. There is no statute that expressly authorises the President to take possession of property as he did here. Nor is there any Act of Congress to which our attention has been directed from which such a power can fairly be implied... It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this ower to the President. The contention is that Presidential power should be implied m the aggregate of his powers under the Constitution. Particular reliance is placed ovisions in ART. II, which say that 'The executive power shall be vested in a Presi- . . . ; that 'he shall take care that the laws be faithfully executed'; and that 'Commder-in-Chief of the Army and Navy of the United States.'

substantially the same meaning as 'executive authority' in the *Act of 1935, and that it is* the superintendence, direction and control of the civil Government of a State which is vested in the Governor of the State It follows, therefore, we think, that although an executive act by a State Government may not be authorised by legislative enactment it will nevertheless be within the executive power of the State if

(i) it is not an act which has been assigned in the Constitution of India to other authorities or bodies such as the legislature, the judiciary or the Public Service *Commission* ,

(ii) it is not contrary to the provisions of any law, and

(iii) it does not encroach upon or otherwise infringe the legal rights of any member of the public

"It has not been shown to us that the act of the State in putting its own buses on the roads is contrary to any law or that, taken by itself, that act infringes the legal *rights of any member of the public We see, therefore, nothing illegal per se* in the State Government running a bus service on the public highway "

The minority judgment of Aggarwala J, however proceeded upon the following basis (p 329) —

"The Indian Constitution is a written Constitution Any powers that the different organs of Government enjoy must have their source in that Constitution or in what is *necessarily implied from what is stated therein Thus it may be laid down that the* executive powers of the Governments in India must be confined to

(a) powers expressly conferred by the Constitution,

(b) powers expressly conferred by the legislature, and

(c) implied powers

Implied powers are also of two kinds —

(i) those which vest in the Government by virtue of what is called its primary and inalienable functions or sovereign power, i e defending the State against external and internal enemies and maintaining law and order and

(ii) those which are necessary for the exercise or performance of a general power conferred or duty enjoined by the Constitution of statutory enactments

It is submitted, with respect that Aggarwala, J, in the extract cited above takes a somewhat narrow view of the scope of executive power

In the case of *Rai Sahib Ram Jawaya Kapur and others versus the State of Punjab*, decided by the Supreme Court of India, reported in 1955 S C (p 549) the views of Aggarwala J, referred to above, have been disapproved and considered as "narrow and unsupportable " Mukherjea J, while delivering the judgment of the Supreme Court in the case, remarked "It may not be possible to frame an exhaustive definition of what executive function means and implies *Ordinarily, the executive power connotes the residue of governmental* functions that remain after legislative and the judicial functions are taken away " He further went on to say that (p 556) 1955 S C (Ind a) p 549

"The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another The executive indeed can

as 'subordinate', as it is usually equipped with the force of law. Owing to the wide discretionary power conferred by the instrument of authority, it also enjoys to a great extent immunity from judicial control. The Government is thus being instituted as the second legislature and the ordinance changed into a law. Whatever are the reasons for these changes, it would be futile to minimise the dangers which result from the present lack of constitutional balance. These dangers are real dangers, despite the fact that they are so far not of actual, but of a potential character only. Though it is true that upto the present no British Government has made full use of all the powers which confident Parliaments have bestowed upon it, these powers exist and their very existence may—in changed circumstances—constitute a serious threat to the democratic foundation of the British Constitution." (P. 147.)

Road to Moscow.

This tendency to acquire more and more powers for the Executive has been described somewhat forcibly by the caption, "Road to Moscow", under which it has been dealt with by Professor G. W. Keeton in his recent book, "The Passing of Parliament". (1954, Second Ed. Ernest Benn. Ltd. London).

New Despotism.

Lord Hewart wrote in 1929 a very stimulating and provocative dissertation on the menace of delegated legislation and called it "New Despotism". The book coming as it did from the *Chief Justice of England* had a profound influence on the legal thought in the country. Several other books have endeavoured to do the same thing: of these mention may be made of books like (1) "*Robson's Justice and Administrative Law*", (2) C. K. Allen's "*Bureaucracy Triumphant*", "*Law and Orders,*" (3) Dr. Port's "*Administrative Law*" and (4) Mr. Glleson Robinson's "*Public Authorities and Legal Liability.*" Some of these books underlined the thesis that had been advanced so ably by Lord Hewart, namely, that there was a serious threat to the rule of law and parliamentary sovereignty and that the ever increasing encroachments and assaults directed against these main pillars of the Liberty of the Individual ought to be resisted. It was largely due to the influence wrought on the public mind by this type of crusade that the Lord Chancellor, Lord Sankey, in 1929, in response to the state of public feeling upon the subject, appointed the *Ministers' Powers Committee.* And of the report of this committee something will be said later in this book.

Lord Hewart on New Despotism.

Lord Hewart's complaint was directed not so much against the concept of delegated legislation as against the tendency to concentrate arbitrary power in the hands of the executive to such an extent that the courts of law are rendered helpless "to maintain the rule of law". This, he said, had produced "Administrative Lawlessness." "When it is provided that the matter (which affects rights of citizens) is to be decided by the Minister, the provision really means that it is to be decided by some official, of more or less standing in the department, who has no responsibility except to his official superiors. The Minister himself in too many cases, it is to be feared, does not hear of the matter or the decision, unless he finds it necessary to make enquiries in consequence of some question in Parliament. The official who comes to the decision is anonymous, and, so far as interested parties and the public are concerned, is unascertainable. He is not bound by any particular course of procedure, unless a course of procedure is prescribed by the department, nor is he bound by any rules of evidence, and indeed he is not obliged to receive any evidence at all before coming to a conclusion. If he does admit evidence, he may wholly disregard it without diminishing the validity of his decision. There is not, except in comparatively few cases, any oral hearing, so that there is no opportunity to test by cross-examination such evidence as may be received, nor for the parties to controvert or comment on the case put forward by their opponents. It is, apparently, quite unusual for interested parties even to be permitted to have an interview with anyone in the department. When there is any oral hearing, the public and the press are invariably excluded.

The Court gave reasons for saying that none of these provisions by itself, nor again taken in conjunction with the remaining ones furnished any basis for defending the existence *of such a power in favour of the President* Mr Justice Jackson put forward the objection tersely when he repudiated the suggestion that the words the executive power occurring in ART II meant grant of all the executive powers of which the government is capable, in words that follow

'The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III and the description of its evils in the declaration of independence leads me to doubt that they were creating their new executive in his image Continental European examples were no more appealing And if we seek instructions from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but *regard it as an allocation to the presidential office of the generic powers* thereafter stated' (See p 641)

A sum up and conclusion

The fundamental question whether in *all cases* executive action to be immune from a challenge in the Law Courts must necessarily flow from a legal source (whether that source is conceived to be the Constitution or law) must therefore be answered in the negative It is not correct to say that the executive is entitled to do only that which it is expressly empowered by the Legislature to do The limitation on the scope of executive action which identifies it with the field of legislative competence primarily appears to have been due to the operation of the federal principle the paramount purpose which was thus sought to be realized by this means was to avoid clashes of jurisdiction between the Provincial and the Federal executive action It is true that powers of the several organs set up under the Constitution *must be derived from the language of the Constitution* but there *is no* provision in the Constitution which expressly limits the executive action to being confined *only* to the implementation of the laws The right to challenge administrative action accrues to the subject only in those cases where as a necessary result of such an action his rights are invaded It is in those cases that the executive must justify its action by appeal to the existence of some legal source whence its power to act in a particular manner could be said to flow The Latin tag *Salus Populi suprema lex* cannot be used by government as an excuse for pursuing its own idea of the public interest without regard for legality Substantially, therefore it would be correct to say that the executive is the repository of *all* power which it is necessary to have in order to run the administration of the country and to promote the purposes for which Governments are established and it is only in respect of matters that are forbidden to it by or under the constitutional provisions that its authority must be declared to be confined within those limits The Executive action cannot override the Constitutional limitations nor can it be suffered to violate the *legal rights of any person Where a law directs the executive to do certain things it is* duty bound to carry out that mandate, but this is not the same thing as saying that unless there is express provision of the law enabling the executive to do certain things it cannot do those things

Modern Executive tends to be despotic

The modern executive, however, is increasingly becoming despotic There is an attempt to concentrate not only an enormous amount of administrative but also the legislative and judicial powers in the hands of the executive, with the result that the power of the executive has swelled to unusual proportion and has upset the equilibrium of power relations in the modern States "The democratic method of law making by a representative Assembly", says M A Sieghart in his book '*Government by Decree*, is being superseded in many fields by the autocratic method of Governmental legislation Though this legislation is delegated and controlled by Parliament, it can no longer be described

On 21st June, 1944, the *House of Commons* in a resolution passed by it, ordered "That a *Select Committee* be appointed to consider every Statutory Rule or Order (including any *Provincial Rule made under Section 2 of the Rules Publication Act*, 1893) laid or laid in draft before the House, being a Rule, Order, or Draft upon which proceedings may be taken in either House in pursuance of any Act of Parliament, with a view to determining *whether the special attention of the House should be drawn to it on any of the following* grounds :—

* * * * * * * * * * * *

(2) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specified period;

(3) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

(4) that there appears to have been unjustifiable delay in the publication of it; and

(5) that for any special reason, its form or purport calls for elucidation.

These and such other attempts have been made in England to exercise all the care and caution which human ingenuity can suggest to counteract the *mischief which is likely* to result if delegated legislation is not kept within a well defined sphere of its operation.

Report of the Select Committee on Delegated Legislation.

It would be instructive for any student of Constitutional history of the working of *Parliamentary Institutions in England to read the report of the Select Committee on Delegated Legislation, dated* 27th October, 1953. This was the Committee that had been appointed by resolution of the House of Commons on 18th December, 1952, to consider "*in what respects the existing procedure, by which the control of this House of Commons*' delegated legislation is exercised, needs to be improved and supplemented and by what means this can be achieved." The report contains useful material and the following *extracts reproduced therefrom, throw a considerable light on the political and legal aspect* of delegated legislation:

"(4) Your committee have been asked, in the first place, to consider the existing procedures by which the control of this House over *delegated legislation* is exercised.

(5) The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate: Parliament is supreme and the power of the Queen in Parliament to legislate is unlimited. On the other hand, the power of *legislation* as *granted* by Parliament to another body or persons is limited by the exact extent of the delegated power so granted; the purported exercise of power beyond the extent so granted will be *ultra vires* and ineffective.

(6) The legality of an Act of Parliament cannot be challenged in or by the Courts of Law, but the question whether subordinate legislation is within the power delegated by Parliament can be and is challenged in and by the Courts of Law.

(7) Frequently, subordinate legislation is issued in the form of an Order-in-Council, that is an Order expressed to be made by Her Majesty by and with the advice of Her Privy Council and signed by the Clerk of the Council.

But not every instrument so issued is an enactment of subordinate legislation under a power delegated by Act of Parliament. Orders-in-Council are of two kinds and they differ fundamentally in constitutional principle. The two kinds are :—

(a) those made in virtue of the Royal Prerogative, and

(b) those which are authorised by Act of Parliament.

The Royal Prerogative is that which remains of the original sovereign power of the

Finally, it is not usual for the official to give any reasons for his decision " (pp 43 44)

This procedure in the opinion of *Lord Chief Justice* was one in marked contrast with the usual procedure which is followed in courts of law The ingredients that constitute the essence of judicial procedure are the following —

(1) that the Judge is identified and is personally responsible for the decision,

(2) the result is formed by the uniform application of the principles which are known and established, and finally,

(3) that all the parties to the controversy are present and fully heard

In other words, a decision of a court in every important respect sharply contrasts with the edict, however benevolent of some hidden authority, however capable, depending upon the process of reasoning which is not stated, and the enforcement of a scheme which is not explained The administration of the law of the land in the ordinary courts pre supposes, at least personal responsibility, publicity, uniformity and the hearing of parties

Menace of Delegated Legislation

It was as a result of this crusade, that was carried on by some of the greatest of the constitutional lawyers of England, that Mr Dingle Foot on 27th of January 1937, moved a somewhat unusual motion in the *House of Commons* "That in the opinion of this *House*, the power of the executive has increased, is increasing, and ought to be diminished " He explained the two aspects of the subject to which his motion related The first was the continuous encroachment of the Executive at the expense of the House of Commons with the result that ' this House becomes more and more subservient to the Government of the day " The second was the attempt that has been deliberately made in Statute after Statute in recent years to invest Government Departments with completely arbitrary powers (See House of Commons Debate, 27th January 1937, Official Report cc 1026 seq)

Defence of Delegated Legislation

On 17th of May, 1944, another *Member of Parliament*, Mr Molson moved a resolution asking for the setting up of a *Select Committee* to carry on a continuous examination of all *Statutory Rules and Orders* and other instruments of delegated legislation presented to Parliament He stated in his speech some of the reasons that tended to show why delegated legislation is not only desirable but necessary In the first place, it economises the time of the legislature It is flexible in that it can limit the application of legislation by time, location, ownership, age or otherwise, and all these limitations are capable of being changed at short notice The value of the delegated legislation further lay in the fact that in sudden emergencies, it enables the legislature to dispense with long deliberations and to arm the Executive with the special powers that are, having regard to the exigencies of practical politics, necessary In view of the changed conditions legislature is forced to influence the economic life of the country by physical measures, and when this happens powers of this kind are almost inevitable When we are to regulate the economic life of the State by such devices as imposition of import duties, fixation of quotas, issuing of licences, award of bounties and by several such other expedients, it is obvious that some power has to be given either to the Treasury or the Tariff Advisory Committee to give effect to the policy of Parliament He pointed out that courts were helpless to protect the people's liberty wherever in pursuance of the powers of delegated legislation any one was threatened by its indiscriminate and irresponsible use "The courts are only suited for the purpose of determining what is legal and what is illegal What we are primarily concerned about are Orders and Regulations issued by the Executive which are perfectly lucid and legal, but which are bureaucratic, vexatious, embarrassing and harassing to the subject Whether or not this House should approve an Order of that kind is a political decision which only a legislature is competent to make "

(a) Legislative Business—and Procedure.

The procedure by which legislative business, as any other business of the National Assembly, is to be transacted is regulated by the rules framed by it [*See ART. 55*(a)]. These rules of procedure and standing orders are designed to bring about expeditious disposal of legislative business and to enable the members to exercise effective control over the business of Government. Due to the importance that attaches itself to the rules of Legislature, the rules in force governing the business of the National Assembly have been included in the Appendix, and all that is necessary in the present context is to outline the broad features of the procedure concerning the passage of a bill from its various readings in the House till it is finally passed by the Legislature and becomes Law.

The first step is taken when notice of a motion for *leave to introduce* the bill is given. A copy of the bill along with the statement of objects and reasons is made available within the prescribed time before the motion "that the bill be taken into consideration", can be put before the House. If the motion is passed, we reach the second phase and at that stage the principle of the bill is discussed and the question that the bill be read a second time, is thereafter put and if the motion is carried, the second reading of the bill is said to have taken place. After this, usually the bill is sent to a Select Committee (which is invariably presided over by the Minister of Law,) for a detailed examination of its provisions and for the consideration of any amendments that may have been moved in the House, to modify the bill. The Select Committee is required to examine the bill in the light of the discussion that might have taken place in the House and then to submit its report. The bill is then, along with the report of the committee, sent back to the House, and the House resumes the consideration of the bill as amended by the Select Committee, and this time the discussion takes place mainly with a view to bringing about suitable alterations of language in the text of the bill. It is usually not open at this stage for any member to deal with the principle of the bill or to oppose it. After full discussion of any amendments that may have been tabled, the Speaker takes up the bill clause by clause and thereafter puts the bill as a whole to the House. If it is passed by the House it is then sent to the President for his assent.

What actually happens in the House, during the course of the discussion, affords little information about the real extent of the work which has been put in "behind the scenes" for preparing the ground to initiate legislation. The first step, after the Cabinet has decided to have a measure put through the House, is for the Government draftsman to prepare the bill. Invariably when the bill in the draft form comes to the Cabinet for consideration, a committee of the Cabinet deals with it in order to give effect to the view-points of several Ministers that may be interested in the provisions or principle of the bill. Expert opinion is made available in the light of which the provisions of the bill are finally formulated by the Draftsman.

Inside the House, of course, it is the Minister incharge of the Bill who has to face the 'turns' and 'twists' of the debate with a view to securing the passage of the bill during the course of its various stages. He is, as the expression goes, there to pilot the bill. The following extract fairly depicts the situation with which the Minister who is piloting the bill is confronted : (See 'Parliament' by Sir Courtna Ilbert, p. 63)

> "Inside the House the Minister is battling with amendments, some from enemies anxious to make the Bill unworkable or to reduce its operations to a minimum, others from indiscreet friends. Amendments are often framed hastily, without reference to grammar, logic, consistency or intelligibility. They are apt to be crowded in at the beginning of each clause or sentence, with the view to obtaining precedence in discussion. The language of a law ought to be precise, accurate, and consistent, but the atmosphere of a crowded or heated assembly is not conducive to nicety or accuracy of expression. Decisions often have to be taken on the spur of the moment, and in view of the possi-

Crown to legislate without the authority of Parliament, e g power to declare a rigid blockade of enemy territory in time of war

This power is in no sense delegated and Orders in Council issued in exercise of "this power are not subordinate, they are original legislation Your Committee are not concerned with them in this report "

Before, however, we could properly deal with the problem of Delegated Legislation as it affects the interpretation of our Constitution, we may, with advantage first study the important duties and functions of Legislature and then see how far it would be constitutionally justified in delegating its power of law making to the executive

77. The Functions of the Legislature

The main function of the Legislature, in a parliamentary democracy is to produce the personnel of the Cabinet to form the Government so that the administration of the country in accordance with its mandates should be carried on

Speaking in the *House of Commons* on the 10th of November 1951 Mr Harold Macmillan summed up the other important functions of the Parliament as follows

"Parliament has of course three main purposes first to vote supplies second to deal with legislation mainly that put forward by the Government of the day but third and of equal importance what Mr Asquith (Sic) used to call Grand Inquest of the Nation' I think all of us know what it means, it means chiving the Ministers "

The business of the Legislature thus falls into three broad categories *legislative financial* and *critical* it has to pass laws, to vote supplies and keep the conduct of Government under the searchlight of public criticism

In modern times when the concept of the social welfare state has invaded the

emergency like wartime or other abnormal periods in the life of the state the policy of the Government is to narrow down the initiative of private members to put through legislation Government has practically the command of the parliamentary time In Pakistan so far ever since its inception not a single private member s bill has reached the status of a law

The legislative procedure of the Houses and the requirement as to the mode of taking decisions by majority vote etc are mentioned in *Art* 55 in the case of the National Assembly, and in *ART* 88 in the case of a Provincial Assembly The decision is to be taken by a majority of the members present and voting and the person presiding is not entitled to vote except when there is an equality of votes, in which case ' he shall have and exercise a casting vote" The National and also the Provincial Assembly has the power to act notwithstanding any vacancy in the membership thereof, and the proceedings of the Assembly are not to be rendered invalid only for the reason that some person who was not entitled to vote sat or voted or otherwise took part in the proceedings, and the quorum is fixed at not less than 40 members being present during the meetings of the Assembly, and a duty has been cast upon the person presiding when his attention is drawn to the fact that less than 40 members are present, either to adjourn the Assembly or to suspend the meeting until at least 40 members are present Subject to these constitutional provisions, both the National and Provincial Assemblies are masters of their procedure and can prescribe by rules the kind of procedure in accordance with which they would like to transact the business assigned to them under the Constitution ARTS 55 and 88

be laid before the National and Provincial Assemblies respectively a *financial statement* in respect of every financial year. This statement must show the sums required to meet the expenditure described by the *Constitution* as *expenditure charged upon the Federal Consolidated Fund* in *ART.* 97, and it must further separately show the sums required to meet other expenditure proposed to be made from the *Federal Consolidated Fund* in the case of *Federal Affairs*, and *Provincial Consolidated Fund* in respect of *Provincial Affairs*, and the aforesaid Annual Financial Statement shall separately show expenditure on revenue account from other expenditure.

The items of expenditure charged upon the Federal and Provincial Consolidated Fund could be discussed in, but shall not be submitted to the vote of, the relevant Assembly. As to the remaining expenditure it shall be submitted to the relevant Assembly in the form of demands for grants and it is reserved to such Assembly either to assent to or to refuse to assent to any demand or to assent to any such demand subject to reduction of the amount specified therein. (See *Arts. 65 and* 98). In each case, the demands for grants can only be made on the recommendation of the President or the Governor as the case may be.

The next stage in the financial procedure is for the Government to introduce a bill and provide for the appropriation out of the Consolidated Fund of all moneys required to meet the grants made by the relevant Assembly and the expenditure charged on the Consolidated Fund, but the moneys thus required to be appropriated shall not exceed in any case the amount shown in the statement previously laid before the relevant Assembly. (See *ARTs. 66 and* 99). No amendment can be proposed to any such bill which shall have the effect of varying the amount or altering the destination of any grant so made, and the moneys can only be withdrawn from the Federal Consolidated Fund under the authority of the law passed in accordance with the provisions of *ART.* 66 in relation to Federal Consolidated Fund and *ART.* 99 in respect of Provincial Consolidated Fund. It is necessary to bear in mind this limitation on the power of Government to appropriate moneys from the Consolidated Fund, for, unless it is able to get the appropriation bill passed, it will not be able to withdraw any amount from the Federal Consolidated Fund, with the result that the affairs of the Government will come to a stand still. *ART.* 67 makes provision for Supplementary and Excess Grants being made if in respect of any financial year it is found that:

(a) the amount authorised to be expended for a particular service for the current financial year is insufficient, or that a need has arisen for expenditure upon some new service not included in the Annual Financial Statement of that year, or

(b) that any money has been spent on any service during a financial year in excess of the amount granted for that service for that year.

The President has also the power "to authorise expenditure from the Federal Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not", and he "shall cause to be laid before the National Assembly a Supplementary Financial Statement, or as the case may be, an Excess Financial Statement setting out the amount of that expenditure". This Supplementary Financial Statement or Excess Financial Statement shall be drawn up in accordance with, and be subjected to the same procedure as applicable to the Annual Financial Statement contained in *Arts. 63 to 66*. A parallel provision in relation to the administration of Provincial affairs is contained in *Article* 100.

In Arts. 68 and 101 are mentioned the powers of the relevant Assemblies to make any grant in advance in respect of an estimated expenditure for a part of any financial year, pending the completion of the procedure prescribed under the Constitution for the voting of such grants (*ARTs. 65 and* 98), and the passing of *Authorisation Laws* in accordance with the provisions of the Constitution in relation to that expenditure (*Arts. 66 and* 99). It can

bility of a snap division At last the amendments are cleared off the paper, the new clauses, often raising the same questions are disposed of, and the much buffeted craft with tattered sails, the deck encumbered with wreckage, and with several ugly leaks in her hold, labours heavily into a temporary harbour of refuge There is a short interval for the neces [illegible] may or may [illegible] necessary to [illegible]

(b) F[illegible] cial Procedure

The Financial Procedure has been described in our Constitution in *ARTs 58 to* 68, n respect of Federal voting of supplies and the passing of money bills and in *ARTs* 91 *to* 101 n respect of similar matters in their relation to provincial Administration It would be useful to describe the substance of these Articles so that the extent to which the Legislature has, under our Constitution, the control over the financial affairs of our country could be appreciated

[illegible] hich having regard [illegible] which if enacted [illegible] ues of the Federa [illegible] the recommenda ion of the President (*ART* 59) and in the case of the Provincial Assembly except on the recommendation of the Governor (*ART* 92) This ensures that private members not itting on the treasury benches have no right of initiating measures that have financial im plications except by procuring in the first instance the recommendation of the Federal or Provincial Cabinet Money bill has been so extensively defined as to include all conceiv able cases of measures that have financial implications and the question whether or not a bill is a money bill is a matter which it is declared by *ARTs* 58(3) and 91(3) to be ex lusively within the competence of the Speaker to determine and a certificate under his hand to the effect that a certain bill is a money bill is conclusive for all purposes and *shall not be questioned in any court*

ARTs 61 *and* 62 as also their counterparts in the Provincial sphere namely *ARTs* 94 *and* 95 describe the procedure of showing the receipts of the revenues of the Government as also provide for laws being passed by the Parliament and the Provincial Legislature (in relation to their respective spheres) with regard to the matters relating to heir custody etc the Federal Consolidated Fund ' shows all the revenues received by he Federal Government all loans raised by that Government and the moneys received by t in payment of any loan All other public moneys received by or on behalf of Federal Government shall be credited to the public account of the Federation All matters re ating to the Federal Consolidated Fund such as the payment of moneys into such a fund the withdrawal of moneys therefrom the custody of public moneys other than those credited o such a Fund received by or on behalf of the Federal Government, their payment into the public account of the Federation and the withdrawal of moneys from such account and all matters connected with or ancillary to matters aforesaid, can be regulated by an Act of Parliament, and until provision in that behalf is so made by rules made by the President The public account of the Federation would include payments made to it of all moneys received by or deposited with any officer employed in connection with the affairs of the Federation in his capacity as such, other than revenues or public moneys raised or received by the Federal Government and any court to the credit of any cause, matter, account or person in connection with the affairs of the Federation

Similar provisions are mentioned by the Constitution as being applicable to the provincial sphere of Administration

The Constitution imposes a duty on the President as also on the Governor to cause to

rendered to him. But as with the passage of time the work of the administration increased, the kings were put to the necessity of finding the means for financing the personnel of administration. Much of the wealth of the English kings, for instance, came from the feudal tenants and there were the customary dues that were payable when the eldest son of the king was knighted or his eldest daughter got married. The king was also entitled as of right to accept *fees* in the courts in which justice was administered, and not infrequently he would sell out his rights of jurisdiction to administer justice to local authorities. The payment of *fees* in court which is a feature of our contemporary administration is the survival of this, not entirely indefensible, practice which was prevalent during the middle ages. For the first time in the English constitutional history it is with the passing of the *Magna Charta*, that one sees the attempt being made to impose limits on the right of the King to raise revenue, and this process went on acquiring importance till we come to the *Bill of Rights* of the year 1688 wherein it was expressly declared that the imposition of taxes without parliamentary authority was illegal. The case of *Rex v. Hampden, of the year 1637, reported in 3 State Trial* 825, is of much importance precisely on this account: it would be recalled that Hampden had refused to pay the *Ship-money Tax* which the king had imposed "in exercise of his prerogative." It should also not be forgotten that the *Court of Exchequer* decided in favour of the *Crown's* right to impose such a direct tax, and it was only in 1640 that the long Parliament repudiated this right of the Crown to impose direct taxation.

The right to control the purse, the right to vote supplies, has played a decisive role in the making of democratic institutions. No student of History can forget that "*No taxation without representation*" was the sacred slogan of those warriors who fought the *American War of Independence*.

If taxation has become a normal feature of our political life, it is essentially because the idea of the role of the modern State has, in our day, undergone complete transformation. The Modern State has to carry on numerous services for the purpose of promoting public welfare and in the fulfilment of this task it must have adequate revenues. As far back as 1874, in England, the income-tax assessed was 3d in the £, and Gladstone sought to justify, as if apologetically the imposition of such a tax because of the existence of war conditions and he promised to the nation that he would soon have it abolished.

Mode of Construing Fiscal Acts.

The foregoing facts been recounted to explain why courts of law in their interpretation of taxing Acts exercise a great deal of judicial sagacity in construing them *strictly* and in favour of the subject. Any attempt to avoid payment of taxes, if it is within the law, does not incur any odium or provoke any moral censure. In the words of Lord Sumner, in the case of *Levene v. Commissioners of Inland Revenue*, reported in (1928) *A.C.* 217: *H.L.*:—

"It is trite law that His Majesty's subjects are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them."

Similarly, the observations of Lord Tomlin, in the case of *Commissioners of Inland Revenue v. Duke of Westminster* (1936), *A.C. p.*1, indicate the same approach :—

"Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, however unappreciative the Commissioners of Inland Revenue, or his fellow-taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has

even make grants for meeting any unexpected demand upon the resources of the Federation or the Province, as the case may be, when on account of the magnitude or the indefinite character of the service, the demand cannot be specified with the details ordinarily given in an Annual Financial Statement It can also make an exceptional grant which forms no part of the current service of the current financial year, and the Parliament and the Provincial Legislature shall have the power to authorise by law withdrawal of moneys from the Consolidated Fund for the purposes for which the said grants are made It should be remembered that in respect of a money bill there is no power with the President to *return* the same bill within the meaning of *ART* 57 (1) (c) He can either assent to the bill or declare that he withholds assent therefrom But he cannot return the money bill to the Assembly with a message requesting that the bill or any specific provision thereof be reconsidered, and that any amendments specified by him in the message be considered Although theoretically it is possible for the President to declare that he withholds assent

ce, it would be impossible

would be tendered to him

ting the money he requires

for the purposes of carrying on the administration of the country

In Chapter III of Part VI are mentioned provisions relating to Audit and Account and a reference to its *ARTs from* 120 *to* 124 would show that the accounts of the Federation and of the Provinces shall be kept in such form as the Comptroller and Auditor General may with the approval of the President prescribe The reports of these officers relating to the accounts of the Federation shall be submitted to the President, who shall cause them to be laid before the National Assembly, and the reports relating to the accounts of a Province shall be submitted to the Governor who shall cause them to be laid before the Provincial Assembly The Comptroller and the Auditor General of Pakistan are appointed by the President and their terms and conditions of service, and the term of office, are determinable by an Act of Parliament and until they are so determined by the rules made by President In order to ensure their independence, there is a constitutional guarantee extended to the holders of the office of Comptroller and Auditor General that their removal can only be effected in the manner and on the grounds on which a Judge of a High Court can be removed In order to ensure that they do not misconduct themselves as a result of any corrupt inducement offered to them, namely that they would be employed after their term of office is over, they have been rendered ineligible for further appointment in the service of Pakistan It would be noticed that there are no separate Auditors General and Comptrollers General for the Federation and Provinces In this respect, too, the Federal principle has been violated in our Constitution

We have reviewed the main steps that are involved in the passing of the budget, an event which people living in parliamentary democracies rightly regard as a matter of considerable importance Its importance lies in the *opportunity* which such an occasion provides to the representatives of the people to review the financial position of the country and to criticise, wherever necessary, the actual working of the administration

Excursus on the Historical origins of the Government's Power to tax the subjects

Students of English constitutional history know that the entire struggle between the *Stuart Kings* and their *Parliaments* centred around the question of taxation The Kings wanted money to carry on the Government and the Parliament refused to vote supplies except in accordance with their notions of what ought to be made available to their kings

It is not sufficiently realised that the old concept of administration by a king was that he was to "live of his own" The king invariably was the greatest land owner in the country and this constituted the principal source of his income He carried on the administration of the country through his servants whom he paid for the services they

legislative powers being exercised by the executive? These questions raise a fundamental issue of considerable importance in the study of constitutional law.

Delegated Legislation and the Theory of Separation of Powers.

The problem of delegated Legislation may, to begin with, be viewed as being a concomitant result of the acceptance of the theory of separation of powers. The doctrine of the separation of governmental powers means theoretically that there are different departments or branches of Government acting as the agents of the sovereign power, that there are governmental functions corresponding to such branches; and that "each one has its own powers, possessed by no one of the others and which it cannot delegate to any other branch of Government, which cannot be exercised by any other branch of the Government, which it cannot be compelled to exercise by any other department and of which it cannot be deprived by any other branch of the Government; and that it cannot exercise any of the powers of any other branch of Government or deprive such branch of its power or compel it to exercise them."

This passage from *Willoughby's Constitutional Law of the United States* illustrates the approach which the Judges adopt while examining the extent of the inherent authority of any one organ of the State abdicating its duty to exercise that power. The founders of the American Constitution, as has been pointed out earlier, were very much influenced by the doctrine of separation of powers and the effect they have given to the theory of separation of powers becomes manifest if the language and the scheme of the U.S. Constitution are carefully scrutinised. If the principal organs of the State derive their power from the Constitution, they are by that very circumstance deemed to be charged also with the duty of exercising that power themselves. Nagatively, they are debarred from creating, by means of delegation of these powers, other agents for the purpose of discharging the functions which devolve on them by virtue of the mandate contained in the Constitution.

"It is not a correct statement of the principle", says Willoughby in his *Constitution of the United States*, Second Edition at page 1619, "of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another.

"Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions . . .

"Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested."

Increase of the Legislative Business in Modern States.

The Legislatures in the modern States have to perform very many duties, and the amount of legislative work they are called upon to transact is so enormous that if, in some manner, schemes were not designed to delegate at least a part of that work to other subordinate organs and agencies, it would not be possible for them, having regard to the time and information at their disposal, to carry through this stupendous programme of providing for the detailed system of law that is required of them. The necessity to delegate some part of the legislative authority is there; the *only* question is about the *limits* within which such an authority could be delegated. Even in America, under the stress of modern conditions, the Legislature finds it necessary to hand over considerable amount of legislative power for being exercised by subordinate agencies. The concept of the welfare state postulates the assumption by the State of the duty of fulfilling functions and duties of a far-reaching character. The growth of the modern technology, the swift progress of the modern States in the industrial and economic fields, have forced Legislatures to delegate

so ordered his affairs that the amount of tax sought from him is not legally claimable

' There may, of course be cases where documents are not *bona fide*, nor intended to be acted upon, but are only used as a cloak to conceal a different transaction No such case is made or even suggested here The deeds of covenant are admittedly *bona fide*, and have been given their proper legal operation They cannot be ignored or treated as operating in some different way because as a result less duty is payable than would have been the case if some other arrangement—called for the purpose of the appellants' argument the substance'—had been made "

To the same effect again are the observations of Lord Greene in the case of *Lord Howard de Walden v Inland Revenue Commissioner*, reported in 1942 1 K B 389 at p 397 —

' For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents of whom the present appellant has not been the least successful It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers "

The very term unlawful as applied to the conduct of a person who has contravened a provision of revenue law has to be construed somewhat differently Now the word 'unlawfully' ", observed Griffith C J in the case of *Lyons v Smart*, (1908) 6 *C L R p* 143 ' is a word commonly used in statutes creating crimes misdemeanours and minor offences and in such acts it is used in two shades of meaning, one when referring to an act which is wrong or wicked in itself—recognised by everybody as wicked—as for instance when it is used with reference to certain sexual offences or with reference to acts which are absolutely prohibited under all circumstances the other when referring to some prohibition of positive law The Customs Act of 1901 has nothing to do with what is right or wrong or virtuous It contains certain arbitrary rules which the legislature lays down What is wrong is wrong because the Act says so and for no other reason The word unlawfully must, therefore, there being no other relevant law be read in that context as meaning 'in contravention of the provisions of this Act' '

Discussion on Budget

By means of criticism which the legislature has the opportunity to offer during Discussion on Budget, it is able to exercise a great deal of influence on the shaping of political policy as also on the details of administrative organisation of the State

(c) Legislatur—as Grand Inquest of the Nation

Over and above this right of the Legislature to review the work of administration annually, any member could ask *questions* from the Minister in Charge of a given department with a view to eliciting information on any matter of public importance This is the 'Grand Inquest of the Nation', of which Harold MacMillan speaks and it is, as one can readily see, a very useful method of keeping ministerial conduct of public affairs under the perpetual search light of criticism by members of the Legislature

78 Prohibition against Delegated Legislation

How far can a Legislature under our Constitution abdicate the exercise of its legislative power? To what extent can the Legislature delagate its authority to make laws to the Ministers or to other public functionaries of the executive departments of the Government? How far are the courts in this country entitled to question the validity of

stitutional delegation. Reference must be made, however, to the case of *Panama Refining Co. v. Ryan*, (1935) 293 *U.S.* 388: 79 *L.Ed.* p. 446, and *United States of America v. A. L. A. Schechter Poultry Corporation* (1935), 295 *U.S.* 495: 79 *L.Ed. p.* 1570, where the *United States Supreme Court* struck down parts of the *National Industrial Recovery Act* as being vitiated by unconstitutional delegation of legislative power. The attempt to delegate such a power was denounced in these two cases but no Act ever since 1935 has been held as invalid on this ground. In the former case, the *Supreme Court* ruled that "a delegation of legislative power to an administrative officer is not brought within the permissible limits of such delegation by prescribing the public good as the standard for the administrative officer's action," and, in the latter, that delegation of power to make Codes for the government of trade and industries by or with the approval of the *President of United States* without setting up any standards aside from the statement of general rehabilitation, correction, and development of trades and industries was unconstitutional. A congressional legislation that enabled certain trade groups to frame a *Code of Fair Competition* and that, on approval by the President, it should have the force of law, is unconstitutional delegation because the Act contained no definition of 'fair competition' and, in the words of Justice Cordozo, "the delegated power of legislation which has found expression in this Code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant."

Unconstitutional Delegation of Legislative Power seen under the doctrine of English Constitutional Law.

The background against which prohibition against delegated authority must be viewed in our country is that of the *English Constitutional Law*.

The *English Parliament*, constitutionally speaking, is possessed of omnipotent powers, and the courts of law in England have not the jurisdiction to challenge any of its legislative enactments as being in excess of its authority. The dogma of prohibition against delegated authority has not on this very account the kind of importance in England which it undoubtedly has in the American jurisprudence. In England, however, it is only in the sphere of sub-delegated legislation that the doctrine has some relevance: that is, if the Parliament empowers a Minister to do certain things and the Minister, in the purported exercise of the authority thus delegated to him, acts in excess of his powers by doing things which transcend the sphere of authority delegated to him, courts of law in England would denounce his acts on the ground of *vires*.

Case of the Colonial Legislatures.

Since the Colonial Legislatures set up by the English Parliament under the Acts passed by it were themselves non-sovereign law-making bodies, their Acts on the strength of this principle have been open to challenge on the ground of *vires*. But the essential thing to notice in this behalf is that the *extent* to which delegation could be tolerated in America, and in systems of law that have been founded on the English jurisprudence, is one of difference of degree, and not one of difference in kind. We have the British concept of delegated authority which permits delegation, comparatively speaking, to a *greater* extent than what courts of law, steeped in the American juristic tradition, would be prepared to concede. According to the British concept, as long as the Legislature does not completely divest itself of its legislative authority, in other words, does not efface itself in an attempt to set up another body to exercise legislative powers in its place, there is no constitutional bar to its competence to delegate its legislative authority.

The Privy Council have repeatedly observed in regard to the constitutional status of the Colonial Legislatures that they are not the delegates of the Parliament, and that they have plenary powers within the sphere of legislative authority prescribed under the Acts that have created them. In delegating legislative powers, therefore, such Legislatures do not violate the maxim *Delegatus non potest delegare* [See the Canadian case of *Hodge v. Queen*, (1883), 9 *Appeal Cases, p.* 117].

Hodge vs. Queen.

In the above Canadian case the question was whether the Provincial Legislature of

a certain type of legislative function to the administration The dogma which prohibited the delegation of a legislative authority, has been eaten away by a torrential impact of numerous exceptions which Judges have been constrained to concede so much is this true that Professor Willoughby sums up the present position by observing ' The rule of the dogma has so many exceptions that it is difficult to decide whether the dogma or the exceptions state the true rule

The constitutional objection to the validity of Delegated Legislation was stated by Cooley in his *Constitutional Limitations*, as follows (7th Edition p 163) —

The Const tutic object on t Delegated Leg slat on stated

' One of the settled maxim in *Constitutional Law* is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority Where the sovereign power of the State has located the authority there it must remain and by that constitutional agency alone the laws must be made until the constitution itself is changed The power to whose judgment wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign post '

In a case decided by the United States Supreme Court in 1944 (*Yakus v United States*, 321 *U S* 414 *at pages* 424 426) the Chief Justice summed up constitutional position with regard to the competence of the Congress to delegate its legislative power to another agency as follows

Yakus vs

"The Constitution as a continuously operative charter of government does not [illegible]

properly to investigate The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence ascertained from relevant data by a designated administrative agency it directs that its statutory command shall be effective It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment and for the formulation of subsidiary administrative policy within the prescribed statutory framework Only if we could say that there is an absence of standards for the guidance of the administrator s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose

It would be noticed that, broadly speaking what the Supreme Court has ruled is that although the Congress cannot delegate its legislative power to another agency it may nevertheless empower another agency to exercise rule making powers (within considerable range and variety) provided they fall short of being construed as Legislative powers

What is and what is not, a legislative power *stricto sensu* has never been successfully defined The number of occasions upon which the U S Supreme Court has been called upon to lay down a definition of what may be regarded as legislative power is considerable but each time the definition offered by it is different from the earlier ones, at least in so far as the actual decision in the case was concerned On the whole, however, in America the tendency is to strike down as few Acts as possible on the ground of uncon

No satisfac defin tion o Legislativ Power '

Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification.')

"(2) Was the *Ajmer-Merwara (Extension of Laws) Act*, 1947, or any of the provisions thereof and in what particular or particulars, or to what extent *ultra vires* the Legislature which passed the said Act?" (Section 2 of the *Ajmer-Merwara (Extension of Laws) Act*, 1947, runs as follows: '*Extension of Enactments to Ajmer-Merwara*. The Central Government may, by notification in the official gazette, extend to the *Province of Ajmer-Merwara* with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the time of such notification.')

"(3) Is section 2 of the Part 'C' *States* (*Laws*) *Act*, 1950, or any of the provisions thereof and in what particular or particulars, or to what extent *ultra vires* the Parliament?" (Section 2 of the Part 'C' *States* (*Laws*) *Act*, 1950, runs as follows: 'Power to extend enactments to certain Part 'C' States.—The Central Government may, by notification in the Official Gazette, extend to any Part 'C' States (other than *Coorg* and the *Andaman and Nicobar Islands*) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a *Part 'A' State* at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part 'C' State.')"

From the analysis of the foregoing three questions it would appear to the student that each one of these questions related to the determination of *nature* and *extent* of delegated legislation under three different constitutional dispensations: the first raises the question of the legislative power of the *Indian Legislature* prior to the *Government of India Act*, 1915; the second, to the phase that followed the coming into force of the *Government of India Act*, 1935; and the last raises a similar issue in regard to the power of the *Indian Parliament* under the present *Constitution of India*. In order to answer these questions it was necessary to advert to the salient features of the constitutional history of India with particular reference to the changing constitutional instruments under which that country came to be governed in the first half of the twentieth century. The nature of the legislative powers under the different constitutional instruments under which *Government of India* had been at various stages established was stated by Kania C.J., and the following extracts from his judgment are cited as they are of considerable interest to the student of the *Constitutional History* of this country (p. 335):

Evolution of the Legislative Power in India.

"The East India Company first started its operations as a trading company in India and gradually acquired political influence. The Crown in England became the legislative authority in respect of areas which had come under the control of the *East India Company*. The Indian Councils Act of 1861, Section 22, gave power to the *Governor-General-in-Council*, with additional nominated members, to make laws. The constitutional position therefore was that the British Parliament was the sovereign body which passed the Indian Councils Act. It gave the *Governor-General-in-Council* in his legislative capacity powers to make laws over the territories in India under the governance of the Crown. Under the *English Constitution* the *British Parliament* with its legislative authority in the *King* and the two *Houses of Parliament* is supreme and its sovereignty cannot be challenged anywhere. It has no written *Charter* to define or limit its power and authority.

"As against this, the *Governor-General-in-Council* with legislative powers established under the *Indian Councils Act* stood in a different position. Its *Charter* was the *Indian Councils Act*. Its powers were there necessarily defined and limited. That power, again, at any time could be withdrawn, altered and expanded or further curtailed. Moreover, as the powers were conferred by an Act of the British Parliament, the question

Ontario had the power to entrust the Board of Commissioners the power of making rules under the parent Act, (Liquor Licence Act, 1877), and thereby create offences and sanction penalties for the breaches of those rules Their *Lordships* of the *Privy Council* upheld the power delegated by *Ontario Legislature* They observed

"When the British North America Act enacted that there should be a legislature for *Ontario*, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in S 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by laws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect

Russell vs Queen

In an earlier case of *Russell v Queen*, reported in *7 Appeal Cases* 829 *of the year* 1882, Their Lordships were invited to say if the *Canadian Temperance Act* was *ultra vires* of the *Dominion Parliament of Canada* in that it had been directed by the Legislature enacting it that it would come into force in any county or city if upon the passing of the vote of the majority of electors of that county or city, the Governor General declared the Act to be in force Their Lordships said that this did not constitute a delegation of power to a majority of the voters

"The short answer to this objection is that the Act does not delegate any legislative powers whatever It contains within itself the whole legislation on the matters with which it deals The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled Conditional legislation of this kind is in many cases convenient, and is certainly not unusual and the power so to legislate cannot be denied to the Parliar [illegible]
If authority c [illegible] *Burah*,
(3 *A C*, *p* 8

A study of the opinion delivered by Supreme Court of India—in re Delhi Law's Case

The question relating to the constitutional limitations upon the Indian Legislature's competence to delegate its legislative authority has been discussed at considerable length in the opinion rendered by the *Supreme Court of India* in 1951 (In re *The Delhi Laws Act*, 1912, reported in *A I R* (1951,) *Supreme Court p* 332) The whole of the Report in that case is instructive on the question of delegated legislation and the view taken of the law there is of much assistance in the comprehension of the legal position in relation to the problem of delegated legislation in our country

The problem which was considered in this case arose out of a reference made by the President of India under Article 143 of the *Indian Constitution* asking the Court's opinion on the following three questions

"(1) Was section 7 of the *Delhi Laws Act*, 1912, or any of the provisions thereof, and in what particular or particulars, or to what extent *ultra vires* the Legislature which passed the said Act?' (Section 7 of the *Delhi Laws Act*, mentioned in the question, runs as follows 'The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of

Independence Act, 1947, was to remove the authority of the *British Parliament* to make any laws for *India*. The *Indian Central Legislature* was given power to convert itself into a *Constituent Assembly* to frame a *Constitution for India*, including the power to amend or repeal the *Government of India Act*, 1935, which till the new *Constitution* was adopted, was to be the *Constitution of the Country*. Even with that change it may be noticed that the executive Government was not responsible to the *Central Legislature*. In fact with the removal of the control of the Parliament it ceased to be responsible to anyone."

With this outline of the Constitutional history in the background let us look at the logic of legal reasoning by recourse to which the questions referred to the Supreme Court were answered by its judges :

Contentions of the Attorney-General of India stated.

It was urged during the course of argument by the *Attorney-General*, on behalf of the *President of India, that the legislative power carried with it a power of delegation to any person the Legislature may choose to appoint so long as three tests were fulfilled* :

(1) It must be a delegation in respect of a subject or matter which is within the scope of the legislative power of the body making the delegation.

(2) Such power of delegation is not negatived by the Instrument by which the legislative body is created or established.

(3) It does not create another legislative body having the same powers and to discharge the same functions which it itself has, if the creation of such body is prohibited by the Instrument which establishes the legislative body itself.

It was also urged that in the case of an unwritten Constitution like that of the *British Parliament*, there can not be and is not any affirmative limitation or negative prohibition against delegation and therefore the power of delegation is included to the fullest extent within the power of legislation. The *British Parliament* can efface itself or even abdicate because it has a power to pass the next day a law repealing and annulling the previous day's legislation. When the *British Parliament* established legislative bodies in *India*, *Canada* and *Australia* by *Acts of the British Parliament* the *Legislatures* so established, although in a sense subordinate (because their existence depended on the Acts of the *British Parliament* and which existence could be terminated or further fettered by an *Act of the British Parliament*), nevertheless are supreme with plenary powers of the same nature as the *British Parliament*, on the subjects and matters within their respective legislative authority. As the power of delegation is included in the power of legislation, these legislative bodies have also, subject to the three limitations mentioned above, full power of delegation in their turn.

Reliance was placed in support of these contentions upon the cases decided by the Privy Council :

(1) *Queen v. Burah* (*4 Calcutta 172, equivalent to 5 Indian Appeals, p. 178, decided in 1878*); and

A summing up of the effect of pre-existing case—law.

(2) *Emperor v. Benoari Lal Sharma and others* (*72 Indian Appeals, p. 57*).

Kania C.J. summed up the effect of these decisions in the following words (p. 340)—

"A close scrutiny of these decisions and the observations contained therein, in my opinion, clearly discloses that instead of supporting the proposition urged by the *Attorney-General* impliedly that contention is negatived. While the Judicial Committee has pointed out that the Indian Legislature had plenary powers to legislate on the subjects falling within its powers and that those powers were of the same nature and as supreme as the *British Parliament*, they do not endorse the contention that the Indian Legislature, except that it could not create another body with the same powers as it has, or in other words, efface itself, had unlimited powers of delegation. When the argument of the

whether the action of the *Governor General in Council* in his legislative capacity was within or without its legislative power was always capable of being raised and decided by a Court of Law In Dicey's *Law of the Constitution, 9th Edition*, the author has distinguished the position of a sovereign Legislature and a subordinate law making body The distinction is drawn from the fact that the subordinate Legislatures have a limited power of making laws It is therefore clear that the *Indian Legislature in* 1861 and up to 1915 was a subordinate Legislature and not a sovereign Legislature

"At this stage it may again be noticed that the Government was unitary and not federal There was no distribution of legislative powers as between the Centre and the different Provinces Another important factor to be borne in mind is that while the British Parliament was supreme its executive Government came into power and remained in power so long only as the Parliament allowed it to remain and the Parliament itself was not dissolved The result is that the executive Government was a part of the Legislature and the Legislature controlled the actions of the executive Indeed, the Legislature was thus supreme and was in a position effectively to direct the actions of the executive Government In India the position was quite different if not the reverse The *Governor General* was appointed by the Crown and even after the expansion of the legislative body before the *Government of India Act of* 1915 in numbers it had no control over the executive In respect of the *Indian Legislature* functioning prior to the *Government of India Act of* 1915 the control from the *Secretary of State* was justified on the ground that the *Provincial Legislatures* were but an enlargement of the executive Government for the purposes of making laws and were no more than mere advisory bodies without any semblance of power The Executive *Government of India* was not responsible to the Indian Legislature and the composition of the Indian Legislature was such that the executive officers together with the nominated members constituted the majority in the *Legislature* The result was that the *Legislative Council* was practically a creature of the executive Government of India and its functions were practically limited to registering the decrees of the executive Government

"The possibility of the Legislature recalling the power given under an Act to the executive against the latter s consent was therefore nil Once an Act giving such power (like the *Delhi Laws Act*) was passed practically the power was irrevocable In my opinion, it is quite improper to compare the power and position of the Indian Legislature so established and functioning with the supreme and sovereign character of the British Parliament

"The legislative power of the *Indian Legislature* came to be changed as a result of the Act of 1915 by the creation of *Provincial Legislatures* Diarchy was thus created but there *was no federation under the Act of 1915 Under the Government of India Act, 1935, the* legislative powers were distributed between the *Central Legislature* and the *Provincial Legislature*, each being given exclusive powers in respect of certain items mentioned in Lists I and II of the Seventh Schedule List III contained subjects on which it was open to the Centre or the Province to legislate and the residuary power of legislation was controlled by section 104 This Act however was still passed by the *British Parliament* and therefore the powers of the Indian Central Legislature as well as the Provincial Legislatures were capable of being altered, expanded or limited according to the desire of the British Parliament without the *Indian Legislature* or the people of *India* having any voice in the matter Even under this Act, the executive Government was not responsible to the *Central Legislature* or the *Provincial Legislature* as the case may be I emphasize this aspect because it shows that there was no fusion of legislative and executive powers as was the case with the *Constitution in England* The result of the *Indian*

in this country have *plenary* authority to delegate their power to make laws to subordinate agencies of their choice and such delegation, however inexpedient or undesirable politically, is constitutionally competent."

1949 F. C. 175 no longer good law in India.

It would now appear that the case decided by the Federal Court of undivided India, *Jatandra Nath Gupta and others v. the Province of Bihar and others*, in 1949 *Federal Court page* 175, (in which it was laid down that the power to extend the operation of a temporary Act beyond the period specified in the Act is the exercise of a legislative power which cannot be delegated to any other body and any attempt to confer such delegated authority on the *Provincial Government* to extend the operation of such a temporary Act beyond its original span of life amounts to unconstitutional delegation of legislative power,) is no longer valid law in view of the decisions recorded by the Supreme Court in the *Delhi Laws Act* case

Observations of Das J. in 1951 S C. 332.

With regard to this case of the *Federal Court of India*, Das J., in the *Delhi Laws Act Case, AIR* (1951) *S C.* 332 *at p.* 429, observed:—

"On a perusal of the judgment of the majority of the Federal Court in that case it appears to me that the important questions were not canvassed before them half so strenuously and fully as they have been done before us on this occasion. Indeed, I am led to believe that learned counsel appearing for the *Province of Bihar* practically conceded that the delegation of the power of modification was not permissible and that his whole case was that that part of the provision was severable and the rest was conditional legislation which came within the principle laid down in Burah's case. The majority of the Court, however, held that the power of modification included in the proviso to section 1(3) was not severable as suggested by counsel and, therefore, the whole of the proviso was *ultra vires* and consequently the notification issued thereunder was illegal I feel bound to say, with the utmost humility and for reasons given already, that the observations of the majority of the Federal Court in that case went too far and in agreement with the learned *Attorney-General* I am unable to accept them as correct exposition of the principles relating to the delegation of legislative power."

Reference to some decided cases on the problem of Delegated Legislation

Similarly, it has been held in the case of *Laxmi Bai v. State of Madhya Pradesh* reported in A I R (1951) *Nagpur page* 94, that a power given to the Provincial Government to put an end to the operation of a temporary *Statute* is not unconstitutional delegation of legislative power.

The course of decision in India on the problem of delegated legislation can be followed up by the study of the following cases :—

(1) *Queen v Burah* (4 *Calcutta, page* 172; 5 *Indian Appeals, page* 178; (1878) 3 *A C.* 889,

(2) *Emperor v. Benoarilal* (1945) *Privy Council, page* 48, 72 *Indian Appeals, page* 57, 1945 *Karachi* (*PC*) 97;

(3) *State of Bombay v. Narottam Das* (1951, *Supreme Court page* 69), the case in which decision given by the Bombay High Court in 1951, Bombay page 180, was reversed by the Supreme Court); and

(4) *In re. Delhi Laws Act, A.I.R.* (1951) *S.C.* 332.

(5) *Edward Mills Co., Ltd., Beawar and Others v. State of Ajmer*, 1955, *Supreme Court page* 25. In this case reference was made to the observation of O'Connor, J. *of the High Court of Australia* in the case of *Baxter v. Ah Way*, (1909) 8 C L R. 626 *at* 637,

Summary.

Summing up the study of the case-law that governs the concept of delegation of legislative power as it has developed in India, it is sufficient to remark that by now it is well settled that the *essential legislative* power is incapable of being constitutionally

power of the *Indian Legislature* to delegate legislative powers in that manner to subordinate bodies was directly urged before the Privy Council, in each one of their decision the Judicial Committee has repudiated the suggestion and *held that what was done was not delegation but was subsidiary legislation or conditional legislation* Thus while the Board has reiterated its views that the powers of the Indian Legislature were 'as plenary and of the same nature as the British Parliament', no one, in no case, and in no circumstances, during the last seventy years, has stated that the *Indian Legislature* has power of delegation (as contended in this case) and which would have been a direct, plain, obvious and conclusive answer to the argument Instead of that, they have examined the impugned legislation in each case and pronounced on its validity on the ground that it was conditional or subsidiary legislation

Delegated Legislation Views of Kania C. J

After reviewing the case law contained in the several judgments of the Supreme Courts of Canada and Australia, and the decisions of the Privy Council that were cited at the bar, the learned Chief Justice came to the conclusion (at p 345)

"That while a Legislature, as a part of its legislative functions, *can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a Legislature has power to lay down the policy and principles providing the rule of conduct and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage* In cases of emergency, like war where a large latitude has to be necessarily left in the matter of enforcing regulations to the executive, the scope of the power to make regulations is very wide, but even in those cases the suggestion that there was delegation of 'legislative functions' has been repudiated Similarly, varying according to the necessities of the case and the nature of the legislation, the doctrine of conditional legislation or subsidiary legislation or ancillary legislation is equally upheld under all the Constitutions *In my opinion, therefore, the contention urged by the learned Attorney General that legislative power carries with it a general power to delegate legislative functions, so that the Legislature may not define its policy* at all and may lay down no rule of conduct *but that whole thing may be left either to the executive authority or administrative or other body, is unsound and not supported by the authorities on which he relies* I do not think that apart from the sovereign character of the *British Parliament* which is established as a matter of convention and whose powers are also therefore absolute and unlimited, in any Legislature of any other country such general powers of delegation as claimed by the *Attorney General* for a *Legislature*, have been recognised or permitted"

No firm conclusions reached by t Court

To the three questions formulated in the reference submitted for opinion to the Supreme Court, the different Judges composing the Bench returned different answers It is not possible to comprehend what in principle was decided by the Supreme Court so that in terms of that principle subsequent litigation involving the determination of limits within which legislative powers could be delegated, could be resolved satisfactorily

In a subsequent case decided by the *Supreme Court of India, Patanjali Sastri*, in the case reported in *AIR* (1952) *S C p* 123, *Kathi Raning v State of Saurashtra* in respect of the principles laid down in the *Delhi Laws Act case*, observed as follows (at p 126) —

"While undoubtedly certain definite conclusions were reached by the majority of Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different, and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases I have there expressed my view that Legislatures

under the Constitution. But since the legislature is primarily charged with the duty of law-making, it cannot evade the performance of that duty by assigning it to another organ of the State power. In each case, therefore, the entire text of the impugned statute has to be scrutinised to see exactly the kind of power that has been delegated to subordinate agencies by the Legislature; and if the courts should come to the conclusion that there is the delegation of *essential* legislative power in any rule or law, made pursuant to the exercise of such a power, the legislation must be struck down as offending against the limits of the rule that permits delegated legislation. In each case where the question as to the unconstitutional delegation of legislative power is raised, the effort should be made to find out whether or not "essential" legislative power has been delegated.

There are, however, *two well-recognized exceptions to the rule* that prohibits the delegation of legislative power. And these are (1) conditional legislation, and (2) subordinate legislation.

Conditional Legislation.

When a law is full and complete when it leaves the legislative chamber but only the *operation of it is made dependent on the fulfilment of some specified condition*, and what is delegated to an outside body is merely the authority to be determined by the exercise of its own judgment whether or not the condition thus specified has been fulfilled, we have a case of what is called 'conditional legislation' having been enacted by the Legislature, and upon the determination of the existence of the condition by the body named therein, the law becomes effective. The principle on which this is said to be permissible is that the Legislature is thereby not delegating its power to make a law but is *only delegating the power to determine some facts or state of things upon which the law-making organ makes or intends to make its own action dependent*. In the words of an American Judge (see 1873, (13) *American Reports* 716 *at page* 722), "To deny this would be to stop the wheels of Government. There are many things upon which wise and useful *Legislation* must depend, which cannot be known to the law-making power and must, therefore, be a subject of enquiry and determination outside the *Halls of Legislature*." This was also the principle established in the case of *Queen v. Burah*, to which reference has already been made. The *Privy Council* observed in that case, "The proper *Legislature* has to exercise its judgment as to place, persons, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled the legislation is now absolute."

Power to extend the life of a Temporary Act—not a Conditional Legislation: Sobho Gianchandani v. Crown.

The *Federal Court of Pakistan* in the case of *Sobho Gianchandani v. Crown*, reported in *P.L.D.* (1952) *Federal Court*, 29, has ruled that the power conferred by the *Legislature* on the Executive to extend the life of a temporary Act like the *Pakistan Public Safety Ordinance of* 1949 (which was to remain in force initially for a period of one year from the date of its *promulgation*, which was 8th October 1949), was not a power in the nature of conditional legislation. The learned Chief Justice Abdul Rashid observed (at p. 37):—

"There is no analogy between conditional legislation which authorises an outside authority to determine its commencement and the power to determine the life of the Act itself. The power of extending the life of an Act is really a power to bring the Act into existence for a further period, and it is therefore identical with the power of re-enactment. The power to extend the life of an Act cannot be regarded merely as conditional legislation."

This distinction was further elucidated in the following words:

"When a law is made to take effect on the happening of a certain event, the Legislature in effect declares the law but leaves it to an external agency to bring it into force, whenever it considers it expedient to do so. A law may be regarded as inexpedient in certain events, but expedient if certain events should take place. In passing conditional legislation, the Legislature completely performs the duties which are imposed

delegated Short of delegating the essential legislative power the Legislature can, within the framework of the policy laid down by it, delegate to a subordinate agency the power to carry into effect by making detailed rules the policy thus laid down This is the view which in the opinion of the present writer seems to have been firmly established in the decision of the Delhi Laws Act Case It would not be wrong to say that the following extract from the judgment of Mukherjea, J (at p 397) enunciates the correct rule

"Delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law making powers by the proper Legislature and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery A constitutional power may be held to imply a power of delegation of authority which is necessary to effect its purpose, and to this extent delegation of a power may be taken to be implicit in the exercise of that power This is on the principle 'that everything necessary to the exercise of a power is implied in the grant of the power Everything necessary to the effective exercise of legislation must, therefore be taken to be conferred by the Constitution within that power' Per O'Connor J in *Baxter v Ah Way* (1909) *8 C L R p* 626 But it is not open to the Legislature to strip itself of its essential legislative function and vest the same on an extraneous authority The primary or essential duty of law making has got to be discharged by the Legislature itself, delegation may be resorted to only as a secondary or ancillary measure

The following statement of the limits on the validity of delegated legislation as summarised by Fazl Ali J in the *Delhi Laws Act Case* is of some interest, although not quite helpful, in the matter of assisting the student of law in drawing a line between the class of cases, where legislation, though delegated, is permissible, and where it is a delegation of a kind that is forbidden, because in such cases the Legislature "may be deemed virtually to have abdicated its authority to make laws and brought about its own self effacement' According to Fazl Ali J (at p 255) — **Statement of the law as attempted by Fazl Ali J**

"(1) The Legislature must normally discharge its primary legislative function itself and not through others

(2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation

(3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as subordinate authority and does not become a parallel Legislature

(4) Therefore, there are only two main checks in this country on the power of the Legislature to delegate these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self effacement' "

The language of ART 105 of our Constitution, in so far as it might conceivably be deemed to assist the determination of the question relating to the extent to which Legislature in our country can validly delegate legislative authority to other bodies, is "Parliament and a Provincial Legislature *may make laws*" It would be noticed that there is no express provision which limits the power of the Legislature to delegate the making of rules or regulations that are ancillary to the exercise of this law making power reserved to it **Delegated Legislation —(Position in our country)**

on that legislature, should have intended otherwise than that the powers so conferred should be exercised exclusively by that legislature. The difficulty which, under the increasing complexity of modern conditions, is felt by all legislatures in making provision for every case which may arise within the contemplation of a statute, renders it necessary for some measure of ancillary power to be delegated to executive authorities to make statutory rules and regulations for carrying into effect the provisions of the statute in matters of detail. Delegation to this extent has been universal practice for a great many years, and such provisions will be found in a great number of statutes."

"After the 7th October, 1950, the Ordinance remained on the Statute Book as a result of an exercise of the will, not of the legislating authority, but of the Central Government. What is more, when the first period of extension had been fixed, the power of further extension was derived not from the original Ordinance, but from the Ordinance, as extended, and therefore any further extension would be doubly attributable to the exercise of the Central Government's will. To this extent, at any rate, there was abdication by the legislating authority of its function of keeping the law on the Statute Book. It is also plain that the Central Government's power of bringing the Ordinance to an end and thus removing it from the Statute Book by voluntarily refraining from extending it further, was not subject to control by the legislating authority. Supposing the Ordinance were thus brought to an end, contrary to the wishes of the legislating authority, there would be no power left in the legislating authority, by virtue of the Ordinance itself, to rectify the position but, in order to carry out its will, the legislating authority would have to re-enact the legislation afresh. Therefore in my opinion it is erroneous to regard the acts of the Central Government extending the Ordinance as deriving their efficacy from the will of the legislature."

79. Subordinate or ancillary legislation

It remains now briefly to refer to the concept of subordinate or ancillary legislation. This refers to a situation in which the Legislature lays down the policy in more or less wide terms and gives to some external authority the power to carry out, by framing rules and regulations, the legislative policy so specified. There is always a Section (technically called *Rule-making Power Provision*) in the Act passed by the Legislature that says generally that some extraneous authority, charged with the duty of administering the Act, should frame rules and regulations 'not inconsistent with its provisions' for the purposes of 'carrying out the objects of the Act.'

1953 Mad. 105. In the case of *V. M. Syed Mohd. & Co. Ltd., v. State of Madras*, reported in A.I.R. (1953) *Madras page* 105, after a review of some American cases it was observed :—

"The law is well settled and may be summed up in two principles :

(1) The enunciation of policy is a matter exclusively within the competence of the legislature and incapable of delegation to other bodies.

(2) It is not unconstitutional to entrust to special bodies the carrying out of the policies declared by the Act, and for that purpose to clothe them with authority to frame regulations within the frame-work of the Act."

This sort of delegation of legislative power took place in India, for instance, during the last war when under the *Defence of India* Act, 1939, rules were framed by Central Government pursuant to the general powers that had been outlined in S.2. of the Act. That section of the *Defence of India Act* mentioned a long list of general powers in the exercise of which the Central Government could, by a notification in the official gazette, make

by the *Constitution upon it* That is, it places legislation on the Statute Book and the only function that it delegates to an external authority is to bring the legislation into force if certain events should happen and the enforcement of the legislation should be considered necessary Even if the legislation is not brought into force it remains on the Statute Book to be utilised when and if necessary If, however, a temporary Act is passed by the Legislature for one year, it dies a natural death after the lapse of one year from its commencement Thereafter, it ceases to be a law In these circumstances, can it be said that the external authority that gives a new lease of life to an enactment is merely bringing the legislation into force in accordance with the wishes of the legislature? (p 35) "

It was further laid down

"It is not a correct proposition that the delegation of legislative powers by a Legislature to an external authority is invalid or *ultra vires* only if it amounts to 'self effacement and abdication "

To the same effect were the remarks made by Akram J —

"I think it cannot be denied that a substantial delegation of powers becomes necessary in the ever growing complexities of a modern State, but the question arises what should be the limits of such a delegation In my opinion matters of a fundamental nature or of general policy or of great importance, cannot be delegated, though powers may be assigned within reasonable limits and scope, such as, the determination of time place, persons, dutiable commodities, etc , so that rules, regulations, schemes and bye laws may be made by anyone empowered to do so, within the framework of the main legislation, the main legislation itself, however, cannot be dictated or its contents revised under the delegated powers, to say otherwise would virtually amount to permitting an abdication or a surrender of the legislative authority itself reposed in the person delegating it

Justice Cornelius rested his decision on a somewhat different species of reasoning as the following extracts from his judgment show **Observations of Cornelius**

"*Prima facie* the placing and keeping of a law on the Statute Book and the removing of a law from the Statute Book are legislative functions "

"The true criterion is whether by an act of an outside authority a change is brought about in the network of laws which have validity in the country and are on the Statute Book It is axiomatic that these laws inter act on each other and the provisions of any one of these laws in some respect are operative in addition to parallel provisions in other laws and in some respects in derogation of such provisions The complete removal of a particular law from the Statute Book creates an effect which goes beyond the mere termination of the particular provisions of such law There is also an effect upon other laws as well, whose own provisions thereby are either restored to full force or deprived of supplementary force as a result of the disappearance of the repealed law A repeal has, therefore a wider effect upon the legislative structure of the country than the mere disappearance of the particular law might appear to produce It cannot be denied that to act so that such a result is produced is to act legislatively in the fullest sense There is no difficulty in perceiving the distinction between producing an effect of such a fundamental kind on the one hand and on the other either bringing into operation a statute which is already on the Statute Book or applying the provisions of a law which is on the Statute Book in particular places or to particular persons or things "

"Of the functions which are conferred by a written constitution, the legislative function is by far the most important I cannot conceive that the constitution making authority when providing for the establishment of a legislature and conferring powers

to review, though it may be *prima facie* evidence that the order exceeds powers. When the doctrine of *ultra-vires* is applied, it does not automatically abrogate the sub legislation which is challenged, but merely decides the individual case which has arisen under it. In effect, however, it paralyses the order or bye-law concerned, which is usually repealed or amended." (See his 'Law and Orders' IV Ed. at p. 61).

IV Ed. Some constitutional issues presented.

Considering that the exercise of ordinary law-making activity of the Parliament or Provincial Legislature in this country is, more or less, in the nature of power exercised by a delegated authority and may well be regarded as being in the nature of a bye-law, the questions that arise for judicial examination are the following: (a) Can the constitutionality of the Acts of Parliament or Provincial Legislature be examined by our courts from the point of view of their reasonableness much in the manner in which bye-laws of public bodies are examined by the English courts. (b) Is the constitutional status of Parliament or Provincial Legislature as established by the Constitution in any way different from that enjoyed by the parallel legislatures established under the Government of India Act, 1935. Would the reasoning in the Privy Council case in *Queen vs. Burah*, (1878) 5, *I.A. p.* 178 apply to the case of Legislatures, Federal and Provincial, established by the Constitution, so as to make them not merely *delegates* but as being invested with powers as large and as plenary as the Parliament itself? These questions do present perplexing difficulties but they have got some day to be settled. The concept of the power of a delegate is radically different from the power of the *principal* and the logic of a written Constitution demands due recognition of this difference.

"It is very remarkable", says C. K. Allen, "that our Courts (English Courts) have never expressly decided whether the maxim *delegatus non potest delegare* applies to subordinate legislation. The case of Reg. v. Burah (1878), 3 App. Cas. 889, which concerned the scope of an Indian statute, and which is sometimes cited in this connection, is not really relevant to the general question. On principle, it would seem that a legislative delegate who, without express authority, puts another in his place, is acting *ultra vires*; (a view taken in Donoughmore Committee Report p. 50) but in the absence of judicial decision it is impossible to speak with confidence, and analogies drawn from the law of agency would be imperfect and unreliable in the constitutional sphere." (See p. 104 of his 'Law and Orders').

However, these questions, have not, as yet, anywhere been conclusively determined and are *res-integra*. But much would depend upon the manner in which they are settled by the Courts in India and in our country.

Some objectionable kinds of delegated Legislation.

The extreme form in which delegated legislation becomes objectionable, not from the view point of constitutional law but as a matter of political principle, has reference to that category of cases where the executive is armed, not with the authority merely of carrying out the purposes of the Act, but also, to pass orders which may modify not only the provisions of the parent Act but any other law "as may appear to the Minister necessary or expedient." It was this *extreme* type of *delegated* legislation which evoked the protest of Lord Hewart to which reference has already been made. For example, witness the following two Sections, (66 and 67), which are to be found in the *Rating and Valuation Act of* 1925 (15 and 16 George) :—

"S.66(1) The Minister (of Health) may by order make such adaptations in the provisions of any Local Act as may seem to him to be necessary in order to make those provisions conform with the provisions of this Act.

(2) Every order under this Section shall be laid before both Houses of Parliament, and if an Address is presented to His Majesty by either House of Parliament within the next subsequent twenty-eight days on which that House has sat after any such order

"such rules as appear to it to be necessary or expedient for securing defence of *British India*, the public safety, the maintenance of public order, or the efficient prosecution of war, or for maintaining supplies and essential services to the life of the community" (See further *Mahabir Sahu v Emperor*, A I R (1947) *Patna page* 16, as also *Rex v Halliday*, (1917) *Appeal Cases, page* 260 ... the public safety or defence of ... on the *Secretary of State* to inter ... recommendation of a competent Naval or Military authority it appears to him expedient to exercise such a power for securing the public safety or the defence of the realm), was held to be valid law See also the case of *Institute of Patent Agents v Joseph Lockwood*, reported in (1894) *Appeal Cases, page* 347, where the validity of legislation made pursuant to very wide powers given to the Board of Trade to make such rules "as are in their opinion required for giving effect to the Section" was upheld See also *Hodge v Queen*, (1883) 9 *Appeal Cases page* 117, where a Board of Commissioners' authority, to enact regulations under the powers conferred upon it by the *British North America Act*, 1867, "for the good *Government of Taverns*", was upheld as valid piece of legislation)

The only requirement of law in such situations is to insist that the subordinate body charged with the duty of making rules and regulations must strictly confine itself within the sphere of its authority for the exercise of its subordinate legislative power, and in each case it is the duty of the courts in appropriate proceedings to be satisfied that the rules and regulations so made are

(a) by the authority mentioned in the parent Act, and

(b) that they are within the scope of the power delegated therein

It is for the courts to give effect to the general intent of the Legislature by ensuring that the particular rules and regulations conform to that intent Of course, such rules and regulations lapse when the laws that empower their creation come to an end, either by efflux of time or by repeal or if their life is declared terminable upon the happening of a contingency, upon the happening of that contingency

Such a subordinate agency also cannot *further delegate* its power to another subordinate agency unless it is expressly empowered so to do (*See the case of Cantonment Board Poona vs Western India Theatres Limited*, reported in A I R (1954) *Bombay page* 261)

The extent of judicial control which the Courts of Law in England exercise in respect of "Subordinate Legislation' has been stated by C K Allen as follows

C. K All[en] the Exte[nt of] Judicial Control [of] Subordina[te] Legislatio[n]

"The enactments of parliament itself are, as every body knows, supreme and beyond question by the Courts there is no such thing as an unconstitutional statute in our system But all subordinate legislation is subject to the doctrine of *ultra vires* The essence of the doctrine is simple enough Any person affected by delegated powers has the right to complain if they exceed their charter, and it is then for the Courts to decide, as matter of law whether the impeached order falls within the terms of authority, which is usually a section of a statute Obviously, the wider the terms of delegation the narrower the opportunities of restriction, and even more obviously, if the delegation is expressed in such manner that the delegate is allowed complete discretion, anything he does is *intra vires* and control is excluded We shall see that in many circumstances judicial supervision i[s] ... potentiary ... *ultra vires* is ... field are enti[rely] ... particular bye law The reasonableness of a Ministerial order is never in itself subject

to review, though it may be *prima facie* evidence that the order exceeds powers. When the doctrine of *ultra-vires* is applied, it does not automatically abrogate the sub legislation which is challenged, but merely decides the individual case which has arisen under it. In effect, however, it paralyses the order or bye-law concerned, which is usually repealed or amended." (See his 'Law and Orders' IV Ed. at p. 61).

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is laid before it praying that the order may be annulled it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder or the making of a new order

"S 67(1) If any difficulty arises in connection with the application of this Act to any exceptional area, or the preparation of the first valuation list for any area, or other wise in bringing into operation any of the provisions of this Act, the Minister may by order remove the difficulty or constitute any assessment committee, or declare any assessment committee to be duly constituted, or make any appointment or do any other thing, which appears to him necessary or expedient for securing the due prepara tion of the list, or for bringing the said provisions into operation, and any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the order into effect

Provided that the Minister shall not exercise the powers conferred by this section after the thirty first day of March nineteen hundred and twenty nine

(2) Every order made under this section shall be laid before both Houses of Parlia ment forthwith and if an Address is presented to His Majesty by either House of Parlia ment within the next subsequent twenty eight days on which that House has sat after any such order is laid before it praying that the order may be annulled it shall thence forth be void, but without prejudice to the validity of anything previously done there under or the making of a new order

It is with reference to the last of the two sections quoted above that the Divisi onal Court of the *King s Bench* while considering the case presented to it which involved interpretation of these provisions remarked somewhat sarcastically as follows [The *King v Minister of Health, Exparte Wortley Rural District Council*, (1927) 2 King's Bench page 229] —

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"The imagination fails to contemplate at one view the extent and variety of power which is given to the Minister under those words He may by order remove difficul ties He may cut the *Gordian Knot* in any way that seems best to him The legisla ture not content with arming the Minister with these remarkable and varied and far reaching powers goes on to provide that 'any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient ' For what pur pose? For carrying the Act into effect? Not at all—'For carrying the order into effect' This, I think, though I say it with some hesitation, may be regarded as indicat ing the high water mark of legislative provisions of this character It is obvious that if this Court had taken another view of the case presented to us to day and had decided to quash this order as having been made *ultra vires*, the Minister might to morrow, under the provisions of S 67, have arrived at the same end by making an order and removing the difficulty "

Similarly, in the case, *The King v Minister of Health, exparte Yaffe*, reported in (1930) 2 *King's Bench at page* 98, the point of constitutional law that arose was

Conclusive Evidence clause (1930) 2 K B 98

"When Parliament delegates its powers of legislation to a Minister of the Crown and enacts that, in certain circumstances, he may make 'an order', and that his order 'when made' shall have the effect as if enacted in the Act, is it open to the Judiciary if that alleged order be challenged, to consider whether in fact an order has been made?" (p 110)

As this case is of considerable importance, it is necessary to analyse the views of the Judges who decided it—not only in the Court of first instance (*King's Bench Division of the High Court*) but also in the *Court of Appeal* and in the *House of Lords* The facts that gave rise to the problem posed in that case, were the following

By S.40(3) of the *Housing Act*, 1925, it was provided that the Minister of Health in certain circumstances 'May by order' confirm a scheme. The order of the Minister confirming the scheme was brought upon a *Rule Nisi* issued upon a motion for *a writ of certiorari*. It was contended that the Court had no jurisdiction to go behind this order because in sub-section (5) of S.40 it was provided that "the order of the Minister when made shall have effect as if enacted in this Act."

The Court of the *King's Bench Division* was not unanimous; Swift J. holding, upon an argument which would be presently noticed, that the order passed by the Minister in that case be quashed, whereas the other two Judges who made the majority Judgment (Talbot J. and Lord Hewart C.J.), held that the rule be discharged. The basis of their decision was that the scheme when confirmed by the Minister became a part of the Act and could not be successfully challenged in a court of law.

Views of Swift J.

The ground of the decision of Swift J. lay in his attempt to give due effect to the words 'when made' that appeared in S.40(5). He interpreted these words to mean "when made in sequence with events which the Act prescribes shall lead up to them". The steps required under the Act to be taken were the following :

(1) That an official representation shall have been made to the local authority;

(2) that the local authority shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area;

(3) that after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area;

(4) that maps, particulars and estimates shall accompany such a scheme, S.38(1);

(5) that as soon as an improvement or reconstruction scheme has been prepared the local authority shall publish and serve the notices prescribed by Section 39.

Swift J. held that if any of these steps required by the Act to be taken are omitted the Minister has not made an order within the meaning of sub-section (3) of section 40 (although indeed he may have *purported to do so*) and so sub-section (5) of Section 40 will not apply. His argument on these premises could now be studied from his own words :—

"It is admitted by the *Attorney-General* on behalf of the Minister of Health that the scheme sent to him on April 4 was a scheme which was void and of no effect....It has been quite recently held in the Court of Appeal, affirming the decision of this Court, that a scheme in these terms is not an improvement scheme at all: *The King v. Minister of Health, ex parte Davis*, (1929, 1 *King's Bench, page* 619). The *Attorney-General* admitted that if a writ of prohibition had been applied for before the Minister made what purports to be an Order on November 23, there would have been no answer.

"It seems to me, therefore, that as a matter of fact certain essential steps before the Minister could make an Order were lacking. There was no 'scheme', there was no 'local inquiry' after a scheme had been prepared, and I do not think the time ever came when as a matter of fact he could make an Order.

"Having come to the conclusion that the Minister in this case did not make an Order and never was in a position in which he could make an Order, I am faced by the argument that he has purported to make an Order and that this Court cannot inquire into the validity of what he has done.

"I do not agree . . . .

"We are bound, I think as part of the common law of England, to treat the Order

is laid before it praying that the order may be annulled it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder or the making of a new order

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As this case is of considerable importance, it is necessary to analyse the views of the Judges who decided it—not only in the Court of first instance (*King's Bench Division of the High Court*) but also in the *Court of Appeal* and in the *House of Lords* The facts that gave rise to the problem posed in that case were the following

Governor v. Blair But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain statutory conditions are observed, it should then pass clauses which, it may be contended, allow their delegates to contravene these conditions, and make *ultra vires* orders which cannot be controlled by the Courts which have to administer the laws of the land."

As against the decision of the Court of Appeal the matter went to the *House of Lords* and Viscount Dunedin, in his speech, while not exactly admitting the ground upon which the decision was reached by the *Court of King's Bench Division*, nevertheless restored their order and declined jurisdiction to quash the Order of the Minister and allowed the appeal. (See Judgment in Appeal to the *House of Lords*, March 23, 1931, *Minister of Health v. The King (on the prosecution of Yaffe)*, *House of Lords* (1931) A.C., p. 494, at page 501):—

[1931] A.C. 494—H. of L. at 501

Viscount Dunedin: "The first question, and it is a very important and far-reaching question, is, the question as to the effect of S. 40(5). Has it the effect of preventing any inquiry by way of *certiorari* proceedings of a scheme confirmed by the Minister? It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a *per capita* contribution of £5 to the municipal authority to be applied by them for the building of a bridge, it is [illegible] to common sense that the order would be protected, although, if there was an Act of Parliament to that effect, it could not be touched. Now the [illegible] of the inviolability of a confirmed order is to be found in the case of the *Institute of Patent Agents v. Lockwood*, (1894) A.C. 347. That case arose under the *Patents, Designs and Trade Marks Act*, 1883, by that Act the Board of Trade was empowered to pass such general rules as they thought expedient for the purposes of the Act. Such rules were, "subject as hereinafter prescribed", to be of the same effect as if they were contained in the Act, and were to be judicially noticed. The 'as hereinafter prescribed' were that the rules were to be laid before Parliament for forty days, and if, within forty days, either House disapproved of any rule, it was to be of no effect. . . . The House of Lords held that the provision as to the rules being of like effect as if they had been enacted in the Act, precluded inquiry as to whether the rules were *ultra vires* or not.

"Now, there is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed, and could have annulled them if a motion were made to that effect, whereas here there is no Parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet I do not think that that distinction, obvious as it is, would avail to prevent the sanction given being an untouchable sanction. I think the real clue to the solution of the problem is to be found in the opinion of *Herschell, L.C.*, who says thus: 'No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between the two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which is the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it'. (1894) A.C. 360.

"What that comes to is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If, therefore, the scheme as made, conflicts with the Act, it will have to give way to the

of the Minister made under sub section (5), 'when made' as statutory—but does that justify us in accepting or compelling us to accept his mere *ipse dixit* that he has made '*an order*'? In my opinion, No If we know, as in this case on the evidence we clearly do know, that he could not have made the Order, I believe that it is my duty to say he has not made the Order

"If once an Order is made it becomes a part of the Act of Parliament It has all the strength and virtue of the Act, it is incorporated in it and nobody can question it, but in my view it is open to any citizen adversely affected to inquire Is this in truth an Order made under the Act or is it something which has without justification obtained the semblance of such an Order? And if upon investigation this Court is satisfied that the 'thing' which is purporting to be an Order of the Minister is not and cannot in fact be, an Order within the meaning of S 40(3) of the Act ought it not to say so?

The matter went in Appeal where all the three Judges (Scrutton L J Greer L J, and Slesser, L J) concurred in allowing the Appeal (see *The King v Minister of Health, Ex Parte Yaffe*, (1930) 2 K B, p 98, at p 133) The following observations indicate the basis on which their judgment proceeded Court of Appeal (1930) 2 K B 133

' The Parliamentary history on this particular subject begins in 1890 (p 143), (and) shows a gradual increase in the powers of the Ministry and greater free dom from the control of Parliament The strongest clause is that repeated in *Schedule III*, S 2 of the *Housing Act* 1925 from *Schedule I* S 2 of the *Housing Act* 1909 That clause runs

'Shall save as otherwise expressly provided by this schedule become final and have effect as if enacted in this Act and the confirmation by the Minister shall be con clusive evidence that the requirements of this Act have been complied with and that the Order has been duly made and is within the powers of this Act

' This apparently is intended to prevent any question of *ultra vires* being raised however flagrantly the Order in question may exceed the power of the Act

"The present Act enables a Minister to take away the property of individuals with out compensation on certain defined conditions In my view those conditions must be strictly complied with and only the very clearest words can give final validity to an Order which does not comply with the prescribed statutory conditions (An) Order which goes beyond the statutory conditions under which alone it can be made, an Order which for that reason the Minister could be prohibited from making if he announced his intention of making it, is not an Order which when made can by reason of S 40(5), have statutory effect

' I have considered the authorities cited The case which has given me most anxiety is *Institute of Patent Agents v Lockwood* (1894 *Appeal Cases* 347) It was (there) unnecessary for the House of Lords to determine what would be the position if the rules had been *ultra vires*

"But as a matter of constitutional importance I hope that Members of Parliament and Ministers and Parliamentary draftsmen will consider whether this form of legislation is really satisfactory It may be convenient for Ministers not to have to consider care fully whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute Parliamentary draftsmen may have got into the habit of inserting this kind of *Star Chamber* clause either on the instruc tions of a Minister, or as a matter of habit without his instructions Members of Parliament may not trouble to consider what the sections to which they are giving legislative authority really mean, but simply follow the authority of the *Minister* and the

may deem necessary or expedient, and any Order so made shall have effect from such date, whether before or after the date of the making of the Order, but not being prior to the Constitution Day, as may be specified in the Order."

Clause (3) of Article 224 empowers the President to authorize the Governor of a Province to exercise, in relation to that Province, similar powers as have been conferred upon him in this behalf.

It is necessary to state the reason why this power is conferred on the Executive:

"Our (that is the English) statute-book", says C.K. Allen, "is such a disorderly document that unless some 'floating' power of this kind existed it would be well-nigh impossible to fit the pattern together without an interminable series of dilatory amending Acts. Nor is it a matter of grave constitutional moment that a number of Acts are subject to the 'press-the-button' or 'appointed day' mechanism—that is to say, they do not begin to operate until an Order-in-Council or Ministerial direction calls them into being."

The objection to this category of delegation of power has reference only to the *abnormal extent* to which *sometimes* it is conferred. Whenever this takes place there would be a clear case which would exhibit the total surrendering of legislative power to the Executive. There is, in our Constitution, a sample of this species of absolute and unqualified power conferred on the Executive (see ART. 234.)

As if this was not enough, the President now under the exercise of a professed power said to be derivable from *ART.* 234, has added the following as the *5th clause of ART.*, 224, thus giving to the Judicial Tribunals the power to adapt the existing laws. (See President's *Order XV of* 1956, *of* 13-11-1956) :—

"(5).—Any Court, tribunal or authority required or empowered to enforce a law continued in force under clause (1) shall, notwithstanding that no actual adaptations have been made in such law by an order of the President under clause (2) for the purpose of rendering it consistent with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose:

Provided that if any question arises regarding the adaptations with which such law should be construed for the said purpose, the question shall be referred to the Federal Government if the law relates to a matter enumerated in the Federal List or the Concurrent List in the 5th Schedule and to the Provincial Government in any other case, and the decision of that Government on any such reference shall be final."

"Removal of Difficulty" clause, ART 234.

There is in our Constitution a "removal of difficulty" power given to the President which has all the objectionable features that are associated with what has come to be now nicknamed as "*Henry the VIII clause*". Under *ART.* 234, the abnormal scope of that power could be seen in this that by means of an executive Order even the provisions of the Constitution can be interfered with. The President has the power "for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the *Government of India Act*, 1935, and the Indian Independence Act, 1947, together with Acts amending or supplementing *those Acts, to the provisions of the Constitution, by* Order, *(to)* direct that the provisions of the Constitution shall, during such period as may be specified in the order, have effect, subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient." This clause is just that instance of "intolerable nuisance", to which Sir William Graham Harrison used to refer whenever Acts of Parliament were modified by Rules and Orders. In England, the *Donoughmore Committee* in its Report (1932) expressed a grave disapproval of this type of delegation of Legislative Power and quite for some time now ever since 1932, Parliament

Act The mere confirmation will not save it It would be otherwise if the scheme had been, *per se*, embodied in a subsequent Act, for then the maxim to be applied would have been *Posteriora derogant prioribus* But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in *certiorari*

"I doubt if prohibition will ever be found to be an appropriate remedy In the meantime, I only wish to say that I think the *Court of Appeal*, was right in refusing to decide the case on the ground taken by the Divisional Court

"Now there arises the second question, and it must be apparent that in accordance with the opinion which I have just expressed, the limits are narrow within which objections may be found The respondent can only object with success if he can show that the scheme is a scheme which is not such a scheme as is contemplated and provided for by the Act

"To turn now to the objections urged They are really two in number The first is that the scheme, as submitted to the Minister, did not include a lay out plan, and the second is that in clause (5) of the scheme, as originally presented the Council was given untrammelled powers a defect which the Minister had no right to cure

"My view of the matter is that there is no cut and dried form in which a scheme must be propounded The essentials are that it should clearly show the area which in its present condition is treated as the unhealthy area, and that further it should show that the municipality have *bona fide* proposals in sight, but that all particulars, and the precise form that reconstruction may take, are left over for the decision of the Minister, who can impose such conditions as he desires

"Now, when I apply this view to the facts in the present case, so far from finding something which resembles *Davis's case*, I find a very definite proposal It is clear, therefore that the Minister was fully aware of the general scheme as to how the cleared area was to be dealt with when he granted the confirmation

"As confirmed the scheme seems to be unassailable (It) is clearly my opinion that, if the Minister finds a good scheme, but disfigured by a blot upon it which would make it possible to call the legality of the scheme in question he is absolutely entitled to remove that blot

Thus the Order of the *Court of Appeal* was reversed and judgment of the *King's Bench Division* restored

80 Adaptation of Laws and the Delegation of Legislative Power

A further species of the power, the exercise of which to all intents and purposes partakes of the character of delegated legislation is the one which enables the Executive to *repeal* or *amend existing statutes* There are cases when it becomes absolutely unavoidable for the Parliament to confer this power For example, the delegation of this type of power can be defended on the ground that unless the power of "adaptation" of laws is given in situations where there is a change over from one constitutional framework to another, there is bound to be a great deal of legal chaos Such a power of *adaptation*, for example, was given in S 292, by the *Government of India Act*, 1935, and has also been repeated in the *Indian* and *Pakistan Constitutions* ART 224 (2) gives this power to the President in following terms

"For the purpose of bringing the provisions of any law in force in Pakistan or any part thereof into accord with the provisions of the Constitution, the President may within a period of two years from the Constitution Day, by Order, make such adaptations and modifications in such law, whether by way of amendment or repeal as ne Art 224

Ordinance Making Power and Non-Compliance with condition subsequent.

These considerations have some relevance to the problem that arises for our comprehension when we deal with the limits of ordinance-making power of the President and the Governor under our Constitution. This power is on par with the power of the Legislature, National or Provincial as the case may be, to pass laws and is *available* for exercise at all times when the Legislature is not in session. But it is the requirement of the Constitution that the ordinance shall be laid before the relevant Legislature and shall cease to operate at the expiration of six weeks from the next meeting of the Assembly, or if a resolution disapproving it is passed by the Assembly upon the passing of that resolution. The question that arises for interpretation upon the language of *ART.* 69(2) and 102(2) may be stated as follows: Is it the *mandatory* requirement of the Constitution that the ordinance be laid before the Assembly? What happens if the ordinance is not laid before the Assembly? Does it cease to operate as law on the first day of the Assembly session, or is it that it continues to be the law till six weeks have elapsed from the first date of the meeting of the Assembly next after its promulgation? The answer to this question depends on whether the requirement of the Constitution is regarded as being an imperative or a mere directory provision. It is submitted that in the present author's view, the requirement of the Constitution is *mandatory* and that every ordinance that is not laid before the relevant Assembly dies on the first day of the session of that Assembly. The period of six weeks' life is admissible to such an ordinance only when it is actually laid before the relevant Assembly.

Arts 69 (2) and 102 (2)

81. Legislative and Judicial powers of the Executive—A critical Review of Recent Trends.

No study of the problem of Delegation of Legislative and Judicial powers upon the Executive would be complete unless we review some of the broad features of the criticism to which this tendency to arm the Executive with abnormal power has been subjected in recent years.

Donoughmore Committee on Ministers' Powers.

On 30th of October, 1929, the Lord Chancellor appointed a Committee on Ministers' Powers "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the Supremacy of the Law." This was a high powered Committee and consisted of men of eminence. The original members of the Committee were: the Earl of Donoughmore (chairman), Sir John Anderson, the Dutches of Atholl, the Rev. James Barr, Dr. E. L. Burgin, the Earl of Clarendon, Sir Warren Fisher, Sir Roger Gregory, Professor H. J. Laski, Sir William S. Holdsworth, Sir. W. Ellis Hume-Williams, Sir Leslie Scott, Mr. Gavin Simmonds, Miss Ellen Wilkinson, and Sir John J. Withers. The Countess of Iveagh was appointed as an additional member in January 1930. The Earl of Donoughmore resigned the chairmanship on grounds of health in April, 1931, and was succeeded by Sir Leslie (later Lord Justice) Scott. The Committee published its report in 1932.

The evidence laid before the Committee reflects the view point of some of the eminent English jurists as also of the Parliamentary draftsman, Sir William Graham-Harrison (First Parliamentary Counsel) who, when examined said, he was speaking from practical experience of 27 years as a Draftsman. He said :

"I have no hesitation in saying that it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass, and which the people of this country are supposed to want, if it become necessary to insert in the Acts of Parliament themselves any considerable portion of what is now left to delegated legislation. As classical examples, I would refer to the vast bulk of the *National Health Insurance Regula-*

has *not* enacted this kind of clause—and this despite the provocation to enact this type of clause that must have been given to it under the stress of numerous legislative measures sponsored by the post war Labour Government

Effect of Non compliance with condition subsequent

There are certain Acts that lay down specifically that after "subordinate" legislation is framed, pursuant to the rule making power given to an executive agent under the mandate of law passed by Parliament, it should be *laid* on the table of the House Sometimes the period within which this has to be done is *fixed* and sometimes the expression "as soon as may be" is employed in the Act requiring "legislation" to be laid thereby giving to the *delegate* a considerable latitude of time within which to lay the document Although the law upon the subject is that when such rules are made and promulgated, they take instantaneous effect, that is, even during the period they are in "quarantine" in the insulated chamber of the Legislature, certain questions of constitutional importance relevant to these matters deserve to be stated

The first of these questions is, whether the non fulfilment of this condition could [illegible] provision? And it is upon [illegible] the non compliance with [illegible] ere taken that this provision is merely directory, the rules would have the force of law, non compliance with the laying down clause notwithstanding And if it be held that this direction is imperative, non compliance with it would constitute a condition subsequent on the occurrence of which the rules, although valid when enacted, would cease to have the force of law upon the happening of the "condition subsequent" The second of the two views in the judgment of C K Allen, is a correct view although he confesses that there is very little authority on the point He refers to the case of *Bailey v Williamson* (1873) *Law Reports* 8 *Q B*, *page* 118, on this point in support of this view, although he is conscious of the fact that the provision of the law that formed the subject matter of interpretation in that case was couched in negative terms By S 9 of the *Parks Regulation Act*, 1872 (35 *and* 36 *Victoria*, *Chapter* 15), it was provided "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament, and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before the Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced " Section 4 of the said Act directed that the Regulations shall not take effect until the expiration of one calendar month after the passing of the Act The Court held that by virtue of Section 4, "the regulations, together with the rules if made took effect one month after the passing of the Act, and could at once be confirmed, and Section 9 imposed a condition subsequent, by which any rule disapproved of by either House of Parliament was not to be enforced after such disapproval "

Meaning of "As soon as may be"

The next question has reference to the interpretation of the expression "as soon as may be" The expression is incapable of being confined precisely to a stated term and the utmost that could be said about it is that a court of law is likely to interpret it as being synonymous with that other equally elusive and wooly expression "within a reasonable time " In any case, wherever any such phrase occurs, the compliance with the condition in relation to which it is provided, would be regarded as being in the nature of a *directory* provision and that nothing will turn upon any non compliance with its terms Thus the actual validity of the regulations or rules will not depend upon the view that the court should take of the matter before it in coming to the conclusion that the condition has *not* been complied with

this is either a mere transfer of discretion from the executive to a non-expert judicial body unconcerned with functional ends, or a refusal by the Courts to disturb the administrative determination,

(c) existence of a body of hardened legal doctrine unsuited to the unforeseen circumstances which may now have arisen,

(d) traditional lack of sympathy with the positive aims of modern government,

(e) defects in the procedural machinery and legal forms which must be used in order to obtain access to the Courts. For example, such remedies as *mandamus, prohibition, certiorari,* and *ultra vires* are in many cases useless for the purpose of getting a review of administrative determinations,

(f) expense and difficulty of litigation,

(g) the absence of a body of public law and the concepts appropriate thereto in English jurisprudence, and

(h) volume of business which would press upon the Courts and produce congestion."

In order to remedy the defects which the witness noticed in the actual working of the Administrative Tribunals, he suggested that following considerations be kept in view if an effort had to be made towards a reform of the procedure of Administrative Tribunals:

"An Administrative Tribunal is the appropriate body for deciding the question in dispute :

(1) where a new policy of social improvement is being promoted,

(2) where it is desired to create new standards rapidly in an unexplored field,

(3) where new or existing standards are to be applied or extended throughout the country, and consistency and co-ordination are required,

(4) where special knowledge or experience, or departmental information, are necessary for a good decision,

(5) cheapness and speed are not sufficient justification for an administrative tribunal,

(6) Administrative Jurisdiction should not extend to matters already dealt with by the Courts of Law. It should normally be concerned with disputes in which one or both parties are public authorities.

(7) An Administrative Tribunal should always have power to act as a Tribunal of first instance.

(8) Judicial powers should invariably be exercised by a definite Tribunal consisting of public servants specially nominated for the purpose by the responsible Minister.

(9) An aggrieved party should always have a right to an oral hearing.

(10) Administrative Tribunals should have power to call for documents and compel the attendance of witnesses.

(11) The reasons for a decision and the principles followed should invariably be given. Administrative Tribunals should publish regular reports of their decisions.

(12) Great attention should be paid to the qualifications, training and experience of the *personelle* of administrative tribunals.

(13) The representation of outside interests on the tribunal is desirable in certain circumstances.

(14) The person or persons who enquire into the facts should in all cases also decide the issue.

tions and Special Orders, which run to more than a thousand pages, and to the eight hundred pages of the Orders setting up Trade Boards "

The witness further explained

"the superiority in form which, as a result of the different circumstances and conditions under which they are respectively prepared and completed, delegated legislation has over Statutes in most cases the time available for drafting Bills is inadequate and their final form when they have passed both Houses is generally unsatisfactory On the other hand, Statutory Rules can be prepared in comparative leisure and their subject matter can be arranged in a logical and intelligible shape uncontrolled by the exigencies of Parliamentary procedure and the necessity for that compression which every Minister (however much in debate he may use the draftsman as a whipping boy) invariably demands in the case of a Bill "

Evidence tendered by Robson

More instructive, however, was the evidence tendered by that eminent jurist, W A Robson, to whose book on *Administrative Law* a reference has already been made In a written memorandum that he submitted he observed "The Separation of Powers is a legendary conception which has at no period of English history accurately described the actual division of authority between the various organs of Government " He also felt that "There is no immutable necessity for any particular division of powers Nor has any organ of government a vested right to exercise a particular function It is misleading and unscientific to use language which implies such a right For example, it is common to speak of the 'encroachment' of the Executive on the sphere of the Judiciary As I shall show, the fields of Jurisdiction, of which complaint is made, concern the newer functions of government There can scarcely be 'encroachment' on territory which has not previously been settled "

Explaining that the scope and the character of government have changed enormously in the last 50 years, he observed

"Formerly, government was chiefly regulatory and negative, its main task (apart from defence) was to keep the right and maintain fair play while private interests asserted themselves freely To day, government is largely concerned with the administration of social service, and has become positive in a new sense A century ago, the State acted mainly as policeman, soldier and judge To day, the State acts also as doctor, nurse, teacher, insurance organiser, house builders, sanitary engineer chemist, railway controller, supplier of gas water and electricity, town planner, pensions distributor, provider of transport, hospital organiser, road maker, and in a large number of other capacities "

In relation to this change over from regulatory or control activities to service activities on the part of Government new forms of administrative authority had therefore to be improvised The witness further deposed

"In enquiring into the exercise of judicial powers by Government departments it should not be assumed that the mere existence of legislative enactments conferring powers which preclude review by the Courts of Ministerial determination is evidence of executive tyranny Clearly the manner in which the powers are used is more important than the mere existence of statutory provisions "

In the opinion of the witness, there were certain limitations as to the suitability of the Courts to act as tribunals of review for certain types of administrative decisions and these arise from various causes such as

(a) lack of special knowledge of experience of the subject matter,

(b) absence of a body of case law appropriate to the circumstances The result of

In substance the report defended the *status quo* and recommended no drastic changes. The report of the Committee has not, however, been able to silence the controversy which is still raging in England with regard to the desirability or otherwise of setting up Administrative Tribunals with the kind of powers they have been enjoying in the recent past. In a recent case *Rex v. Brighton and Area Rent Tribunal Ex Parte Marine Parade Estates*, (1936) *Ltd.*, reported in (1950) 2 *King's Bench, page* 410, the Court decided that even if the tribunal had acted on its own knowledge and not upon evidence submitted by the tenants, the ordinary courts were unable to give redress to a landlord whose rents were reduced by the tribunal. A recent writer, G. W. Keeton, has reviewed the present unsatisfactory position on this subject in England as follows :

> "To-day, in Great Britain we live on the edge of dictatorship. Transition would be easy, swift, and it could be accomplished with complete legality. Already, so many steps have been taken in this direction, due to the completeness of power possessed by the Government of the day, and the absence of any real check such as the terms of a written constitution or the existence of an effective second chamber, that those still to be taken are small in comparison. Moreover, in view of the urgency of our needs in the sphere of rearmament, no mitigation of the existing system is to be expected, but rather an intensification of it. To-day, virtually our only remaining constitutional safeguard is the habit of tolerance and the existence of a powerful political opposition, both of which owe their existence to the Revolution of 1688. If both these safeguards disappeared, our constitutional machinery would forthwith become the instrument of a totalitarian despotism." (See his Passing of Parliament p. 33)

Important cases upon the subject referred.

A student wishing to investigate further the problem of delegated legislation and the extremely limited measure of judicial control that is capable of being exercised by the Courts in England over the Administrative Tribunals, would be well advised to study the Chapter entitled "The Menace of Delegated Legislation", which appears in Mr. Keeton's recent book *Passing of Parliament*, and the following English cases to some of which reference has been made already, may also be perused with profit :

(1) *Institute of Patent Agents v. Lockwood* (1894), *A.C.* 347.

(2) *Rex v. Minister of Health; Ex Parte Davis* (1929), 1 *King's Bench, page* 619.

(3) *Minister of Health v. King (on the prosecution of Yaffe)* (1931), *A.C.* 494.

(4) *Errington v. Ministry of Health* (1935), 1 *King's Bench, page* 249. (If a *quasi-judicial* Tribunal (Minister acting under *Housing Act*, 1930, while confirming a clearance order) takes into consideration any extraneous matters (in this case other than those mentioned in para 4 of the first schedule) and if it holds a private inquiry to which persons interested are not invited or takes into consideration *ex parte* statements with which the persons affected by his order have had no opportunity of dealing, it is not acting in accordance with correct principles of justice and its order is liable to be quashed as not being within the powers conferred by the Act).

(5) *Offer v. Minister of Health* (1936), 1 *King's Bench, page* 40.

(6) *Frost v. Minister of Health* (1935), 1 *King's Bench, page* 286.

(7) *Horn* v. *Minister of Health* (1937), 1 *King's Bench, page* 164.

(8) E. *Robins & Sons Ltd. v. Minister of Health* (1939), 1 *King's Bench, page* 520. (Functions of a Minister or local authority under *Housing Act* 1936—how far ministerial or judicial).

(9) *Franklin v. Minister of Town and Country Planning* (1948), *A.C. (H.L.)* 87. Minister while considering the Report of the person who has held a public inquiry under Schedule 1, para 3 of the *New Towns Act*, 1946, after objections have been made to an

(15) The Ministerial control over the work of an Administrative Tribunal should be strictly confined to directions as to principles to be followed contained in a letter of Reference addressed to the members This document should invariably be open to the public

(16) In important questions an appeal should lie to a superior Administrative Appeal Tribunal

(17) The members of Administrative Tribunals should be liable in the ordinary course for malice, negligence, corruption or fraud, committed in the course of their duties

(18) Administrative Tribunals should in no circumstances have power to decide questions involving the liberty of the subject "

Recommendations not accepted by the Committee

These recommendations, however, were *not* accepted by the Committee in their report who observed, "Mr W A Robson has put before us detailed proposals for the establishment of a system of administrative Courts and administrative Law independent of Ministers " The Committee, however, could not recommend their adoption, for in their view "they are inconsistent with the sovereignty of Parliament and the supremacy of the Rule of Law " They further observed

"A regulated system of administrative Courts and administrative Law such as Mr Robson proposes would involve the abolition of both the supervisory and the

The whole report of the Committee is a valuable document and merits careful examination by all those who would like to imbibe its wisdom with a view to appreciating the juristic and the political aspects of the problems posed by the conferment of enormous legislative and judicial powers on the modern Executives

Distinction between judicial and quasi judicial decisions

Before leaving the consideration of this topic, it is necessary to emphasise the relevance of the distinction between *judicial* and *quasi judicial* decisions which the Committee has drawn and which distinction has now acquired more than the mere academic importance that should normally have been attached to a statement upon it which is contained in the report, and this is because it has been noticed with approval in several subsequent judicial determinations as also in several Text Books on jurisprudence as representing a correct statement of the *Law* A quasi judicial decision, say the Authors of the report, is one which has some of the attributes of a judicial decision but not all, and a true judicial decision pre supposes an existing dispute between two or more parties and then involves four requisites

"(1) the presentation not necessarily orally of their case by the parties to the dispute,

(2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence ,

(3) if the dispute between them is a question of law, the submission of legal argument by the parties, and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law

"A quasi judicial decision equally pre supposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4) The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice " (See further Chapter VI of this book)

ART. 224 Continuance of Existing Laws.

The entire *corpus juris* of Pakistan (except of course those provisions of it which became void by reasons of ART 4), was continued under the provisions of *ART*. 224. It is necessary to offer a detailed comment on this Article and with this end in view the Article is reproduced here below :

"224. (1)—Notwithstanding the repeal of the enactments mentioned in ART. 221, and save as is otherwise expressly provided in the Constitution, all laws (other than those enactments), including Ordinances, Orders-in-Council, Orders, rules, bye-laws, regulations, notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Constitution Day, shall, so far as applicable and with the necessary adaptations, continue in force until altered, repealed or amended by the appropriate legislature or other competent authority.

Explanation 1.—The expression 'laws' in this Article shall include Letters Patent constituting a High Court.

Explanation 2.—In this Article 'in force', in relation to any law, means having effect as law whether or not the law has been brought into operation.

"(2) For the purpose of bringing the provisions of any law in force in Pakistan or any part thereof into accord with the provisions of the Constitution, the President may, within a period of two years from the Constitution Day, by Order, make such adaptations and modifications in such law, whether by way of amendment or appeal, as he may deem necessary or expedient, and any order so made shall have effect from such date, whether before or after the date of the making of the Order, but not being prior to the Constitution Day, as may be specified in the Order.

(3) The President may authorise the Governor of a Province to exercise, in relation to that Province, the powers conferred upon him by clause (2) in respect of laws relating to matters enumerated in the Provincial List.

(4) The powers exercisable under clauses (2) and (3) shall be subject to the provisions of any Act of the appropriate legislature."

It would appear that the expression "save as is otherwise expressly provided in the Constitution" has reference to the provisions of *ART*. 4 whereunder the existing law in so far as it is inconsistent with the provisions of Part II becomes void and inoperative. The scheme underlying the Article is to keep the entire pre-constitution Statute Book of Pakistan intact till such time as any portion thereof is altered, repealed, or amended by the appropriate legislature or other competent authority. Under the authority of *ART*. 224, all laws other than the laws repealed by *ART*. 221 (namely the *Government of India Act*, 1935, the *Indian Independence Act*, 1947, together with all other enactments amending or supplementing those Acts) are preserved and are deemed to be in force as though enacted under the mandate of the new Constitution. Thus all laws, including Ordinances, Orders-in-Council, Orders, Rules, Bye-laws, Regulations, Notifications or any other legal instruments, in force in Pakistan or in any part thereof or having extra-territorial validity, immediately before the Constitution Day, continue to operate as law as if the new Constitution had not come into force.

It was essential to make this provision because, in the absence of any such provision being made, all these laws would have automatically lapsed in view of the fact that the constitutional instruments like the *Government of India Act*, 1935, the *Indian Independence Act* etc. that had sustained them, were themselves being repealed by Article 221 of the Constitution.

Indian ART. 372.

Article 224 corresponds to ART. 372 of the *Indian Constitution* which reads as follows :—

"372. (1) Notwithstanding the repeal by this Constitution of the enactments

order under S 1(1) of the Act, has no judicial or quasi judicial duty cast upon him with the result that the consideration of questions relating to bias in the execution of such a duty are irrelevant

(10) *Earl Farl Fitzwilliam's Wentworth Estates Co Ltd v Minister of Town and Country Planning*, (1951) 2 *King's Bench, page* 284, (more particularly the dissenting judgment of Denning L J)

Some of these cases have been considered in detail in the Chapter entitled "Individual and the State—Constitutional Remedies", where the principles regulating the exercise of *certiorari* jurisdiction have been stated

82. Temporary and Transitional Provisions

The last part of our Constitution contains provisions (ARTs 222 to 234) designed to bring about a change over from the provisions of the *Government of India Act*, 1935 (as adapted in Pakistan), as also the *Indian Independence Act of* 1947 and the several Acts amending them, to the kind of constitutional framework which is envisaged by our New Constitution

ART 222 provided for the election of the interim President in accordance with the provisions of the Sixth Schedule The President was to be elected and inducted into [illegible] ARTS 222, 223, 225, 226 227

law on that day the Speaker and the Deputy Speaker of the Constituent Assembly became [illegible]

Governors of the two Provinces became, in consequence of the requirement mentioned in *ART* 226, Governors of those Provinces under the Constitution Under Art 227 the Chief Justice and other Judges of the Federal Court began to hold office as the Chief Justice and other Judges of the Supreme Court established under the new Constitution The Chief Justice and other Judges of the High Court of East Bengal, as also of West Pakistan High Court became the office holders in their respective appointments in the two High Courts of East Pakistan and West Pakistan The jurisdiction and powers of the two Superior Courts were affirmed to be the same, of course, "without prejuduce to other provisions of the Constitution" as were exercisable by the Federal Court and the two High Courts of East Bengal and West Pakistan respectively under the Pre Constitution Law In the sixth clause of Art 227, it was specifically provided

"Subject to the provisions of the Constitution—

(a) all civil, criminal and revenue courts exercising jurisdiction and functions, immediately before the Constitution Day, shall, as from that day, continue to exercise their respective jurisdictions and functions, and all persons holding office in such courts shall continue to hold their respective offices ,

(b) all authorities and all officers, judicial, executive and ministerial throughout Pakistan exercising functions, immediately before the Constitution Day, shall, as from that day, continue to exercise their respective functions "

It would thus appear that all authorities and officers who were exercising, immediately before the Constitution Day, judicial, executive and ministerial powers, subject of course to the provisions of the Constitution, continue to exercise by virtue of this clause their authority and powers under the present constitution

Constitutional Act a provision is incorporated which sanctions the continuance of the pre-existing law despite the repeal of the *Constitution Act* under which it was originally enacted and kept alive. The pre-existing law thus continues to be in force as though no repeal of the parent Act had taken place. Even the temporary Ordinances that were to lapse as a requirement of the *Government of India Act* (as when, for instance, they were not placed before the legislature or having been so placed were not re-enacted by the legislature etc.), by the use of specific language have been made to continue as though they were permanent statutes till they are repealed or amended by appropriate legislature. This had necessarily to be so because the old Central and Provincial legislatures had been replaced by the new ones with considerable alterations as to their legislative power. Besides all this the very requirement of the law as to the termination of the life of the Ordinance as contained in *Ss.* 42 *and* 88 of the *Government of India Act*, 1935, had disappeared with the repeal of that Act by *ART.* 221 of our Constitution. (*see Jibendra Kishore's case P.L.D.* 1957 *S. C. (Pak)*9).

ART. 234. Removal of difficulties.

The President, that is the Federal Government, has been given the power under *ART.* 234, "for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the *Government of India Act*, 1935, and the *Indian Independence Act*, 1947, together with Acts amending or supplementing those Acts, to the provisions of the Constitution, by order, to direct that the provisions of the Constitution shall, during such period as may be specified in the order, have effect, subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient." This power is available to the President, that is the Cabinet, till the first meeting of the National Assembly constituted after the first general election held under the Constitution (see *ART.* 234). It is also the requirement of the Constitution that every order passed in the exercise of this power is to be laid before the National Assembly and may be amended or repealed by an *Act of Parliament* [see *ART.* 234(2)]. This power of the President to alter and amend the Constitution is undoubtedly an abnormal power, but having regard to the fact that a change-over had to be effected from the old constitutional framework as established by the *Government of India Act*, 1935, to the new one as envisaged by our Constitution, the grant of this power was deemed strictly necessary for the purpose of arming the executive with the authority to deal with any situation that should arise in case it was discovered that there was any *lacuna* in the new constitutional instrument. It must be remarked, however, that whether or not an Order has been passed for the purposes mentioned in ART. 234, is a *justiciable* question, and if it is found upon judicial examination to be an order passed for an extraneous purpose it will not be given any effect by a court of law. This provision corresponds to *ART.* 392 of the *Indian Constitution.* The expression "particularly in relation to the transition from the provisions of the Government of India Act" do not restrict but illustrate the scope of the preceding words, namely, "remove any difficulties" (*see Shankari Prasad* v. *Union of India, A.I.R.* (1951) *S.C.* 458.

There are other provisions in this Part like those contained in ARTs. 228, 229, 230, 231 *and* 232 that do not call for any detailed comment. ART. 228 empowers the continuance of legal proceedings initiated earlier than the Constitution Day against the Federation of Pakistan. *ART.* 229 deals with the continuance in office of the Chairman and other members of Federal or Provincial Services Commission. ART. 231 describes succession to property and assets, rights, liabilities and obligations of the present Government of the two provinces and the Federation of Pakistan. *ARTs.* 232 *and* 233 guarantee that subject to the provisions of the Constitution certain classes of persons shall continue to hold their office on the same terms and conditions as were applicable to them immediately before the Constitution Day. (For an appreciation of the scheme of the constitutional provisions see the opinion rendered by our Supreme Court on the Reference made to it by the President under ART. 162 in P.L.D. (1957) Supreme Court p. 219.).

referred to in *ART.* 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of *three* years from the commencement of this Constitution, or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause

"Explanation I —The expression 'law in force' in this Article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas

Explanation II —Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect

Explanation III —Nothing in this Article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force

Explanation IV —An Ordinance promulgated by the Governor of a Province under section 88 of the *Government of India Act*, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of *ART* 382, and nothing in this Article shall be construed as continuing any such Ordinance in force beyond the said period "

Continuance of Existing Laws in other Constitutional Instruments.

This device of preserving intact the fabric of pre existing laws is familiar and has been invariably resorted to in all those constitutional instruments under which the governance of a country is to be secured after the previous constitutional arrangements under which it [illegible] l, are sought to be replaced For instance, even in the [illegible] 92 attempted to achieve the same purpose [See also [illegible] *ndence Act*, 1947] The general rule is that with the repeal of a statute all the laws that have been made under its authority cease to be valid this is of course subject to the provision that there is no saving clause to the contrary (1916 1 *K B*, *page* 688, *Watson v Winch*) It is for this reason that, invariably, in the repealing

FEDERALISM in its broadest and most general sense is a principle which conceives of the federation as the ideal form of social and political life. It is characterized by a tendency to substitute coordinating for subordinating relationships or at least to restrict the latter as much as possible; to replace compulsion from above with reciprocity, understanding and adjustment, command with persuasion and force with law. The basic aspect of federalism is pluralistic, its fundamental tendency is harmonization and its regulative principle is solidarity.

Max Hilderbert Boehm

If the new developments in the older federations are considered together with the new characteristics of the post-war federations, it seems clear that federalism has entered a new phase. Perhaps this may conveniently be called the phase of co-operative federalism. For whereas the guiding principle of eighteenth—and nineteenth—century federalism was the independence of state and federal authorities, the guiding principle of mid-twentieth-century federalism is the need for co-operation between them. The difference is clear; the question remains whether it is great enough to require a rephrasing of the definition of federal government.

Perhaps such a rephrasing is required, but it need not be radical. The classical definition, which was formulated towards the end of the last century by Freeman, Dicey, and others, and has been most carefully explained and justified by Professor Wheare, comprises a number of points: there must be a division of powers between one general and several regional governments, each of which, in its own sphere, is co-ordinate with the others; each government must act directly on the people; each must be limited to its own sphere of action; and each must, within that sphere, be independent of the others. The last two of these points seem inappropriate at the present time, for the older federations have developed practices, and the postwar federations have constitutions, which are clearly incompatible with these conditions. Some may prefer to retain the definition and to admit that these practices do not fit it; and Professor Wheare has suggested that the Indian Constitution should be regarded as quasi-federal and that the Australian system of government is becoming quasi-federal. The alternative is to broaden the definition, and this can be done simply by shortening it.

The following definition may now be adequate: a federal system of government is one in which there is a division of powers between one general and several regional authorities, each of which, in its own sphere, is co-ordinate with the others, and each of which acts directly on the people through its own administrative agencies.

A. H. Birch
(Federalism, Finance and Social Legislation, in Canada, Australia and the United States).

CHAPTER IV

FEDERALISM AND THE PROBLEM OF LEGISLATIVE AND ADMINISTRATIVE COMPETENCE

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, no Federal Law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

(a) to British subjects and servants of the Crown in any part of India; or

(b) to British subjects who are domiciled in any part of India wherever they may be; or

(c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(e) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force wherever they may be."

When the *Government of India Act* 1935 was adopted, after the passing of *Indian Independence Act*, 1947, extra-territorial jurisdiction of the Federal Legislature of Pakistan was expressly affirmed and Section 99, as adapted, assumed the following form:
(*Section 99 Extent of Federal and Provincial Laws*):

"Subject to the provisions of this Act, Federal Legislature may make laws including laws having extra-territorial operation for the whole or any part of Pakistan, and a Provincial Legislature may make laws for the Province or for any part thereof."

It is not essential that laws to have constitutional validity must necessarily have territorial predication. The legislature is competent to pass a law even in respect of one person, and although in that case it could not be said to be a law for Pakistan or part thereof, it may yet be a valid law. Such a law was passed, for instance, when immediately after the establishment of Pakistan, the Governor of Sind, under an Ordinance, had set up a Court of Enquiry to try certain allegations of misconduct and maladministration that had been made against the Chief Minister of the former Province of Sind, Mr M. A. Khuhro. The Provinces, of course, can only make laws that have operational value within the territorial limits defined by the boundaries of the Provinces: negatively, the Provinces have not the power to pass laws having extra-territorial operation (see the case of *B. Ojha v President of Bihar State Board*, reported in A.I.R. (1954) *Patna p.* 262, where it was declared that the State of Bihar (which is a Federal Unit in the Union of India) had no power to make laws which would have extra-territorial operation or which could affect a decree of a Court which is located outside its jurisdiction).

The laws made by a legislature normally have only *intra-territorial* operation, that is, they would apply to all persons and things which are situate, or, to acts and omissions which take place, within the territory over which a given legislature has jurisdiction to legislate. By extra-territorial jurisdiction is meant the capacity or the competence of legislature to pass a law which may validly operate upon persons or things or acts and omissions outside the territory over which it has direct jurisdiction.

Now the general rule is that a *sovereign* legislature has the power to make laws having *extra-territorial* validity. We must, however, distinguish between *the extent of legislative competence to enact valid laws having extra-territorial jurisdiction and their enforceability*. In the case of *British Columbia Electric Railway Company Limited v. The King*, reported in (1946) *Appeal Cases, p. 527 (at p. 542)*, their Lordships of the Privy Council observed:

"What is here in issue is the *extent* of legislative power of a Dominion Legislature having regard to the language of the *Statute of Westminster*. This is not the same ques-

FEDERALISM AND THE PROBLEM OF LEGISLATIVE AND ADMINISTRATIVE COMPETENCE

83 Introductory—Division of Legislative Power

One of the most important problems which has to be faced in the study of any Federal Constitution is to understand the implications of those Constitutional provisions that define the bounds of legislative authority reserved to the Federation on the one hand and to the Federal Units on the other If a double Government is at all to operate in one and the same territory in relation to one and the same people, limits have got to be prescribed in the Constitution not only as to the *territorial* operation of the laws passed by the Federal Units but also upon the area of legislative activity admissible to the Federal and Regional legislatures in so far as the subject matter of legislation is concerned, so that clashes between inconsistent laws with respect to these matters might be avoided These limitations upon the legislative power are of the essence of a Federal polity and as they are imposed by means of Constitutional provisions, comprehension of the legal significance of these provisions must form the subject matter of the special industry of the lawyer That is also one of the reasons why it is said, ' Federalism is legalism "

As this aspect of the study of our Constitution raises questions of considerable importance, it is proposed that a critical study of *ARTs* 105 *to* 111 (Articles that deal with the definition and scope of onferred on the Parlia ment and Provincial Legislat he principles on which they are founded appreciate the *Government of India Act*, 1935, and the case law which has interpreted and applied those provisions Con siderable assistance in the matter of understanding the grammar of the legislative relations between the Federation and the Provinces can also be derived by making a comparative study of the provisions of our Constitution with those of other Federations like the United States, Canada, Commonwealth of Australia and India After this is done we will briefly review the constitutional relationship which obtains between the Federation and the Pro vinces on the Administrative side

84. Territorial Extent of Legislative Power

So far as the *territorial extent* of the operation of Federal and Provincial laws is con cerned *ART* 105 provides the answer as follows Art 105

"*Subject to the provisions of the Constitution*, Parliament *may* make laws, including laws having *extra territorial operation*, for the whole or for any part of Pakistan, and a Provincial Legislature may make laws for the Province or any part thereof "

This Article is a replica of *S* 99 *of the Government of India Act*, 1935, with the only difference that the legislature visualised by that Act did not have conferred upon it, in express terms, absolute competence to enact laws having *extra territorial validity*

Extra territorial jurisdiction had, no doubt, been affirmed in *S* 99, but it was encumbered by the limits mentioned in the five sub clauses that had been tacked on to its second sub section *S* 99 *of the Government of India Act*, 1935 reads as follows — S 99 of the Govt of India Act 1935

"99 (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Pro vincial Legislature may make laws for the Province or for any part thereof

and that in making them liable to income tax on that basis the Indian Legislature is not giving its law any extra-territorial operation."

The Federal Court, however, upon the assumption that the provision complained of had extra-territorial operation proceeded to say that even in such a case such a provision of law would not be *ultra vires* of the *Indian Legislature.* Chief Justice Spens said (at p. 61):

"The lines on which sub-section (2) of S.99 has been framed are even more significant. In the High Court, the learned Judges have read this sub-section as conferring power upon the Federal Legislature to exceed the territorial limits in certain cases and they accordingly limit this power to the five cases specified in that sub-section. This seems to us, with all respect, to be a misreading of the Section. Unlike clauses (b) and (c) of S. 65 of the *Government of India Act of* 1915, sub-section (2) of S. 99 is worded not as a provision 'conferring power to make laws' but a provision which assumes that the preceding sub-section is capable of being read as including the power to make laws even in respect of the matters specified in the five cases dealt with in sub-section (2). This is made clear both by the opening words of sub-section (2), namely, 'without prejudice to the generality of the powers conferred by the preceding sub-section,' and also by the tenor of the sub-section which only purports to obviate objection on the ground of extraterritorial operation."

Clauses (b) and (c) of S. 65 of the *Government of India Act of* 1915, to which by way of comparison their Lordships of the Federal Court made a reference in this case, were in the following terms :

"65.—The Indian Legislature has power to make laws:

(a) for all persons, for all courts, and for all places and things, within British India; and

(b) for all subjects of His Majesty and servants of the Crown within other parts of India; and.....

(c) for all native Indian subjects of His Majesty, without and beyond as well as within British India; and

(d) ......

(e) ......

(f) ......"

Their Lordships felt that the reason for stating in sub-section (2) of S.99 by way of enumeration the extra-territorial powers of law-making was the following :

"If it should be asked what necessity there was, in this view, for specifying particular cases in that sub-section, the answer would be that it was probably thought that the simple omission of the corresponding provisions found in the Act of 1915 might lead to the impression that the power to deal with those matters had been taken away from the Federal Legislature."

They proceeded further to remark :

"Even the language of Section 99(1) involves some limitation and it might have been considered safer to avoid all risk of any difference of opinion as to its scope, so far as the topics specified in sub-section (2) were concerned."

Their Lordships gave one more ground for holding that the power of the Federal Legislature in respect of extra-territorial legislation was not limited to the cases specified in clauses (a) to (e) of sub-section (2) to S. 99, by making a reference to Entry No.23 of List I of Seventh Schedule, relating to '*fishing and fisheries beyond territorial waters*'—and they proceeded to add :

tion as the question whether legislative power is so used as to extend beyond what will prove to be effective A legislature which passed a law having extra territorial operation may well find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of this country must enforce the law with the machinery available to them "

Their Lordships, be it noted, *were interpreting S 3 of the Statute of Westminster* 1931, which says

"It is hereby declared and enacted that the Parliament of a dominion has full power to make laws having extra territorial operation "

Their Lordships concurred with the view expressed by Kerwin J of the *Supreme Court of Canada*, who in his judgment under appeal stated the Rule as follows

" *by head 3 of s 91 of the British North America Act (the Canadian) Parliament* was authorised to make laws with reference to 'the raising of money by any mode or system of taxation ' As long as Parliament legislates with reference to such matters

enactments "

Much of the case law that has arisen in recent years has reference to the problem posed in relation to the power of a legislature to impose *taxes* over persons subject to its jurisdiction (whether corporate or incorporate) in respect of income derived in foreign territories We might notice in this context the case reported in *Broken Hill South Co Ltd v The Commissioner of Taxation (N S W)* (1937) 56 *C L R* 337 *at* 356 There the *Chief Justice of the Australian High Court* observed

"A resident of New South Wales can be taxed in New South Wales in respect of his income wherever derived, his property wherever situated or of any other circumstance The property in New South Wales of any person can be taxed in such manner as the Parliament of New South Wales determines The law imposing any of the taxes mentioned would clearly be a law for the peace, welfare and good government of the New South Wales But it does not follow that any relation to or connection with New South Wales can be utilized as a basis for any taxation ' (See also the case of *Commissioner of Stamp Duties (N S W) v Millar*, (1932) 48 *CLR p* 618 and *Colonial Gas Association Limited v Federal Commissioner of Taxation* (1934) 51 *CLR* 172, *referred to in the above case*)

In the Government of India Act 1935, it is S 99 that deals with the question of territorial jurisdiction and in sub section (2) are laid down, by way of enumeration, the items in respect of which legislature is expressly declared to be competent to give extra territorial effect to its laws

The interpretation of S 99 sub section (2) as given by the Federal Court is to be found in the case of *Governor General in Council v Raleigh Investment Co Ltd* reported in A I R (1944) *F C p* 51 The Court repelled the contention that Indian Legislature was not competent to impose tax upon a person not resident within British India in respect of property which was not situated within British India, since that provision was in the nature of extra territorial legislation not specifically provided for in any of the clauses of sub section (2) of S 99, and on the facts of that the Court held (at p 60) 1944 F C 51

"In the circumstances of the present case, we are of the opinion that the 'source' of dividends paid to the plaintiff company by the sterling companies was British India

for this they referred to the general conception as to the scope of legislative practice in the United Kingdom with regard to income tax. Their Lordships observed (at. p. 120):

"Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within the topic in the legislative practice of the United Kingdom. (See 1933 Appeal Cases, p. 156, at p. 165). The point of reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act." Their Lordships further held that, "the derivation from British India of the major part of its income for a year gives to a Company, as respects that year, a territorial connection sufficient to justify the Company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived. If it is so at home in British India it is a person properly subject to the jurisdiction of the Central India Legislature."

Relevance of the Concept of Extra-territorial Jurisdiction in sphere of provincial Legislative Authority.

All these cases have been referred to by the present writer in an attempt to throw the entire concept of extra-territorial jurisdiction of the Indian Legislature (which was a non-sovereign law-making body) into bold relief. Its pragmatic relevance is still available in the domain of Provincial legislative jurisdiction although, as is obvious, it is no longer relevant for the determination of the scope of the legislative jurisdiction of our Parliament, since that legislative body has now expressly conferred upon it extra-territorial jurisdiction by *ART.* 105. But the Legislatures in the Provinces do not have extra-territorial jurisdiction and the case-law referred to above may well afford a guidance for the determination of any legal problem that might arise in connection with the operation of laws passed by the Provinces that fall within the ambit of the concept of extra-territorial legislative jurisdiction dealt with above.

If a Province were to make laws affecting persons or relating to a subject-matter with which it has no clear and unambiguous territorial nexus such a law will be void (see A.I.R. (1956) *Bombay, p.* 1 *State of Bombay vs. R.M.D. Chamarbaughwala.* If a law, to take one example, relating to preventive detention, has been passed by a Province, the warrant of detention issued by the competent authority under its provisions can have legal force only within its boundaries, and if any attempt is made to execute it in any other part of Pakistan it could be successfully challenged as being an act beyond its legislative and administrative competence. For any law made by a Province to affect matters or persons outside its boundaries, it must be shown that there is a discernible *territorial nexus* between the State and the matter or person sought to be affected thereby. [See (1955) *Bombay* 439, *Radhabai v. The State of Bombay*].

1891 A.C. 455.

We might further notice the case of *Macleod v. Attorney-General for New South Wales* reported in (1891), *Appeal Cases, p.* 455, decided by the *Privy Council* on appeal from the *Supreme Court of New South Wales* upon the question relating to the limits of the legislative power of a Province in a Federal polity. This was a case in which the *Colony of New South Wales* in its *54th Section of the Criminal Law Amendment Act*, 1883, had provided: "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years." On the face of it, the Statute covered all cases of second marriage by a person irrespective of the place where the second marriage takes place, that is, within or without the New South Wales Colony. This wider interpretation was not accepted by the Privy Council and Lord Halsbury, L.C. remarked as to this, "Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That

"It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, *because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and Provincial Legislatures the powers which had been conferred by Sections* 99 *and* 100 *of the Act* Nor can the power be inferred from the doctrine of accessory or necessary powers for, it cannot be said that the other powers conferred on the Federal Legislature cannot be made effective without the right to legislate in respect of fisheries beyond territorial waters The power so to legislate was obviously understood to have been conferred by sub section (1) of Section 99 '

This case went in appeal to the Privy Council, but their Lordships of the Privy Council disposed of the matter upon an entirely different basis—that is on the basis of S 67 of the Income Tax Act, which bars the jurisdiction of the civil court to try civil suits instituted to set aside or modify an assessment made under that Act [See *Releigh Invest ment Co v Governor General, reported in* (1947) *Privy Council, p* 78]

Before taking leave of the above case decided by the Federal Court of India it is necessary to remark that the entire judgment was allowed to be controlled by a considera *tion of the constitutional theory and practice in regard to the concept of extra territorial* jurisdiction of a Dominion Legislature as it obtains in the dominions of the Commonwealth, and more particularly by the proceedings of the Sub committee of the Imperial Conference of 1926 ' which reported that the subject was full of obscurity and there was conflict in legal opinion as expressed in the courts and in the writings of jurists both as to the exist ence of the limitation itself and as to its extent " Their Lordships of the Federal Court referred to the provisions of Section 3 of the Statute of Westminster and the decisions reported in *Croft v Dunphy*, (1933) *A C* 156, and *British Coal Corporation and others v The King*, (1935) *A C* , *page* 500

It is submitted with respect that all these materials constitute a basis which is clearly inadmissible for interpreting the express language of a constitutional instrument of a country to which the statute of Westminster did not apply, and the very fact that Section 99 did not

minster (as it has so often heretofore been judicially determined), was designed to secure the conferment of specific investment of extra territorial power and was calculated to re move the generally accepted limitation on colonial legislative jurisdiction, a limitation which the Courts of the Colony in which the issue came to be raised, were bound to recog nise And it is only after its enactment that that jurisdictional inadequacy no longer hamp ers the legislative freedom of a country like Canada that has the status of a full fledged Do minion (see *Mcleod* v *Attorney General for New South Wales* (1891) *A C* , *page* 455) On the premises of this reasoning, it is submitted with respect, that the decision in *Governor General v Raleigh Investment Company*, (1944) *F C* , *p* 51, does not accord with the correct princi ples of constitutional interpretation and that, to that extent, the decision mis construes and mis applies the second clause of Section 99 of the Government of India Act

We may in the end also notice the case reported in 1948, *Privy Council*, *p* 118 1948 P C 118
(*Wallace Brothers & Co Ltd v Commissioner of Income Tax Bombay*), where also the provisions of the Income Tax Act authorising inclusion of foreign income for the purposes of income tax were challenged as being *ultra vires* on the ground that they had extra territorial opera tion contrary to the provisions of S 99 Their Lordships of the Privy Council left open the question whether the Indian Legislature had or had not extra territorial powers of legisla tion but held on the facts of that case that the power to tax foreign income was inherent in the power to tax the income of a person subject to the jurisdiction of Indian Legislature and

the Constitution which confers upon the legislatures of our country power to pass, what are called, retro-active laws, it cannot be seriously disputed that such a competence is a concomitant correlate, if not an inherent attribute of the powers of the Legislature to make laws. In the case of *The King v. Kidman and others* (1915) 20 C.L.R., p. 425, Higgins J. at p. 451 remarked:

> "The British Parliament, admittedly, has power to make laws retro-active; and, I know of no instance in which a legislature created by the British Parliament has been held to have over-stepped its powers by making legislation retro-active. There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with the vested rights, and of making acts unlawful which are lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retro-active legislation, if it see fit." (See also *L'Union St. Jacques de Montreal v. Belisle*, (L. R. 6 P.C. 31).

Retro-active Legislation and Penal Laws.

But we must note, however, that there is one constitutional limit upon this power to make *ex-post facto* laws in respect of penal legislative measures: ART. 6 offers protection against the making of *retro-active* offences or the infliction of enhanced punishments, and the power to make laws under ART. 105 being itself "subject to the provision of the Constitution", gives place to *ART.* 6, which directs that no person shall be punished for an *act* which was not punishable by *law* when the act was done, nor shall any person be *subjected to* a punishment *greater than that prescribed by law for an offence when the offence was committed.* Subject to this limitation, Legislature has the fullest plentitude of power to interfere with vested rights and can even pass extremely unconscionable fiscal measures and give to them retrospective effect.

A court is not entitled to sit in judgment over the propriety or otherwise of the decision by the Legislature to give retrospective effect to certain laws. For instance, as has been mentioned earlier the retroactive operation of the Finance Act of 1936 (Ch. 34), S. 18(3) was upheld in the case of *Howard De Walden (Lord) v. Inland Revenue Commissioners* (1942) 1 *All E. R. p.* 287. Lord Greene M.R., who delivered the judgment of the Court of Appeal, observed (at p. 290):

> "The fact that the section has to some extent a retro-active effect again appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who well understand the rigour of the contest."

Does the power to legislate retrospectively extend to cover pre-constitution acts and omissions. Union of India vs. Madan Gopal.

It has been held in India that the Legislatures that have been created by the Constitution have the power to enact retro-active laws so as to reach even matters in the pre-Constitution period. (See A.I.R. (1954) *Supreme Court, p. 158, the case of Union of India v. Madan Gopal*). It would, however, be noticed upon the perusal of the judgment in that case that although some observations have been made in support of the proposition that the Legislatures establalished under the Indian Constitution have the power to pass legislation touching and concerning pre-Constitution matters, it was *held*, on the facts of that case, that the impugned legistion, namely the *Finance Act of* 1950 was not, as a matter of construction, a retro-active piece of legislation. The Court remarked that the Act was prospective in operation in that it levied a certain charge of income-tax and super-tax at specified rates for the year beginning on the 1st of April, 1950: it said, "The case is thus one where the statute purports to operate only prospectively, but such operation has, under the scheme of the Indian Income Tax Law, to take into account income earned before the statute came into force. Such an enactment cannot, strictly speaking, be said to be retro-active legislation, though its operation may affect acts done in the past." Their Lordshipsofthe Supreme Court relied on the case of *Queen v. St. Mary, Whitechapel* (1848) 12 *Q.B.*, 120: 116 *E.R.* 811 in support of this view. If this view as to what retro-active legislation is, be regarded as correct, the

seems to their Lordships to be an impossible construction of the statute, the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law " Their Lordships further observed, that in the case of an alleged offender who had committed this offence by marrying a second time outside New South Wales, there would be no jurisdiction to try him under the *New South Wales Code* The wider construction could not be accepted because it would have been beyond the jurisdiction of the Colony to enact such law "Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted *Extra territorium jus dicenti impune non paretur*, would be applicable to such a case Lord Wensleydale when Baron Parke, advising the *House of Lords* in *Jefferys v Boosey*, (1854) 4 *H L R* 815, expresses the same proposition in very terse language He says (at page 926) The Legislature has no power over any persons except its own subject, that is, persons natural born subjects or resident, or whilst they are within the limits of the kingdom The Legislature can impose no duties except on them, and when legislating for the benefit of persons, must *prima facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect All crime is local The jurisdiction over the crime belongs to the country where the crime is committed and, except over her own subjects, her Majesty and the Imperial Legislature have no power whatever It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty s subjects, more than any person who may be within the jurisdiction of the Colony by any means whatsoever, and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass "

The case of *Royal Bank of Canada v The King*, reported in (1913) *Appeal Cases* p 283 also indirectly affirms the proposition that the Provinces of Canada cannot pass laws having 1913 A C 283

matter in that, "the effect of the Statute of 1910, if validly enacted, would have been to preclude the Bank from fulfilling its legal obligation to return their money to the bond holders, whose right to this return was a civil right, which had arisen and remained enforceable outside the Province The Statute was on this ground beyond the powers of the *Legislature of Alberta*, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it "

If it ever becomes necessary for the two Provincial Assemblies of West Pakistan and East Pakistan that any of the matters enumerated in the Provincial List or in respect of any matter not enumerated in *any* list in the Fifth Schedule, should be regulated in the Provinces by an Act of Parliament they could pass resolutions to that effect and upon the passing of such a resolution it shall be lawful for the Parliament to pass the necessary legislation regulating the matter in question But then such a legislation in regard to its operation and effect in any province or part thereof could also be amended or repealed by an Act of the Provincial Legislature of the Province concerned in amending or repealing it (See ART 107) ART 107

85 Retrospectivity of laws

Competence to enact laws retrospectively Although there is no affirmative provision in

and the defendant thereupon became entitled on those allegations to a judgment missing the whole claim. This result was not due to any defect in the jurisdicti the Supreme Court which was ample but to a short-coming in the law in general the absence of appeal, the judgment was final determination of the rights of the p and the ordinary principle that a man is not to be vexed twice for the same al cause of action applies unless it be excluded by Legislature in explicit and unmista terms. This is not the case here."

Their Lordships further observed :

"It would require a language much more explicit than that which is to be in the Ordinance of 1908 to justify a Court of Law in holding that a legislative intended not merely to alter the law but to alter it so as to deprive a litigant of a ment rightly given and still subsisting."

Hedderwick vs. Federal Commissioner.

In short, the court would *lean* against any construction of legislation which have the effect in it of making statute retrospective so as to affect vested rights. following extracts from the judgment of the *Australian High Court* would be of much assis to the student in understanding the limits of this rule. [*Hedderwick and others v. F Commissioner of Land Tax* (1913) 16 *C. L. R. p.* 27 (at p. 36)]:

"As to the rule applicable to changes in the law pending litigation I read *Hardcastle on Statutes*, 2*nd ed.*, *p.* 374:—'*In Main v. Stark* 15 *App. Cas.* 384 *at pp.* 387 Lord Selborne said: 'Their Lordships, of course, do not say that there might n something in the context of an *Act of Parliament*, or to be collected from its lang which might give to words, *prima facie* prospective, a larger operation; but they not to receive a larger operation unless you find some reason for giving it.' 'Words not requiring a retrospective operation, so as to affect an existing Statute judicially, ought not to be so construed.'

"It is a well 'recognized rule that Statutes should be interpreted, if possible, to respect vested rights.' For it is not to be presumed that interference with ex rights is intended by the Legislature, and if a Statute be ambiguous the Court should to the interpretation which would support existing rights."

"It is hardly necessary to remark that the Crown's vested rights are to be resp as much as are the rights of private persons.

"Again, at p. 375, the learned author says :—

"*In Gardner v. Lucas* 3 *App. Cas.* 582, at p. 603, Lord Blackburn stated this of law in the following way with regard to the effect of a Statute upon a transaction and closed, where the effect would be to alter a transaction already entered 'Where,' said he, 'the effect would be to make that valid which was previously in to make an instrument which had no effect at all, and from which the party w liberty to depart as long as he pleased, binding—I think the *prima facie* constructi the Act is that it is not to be retrospective, and it would require strong reasons to that it is not the case.' In Moon v. Durden 2 Ex., 22, an action to recover a su money alleged to have been won upon a wager, was commenced in June 1845. August 1845, the 8 & 9 Vict. c. 109 was passed, which enacted, in sec. 18, that suit shall be brought or maintained for recovering 'any' such sum of 'money', an question was whether that enactment was retrospective so as to defeat an action al commenced. It was held that it was not retrospective, and Parke B., in his judgn said :—'It seems a strong thing to hold that the legislature could have meant that a who under a contract made prior to the Act had as perfect a title to recover a su money as he had to any of his personal property, should be totally deprived of it wit

dicta referred to above would become *obiter* since the reason for deciding the case will then be entirely a different one altogether

It is the view of the present writer that the Legislatures established by the Constitution cannot pass laws affecting acts and omissions that have taken place before the coming into force of the Constitution And before such an abnormal power could be suffered by courts to be assumed by the Legislatures, it must be shown that it was expressly conferred upon them Once it is conceded that the Legislatures established by the Constitution are new legal institutions deriving their powers from the terms of the Constitution itself it would be difficult to justify the assumption of the power by such newly created institutions to pass laws affecting acts and omissions countenanced by subjects during the pre Constitution period

For the student of Law an important feature of retro active legislation to understand is the rule of construction which courts have evolved in regard to the interpretation of the retro active effect of legislation upon what are called 'vested rights The all important rule in this respect is the one which says that all legislation is presumed to be prospective unless by express words or necessary intendment the court finds that the legislation in question is calculated or is designed to have retrospective effect and then too, no more effect by way of retrospective operation would be given to it, than is absolutely necessary Bowen L J observed in the case of *Reid v Reid* (1886) 31 *Ch* p 402 at p 408

Rules of Interpretation in regard to the Retrospective operation of laws

Reid vs Reid

"It seems to me that even in construing an Act which is to a certain extent retrospective and in construing a Section which to a certain extent is retrospective we ought nevertheless to bear in mind that maxim (*omnis nova constitutio futuris forman imponere dilect non praeteritis*) as applicable whenever we reach the line at which the words of the Section cease to be plain That is a necessary and logical corollary of the general proposition, that you ought not to give a larger retrospective power to a Section even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant "

(See also *Gardner v Lucas* (1878), 3 *A C* 582 at 601, *Hough v Windus* (1884) 12 *Q B D p* 224)

In the case of *John Lemm v Thomas Alexander Mitchell* (1912) *A C p* 400 the effect of prior determinations by courts resulting in the accrual of vested rights was considered by their Lordships of the Privy Council In this case the respondent succeeded in obtaining a decree for damages in his favour on the allegation that appellant was guilty of ' criminal conversation with his wife In the proceedings the appellant defended himself by saying that the same action brought by the respondent had been thrown out by the Court on the ground that under the *law of Hong Kong* (as gathered from a certain Ordinance) the common law offence of criminal conversation did not exist and he contended that the new *Ordinance No 20 of* 1908, which had restored and revived the right of action for criminal conversation in Hong Kong did not expressly set aside the judgment that had duly been passed in his favour The Ordinance had undoubtedly an express retro active effect to the extent of enabling action to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony, but the question to be determined was whether it further operated to annul a valid and subsisting judgment as between parties whose rights had been duly determined under and in accordance with the law which existed before the new Ordinance was passed The respondent assumed that it did and the lower Court accepted his case Their Lordships set aside the judgment observing

Retro-active laws and Res-jud cata John Lemm v Thomas A Mitchell

"The substance of the question then tried was whether or not the law of the Colony gave the plaintiff a remedy on the facts alleged It was decided that it did not

and the defendant thereupon became entitled on those allegations to a judgment dismissing the whole claim. This result was not due to any defect in the jurisdiction of the Supreme Court which was ample but to a short-coming in the law in general. In the absence of appeal, the judgment was final determination of the rights of the parties and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies unless it be excluded by Legislature in explicit and unmistakable terms. This is not the case here."

Their Lordships further observed :

"It would require a language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of Law in holding that a legislative body intended not merely to alter the law but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

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In short, the court would *lean* against any construction of legislation which is to have the effect in it of making statute retrospective so as to affect vested rights. The following extracts from the judgment of the *Australian High Court* would be of much assistance to the student in understanding the limits of this rule. [*Hedderwick and others v. Federal Commissioner of Land Tax* (1913) 16 *C. L. R. p.* 27 (at p. 36)]:

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compensation ' So also, in Couch v Jeffries 4 Burr , 2460, a verdict was obtained for a penalty for not paying stamp duty After the verdict, 9 Geo III c 37, was passed, which enacted, in sec 4, that 'if the duty before neglected to be paid shall be paid by September 1, 1769, the person who had incurred the penalty by the omission shall be discharged from the said penalty ' In pursuance of this Statute the defendant had paid the duty which he had before neglected to pay, and thereupon moved that judgment should not be entered up against him 'But', said Lord Mansfield C J , 'here is a right vested, and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it had so legally vested, and who had been put to expense in prosecuting' 'It is a general rule, said Jessel, M R , in *Re Joseph Suche & Co.* 1 *Ch D* , 48, *at p* 50 'that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them ' But there is an exception to this rule, namely, where enactments merely affect procedure, and do not extend to rights of action "

[See also

(1) *Gardner and Co Ltd v Cone* (1928) 1 *Ch* , *p* 955,

(2) *Lord Suffield* v *Commissioners of Inland Revenue* (1908) 1 *K B D* , *p* 865,

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86 Distinction between Procedural Law and Substantive Law

As to the distinction between procedural law and substantive law, no rules exist by recourse to which a clear cut line of demarcation can be drawn between them And, in fact, in no case have any tests been formulated in any of the several cases that have been decided by the Courts in England or elsewhere which can be regarded as being of any practical assistance to the student in the matter of defining the province of substantive as opposed to adjectival law But for the purpose of understanding the theoretical basis of the distinction between these two branches of law, it should be useful to turn to the statement of the principle in terms of which Sir John Salmond regards the problem

"It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure (for a fuller discussion of the topic see W W Cook, 'Substance' and 'Procedure' in the Conflicts of Laws (1933), 42 Yale L J 333) and it will conduce to clearness if we first consider a plausible but erroneous explanation In view of the fact that the administration of justice in its typical form consists in the application of remedies to the violations of rights, it may be suggested that substantive law is that which defines the *rights*, while procedural law determines the *remedies* This application, however, of the distinction between *jus* and *remedium is* inadmissible For, in the first place, there are many rights (in the wide sense) which belong to the sphere of procedure, for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right itself No one would call the abolition of capital punishment, for instance, a change in the law of criminal procedure The substantive part of the criminal law deals, not with crimes alone, but with punishment also So in the civil law, the rules as to the measures of damages pertain to the substantive law, no less than those

declaring what damage is actionable; and rules determining the classes of agreements which will be specifically enforced are as clearly substantive as are those determining the agreements which will be enforced at all. To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.

"What, then, is the true nature of the distinction? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quad ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.

"A glance at the actual contents of the law of procedure will enable us to judge the accuracy of this explanation. Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure. For the first relates to the subject-matter of litigation, the second to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offence is punishable summarily or only on indictment is a question of procedure. Finally, it may be observed that, whereas the abolition of capital punishment would be an alteration of the substantive law, the abolition of imprisonment for debt was merely an alteration in the law of procedure. For punishment is one of the ends of the administration of justice, while imprisonment for debt was merely an instrument for enforcing payment.

"So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other." (See his "Jurisprudence" Ed. p. 475-6).

The distinction between substantive law and adjectival law becomes at times highly important for the purpose of judicial interpretation: an adjectival law is presumed to be retrospective on the theory that nobody has a vested right in procedure, but the substantive law is presumed to be prospective upon the footing of the rule evolved by courts *viz*: that the legislature does not intend to prejudicially affect the rights of the subjects and when it does so intend, it makes its intention manifest by means of appropriate words in the statute.

87. Territorial Extent of Provincial Legislation

We have already seen that if a Province were to make laws affecting persons or relating to a subject-matter with which it has no clear and unambiguous territorial nexus such a law will be void. Thus the competence to legislate (territorially considered) is specifically confined to the extent of there being a territorial nexus between the subject-

compensation ' So also, in Couch v Jeffries 4 Burr , 2460, a verdict was obtained for a penalty for not paying stamp duty After the verdict, 9 Geo III c 37, was passed, which enacted, in sec 4, that 'if the duty before neglected to be paid shall be paid by September 1, 1769, the person who had incurred the penalty by the omission shall be discharged from the said penalty ' In pursuance of this Statute the defendant had paid the duty which he had before neglected to pay, and thereupon moved that judgment should not be entered up against him 'But', said Lord Mansfield C J , here is a right

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89. Concept of the territory of the State

The territory of the State is that portion of the earth's surface which is in its exclusive possession and control and includes not only the column of superincumbent air but also the territorial waters which under the Public International Law extend to three miles from the coast. (See *Vol. 1 of Oppenheim's International Law, 7th Ed., p. 415*, 444, *and the case* reported in A.I.R. (1954) *Madras, p. 291, A.M.S.S. V.M. & Co. v. State of Madras*). Similarly, it is a well-known principle of International Law that for certain purposes like Police, Revenue, Public Health, Fisheries, a sovereign State may enact laws affecting the seas surrounding its coast to a reasonable distance which may exceed the ordinary limits of its territorial waters. In A.I.R. (1933) *Privy Council*, p. 16, E.R. *Croft v. Sylvester Dunphy*, it has been held, for instance, that the Canadian Parliament has the power to pass a legislation, authorising the forfeiture of dutiable goods found in vessels "hovering within a distance of 12 miles from the coast of Canada." This was because, "the States can legislate effectively only for their own territories. To what distance sea-ward the territory of a State is to be taken as extending is a question of international law....Whatever the limits of the territorial waters in the international sense, it has long been recognised that for certain purposes . . . a State may enact laws affecting the seas surrounding its coasts to a distance sea-ward which exceeds the ordinary limits of its territory."

90. Legislative Competence as to subject-matter

In so far as *legislative competence* is to be determined with regard to the *subject-matter* that is constitutionally admissible to Federal and Provincial Legislatures, ART. 106 of our Constitution provides as follows :—

"106.—(1) Nothwitstanding anything in the two next succeeding clauses, Parliament shall have exclusive power to make laws with respect to any of the matters enumerated in the Federal List.

Art. 106

(2) Notwithstanding anything in clause (3), Parliament, and subject to clause (1) a Provincial Legislature also, shall have power to make laws with respect to any of the matters enumerated in the Concurrent List.

(3) Subject to clauses (1) and (2), a Provincial Legislature shall have exclusive power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial List.

(4) Parliament shall have power to make laws with respect to matters enumerated in the Provincial List, except for a Province or any part thereof."

S.100 of the Govt. of India Act, 1935.

This Section is a verbatim reproduction of S.100 of the Government of India Act, 1935, which was in the following words:

"100.—*Subject-matter of Federal and Provincial Laws*:

(1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding sub-sections the Provincial Legislature has,

torial in its effect and therefore *ultra vires* of the powers of the Provincial Legislature

In the *American Constitution*, as also in the *Canadian* and *Australian Constitutions*, the Federal Units do not possess any extra territorial legislative powers (See (1914,) 232 *U S* 299, at 305 6 58 *L Ed* 612, *United States v Bennett*, (1913) *Appeal Cases*, p 283, *Royal Bank of Canada v The King*, (1891) *Appeal Cases*, p 455 *MacLeod v Attorney General for New South Wales*)

88. Legislative Authority in relation to foreigners

In its operation every law passed by the National Parliament of Pakistan, in the absence of statutorily enacted exceptions to the contrary, will apply to all persons, foreigners not excluding, within the territory of Pakistan to which the Act has been made applicable

This, a somewhat broadly stated rule, as to the legislative competence of Parliament to pass laws affecting foreigners, is subject to the ordinary rules of private and public international law concerning diplomatic and consular immunities enjoyed by foreign missions and their representatives stationed within the territory of the State There is also the rule of construction which has been evolved by English Courts, by recourse to which recognition is extended to the principle *viz*, that in respect of crimes committed abroad the State exercises jurisdiction only with respect to its own subjects A law will therefore always be so construed as not to make its enactment applicable to foreigners in respect of acts committed outside the State In the case of *The Queen v Jameson* (1896) 2 *Q B* 425 it was observed

The reason why the diplomatic privileges and immunities are granted to foreign envoys is no other than the one founded on rules governing international morality These rules demand that the municipal law of the receiving States should extend to the foreign representatives the status and position which is due to the sovereign States whose agents they are In the words of Oppenheim

> "The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity, and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges For it is obvious that were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the goodwill of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions" (L Oppenheim's *International Law*, 1948 Ed p 706)

It is perfectly competent to the National Parliament to pass a law which is applicable to acts done or omissions made by Pakistani subjects, no matter where they may be residing at the time when those acts and omissions took place (See S 4 of the Pakistan Penal Code, as also S 188 of the Code of Criminal Procedure)

20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Exclusive Powers of Provincial Legislatures.

"92.—In each Province the Legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and the Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other licences in order to the raising of a Revenue for Provincial, Local or Municipal purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (b) Lines of steam ships between the Province and any British or Foreign Country:
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the General Advantage of Canada or for the Advantage of two or more of the Provinces.

and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List')

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof "

Section 100 of the Government of India Act has also been adapted as ART 245 in the Indian Constitution

S 91 and 92 of the Canadian Constitution

Sections 91 and 92 of the *British North America Act* have a great deal of importance for us, not only because the scheme of those sections was responsible for the phraseology which the framers of the *Government of India Act* 1935 adopted in that Act, but also because, numerous decisions of the Privy Council that have interpreted the provisions of the Canadian Constitution are of considerable assistance to us in the matter of comprehending the precise scope of the powers of the Federal and the Provincial Legislature in regard to their competence to enact laws affecting certain well defined species of *subject matter* that have been made admissible to them by *ART* 106 of our Constitution *Sections* 91 *and* 92 are as follows —

"91 It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces and for greater certainty, but not so as to restrict the Generality of the foregoing terms in this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,—

1 The Public Debt and Property

2 The Regulation of Trade and Commerce

2 A Unemployment Insurance

3 The raising of money by any Mode or System of Taxation

4 The borrowing of Money on the Public Credit

5 Postal Service

6 The Census and Statistics

7 Militia, Military and Naval Service, and Defence

8 The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada

9 Beacons, Buoys, Lighthouses, and Sable Island

10 Navigation and Shipping

11 Quarantine and the Establishment and Maintenance of Marine Hospitals

12 Sea Coast and Inland Fisheries

13 Ferries between a Province and any British or Foreign Country or between two Provinces

14 Currency and Coinage

15 Banking, Incorporation of Banks, and the Issue of Paper Money

16 Savings Banks

17 Weights and Measures

18 Bills of Exchange and Promissory Notes

19 Interest

In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective power. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Section, so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom devolves the difficult duty of fixing the frontiers of Federal and Provincial powers to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. (*Citizen's Insurance Co. of Canada v. William Parson*)—(1881) 7 A.C. 96).

In the case of *Attorney-General for Canada v. Attorney-General for British Columbia*, reported in (1930) *A.C. page* 111, the following *four* propositions have been laid down as indicative of the structural pattern of the legislative powers competent to the Dominion Parliament and the Provincial Legislature:

(a) The Legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in *s.*91, is of paramount authority, even though it *trenches* upon matters assigned to the Provincial legislatures by *s.*92. (See *Tennant v. Union Bank of Canada*, (1894) *A.C. p.* 31).

(b) The general power of legislation conferred upon the Parliament of the Dominion by *s.* 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s.92, as within the scope of Provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion. (See *Attorney-General for Ontario v. Attorney General for the Dominion* (1896) *A.C.* 348).

(c) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in *s.*91. (See *Attorney-General of Ontario v. Attorney-General for Dominion*, (1894) *A.C.* 189, *and Attorney-General for Ontario v. Attorney-General for Dominion*, (1896) *A.C.* 348).

(d) There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail. (See *Grand Trunk Railway of Canada v. Attorney-General of Canada*. (1907) *A.C.* 65).

In this case (which is known as *Regulation of Fish Canneries Case*), a critical review of most of the decided cases was attempted by Lord Tomlin before he laid down these four propositions. It must, however, be observed that although in subsequent decisions of the Privy Council these propositions have, generally speaking, been accepted, they came in for a lot of criticism at the hands of the authors of the Report on the British North America Act. [(See (1.) in re *Regulation and Control of Aeronautics in Canada, Reference* (1932) *A.C.* 54; (2) in re *Silver Bros. Ltd.* (1932) *A.C.* 514; (3) *Canadian Pacific Railway Co. v. Attorney-General for British Columbia and Attorney-General for Canada*, (1950) *A.C.* 122. and (4) the *on Report the British North America Act, pp.* 20, 21 *and* 51)].

11 The Incorporation of Companies with Provincial objects

12 The Solemnization of Marriage in the Province

13 Property and Civil Rights in the Province

14 The Administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts

15 The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section

16 Generally all Matters of a merely local or private Nature in the Province

Analysis of Sections 91 and 92 of the British North America Act would reveal the following main propositions in the light of which the distribution of legislative powers between the Canadian Parliament and the Provincial Legislature, could be understood

Broad features of the federal principle as it operates in Canada

(1) It is lawful for the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to *all* matters *other than those assigned exclusively to the legislatures of the Provinces* (and for this reference would be made to S 92 where 16 heads have been mentioned with respect to which the Provincial Legislature has exclusive power to make laws) It would seem to follow from this that *if* upon an enquiry by a court directed upon the question whether a particular enactment is one which comes under the purview of S 92, it is found that the answer is in the negative then the impugned enactment must be deemed to fall within the scope of legislation competent to the Dominion Parliament under S 91 (*Alberta Debt Adjustment Act reference Attorney General for Alberta v Attorney General for Canada* (1943) A C 356 at *p* 371)

(2) *Such subjects as have been mentioned in section 91 have been specified merely* to secure greater certainty in the matter of defining the sphere of Dominion Legislation And care must be taken *not* to restrict the generality of power expressly asserted in favour of Dominion Legislature in the opening clause of S 91 —the statutory language being "to make laws for peace order and good government of Canada in relation to all matters not coming within classes of subjects by this Act assigned exclusively to the [illegible]

to provide *greater certainty* in the *matter of fixing boundaries of the legislative power* of the Dominion legislature (See *Citizens Insurance Company of Canada v William Parsons* (1881) 7 *A C* p 96) In other words, the heads of subjects enumerated in section 91 merely exemplify the species of general power admissible to the Dominion Legislature, "to legislate for the peace, order and good government of Canada"

(3) In the last paragraph, a caution has been administered by way of an express declaration that any matter enumerated in S 91 shall not be so construed as to enable the Dominion Parliament to enact laws of a local or private nature in respect of matters which have been reserved exclusively to the legislature of the Provinces

The question, "What is legislation which is of a local and private nature, comprised in the enumeration of subjects given in S 91", is a difficult question to answer in the abstract A close study of the case law upon the point tends to show that no firm test has been evolved by the courts by appeal to which this question can be satisfactorily answered, and the judicial determination of these limits has not gone beyond the aforementioned admonition

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiii-A) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

(xxvii) Immigration and emigration;

(xxviii) The influx of criminals;

(xxix) External affairs;

(xxx) The relations of the Commonwealth with the islands of the Pacific;

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) Railway construction and extension in any State with the consent of that State;

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal judicature, or in any department or officer of the Commonwealth.

52.—The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

Federal Principle as it operates in Australia S. 51 and 52 of the Commonwealth Constitution

The Australian Constitution Act of 1900 also embodies a scheme of distribution of legislative powers which is somewhat analogous to the one which has been embodied in our Constitution. There is, however, one important difference. The States within the Commonwealth of Australia occupy a dominant position in that, under *Section* 51 of that Constitution, where subjects have been enumerated, both the Centre and the States have *concurrent* legislative powers with respect to these subjects and whenever there is inconsistency in the actual legislation enacted by the Federal and the State Legislature it is the Federal Law which prevails (*S.* 109). The exclusive field admissible to the Centre is of meagre dimensions and a reference to *S.* 52 of the Constitution Act would show that there are only *three* subjects mentioned therein in regard to which the Federal Legislature has exclusive competence to make laws. Residuary powers are vested in the Federal Units.

Sections 51 and 52 of the Commonwealth of Australia Constitution Act, 1900 are reproduced below for convenience of reference :—

"51.—The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

(i) Trade and commerce with other countries, and among the States,

(ii) Taxation, but so as not to discriminate between States or parts of States,

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth,

(iv) Borrowing money on the public credit of the Commonwealth,

(v) Postal, telegraphic, telephonic, and other like services,

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth,

(vii) Lighthouses, lightships, beacons and buoys,

(viii) Astronomical and meteorological observations,

(ix) Quarantine,

(x) Fisheries in Australian waters beyond territorial limits,

(xi) Census and statistics,

(xii) Currency, coinage, and legal tender,

(xiii) Banking, other than State banking, also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money,

(xiv) Insurance, other than State insurance, also State insurance extending beyond the limits of the State concerned,

(xv) Weights and measures,

(xvi) Bills of exchange and promissory notes,

(xvii) Bankruptcy and insolvency,

(xviii) Copyrights, patents of inventions and designs, and trade marks,

(xix) Naturalization and aliens,

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth,

(xxi) Marriage,

tutional principle providing for the supremacy of federal law. The Constitution clearly states that the laws of the United States, which are made in pursuance of the Constitution, shall be the supreme law of the land, anything in the laws of the states to the contrary notwithstanding. In other words, a state may perhaps in certain ways regulate inter-state commerce but only in so far as such regulations are consistent with, or permissible under, the policy Congress may have chosen to establish. In those fields, then, where both federal and state Governments may sometimes be active, federal law is supreme."

The relationship of the Federal to the State governments within the framework of U.S. Constitution, has been admirably summed up in the case of *United States v. James Gordon Bennett, 58 L. Ed. p. 612*. The controversy presented to the court in this case was with regard to the taxing power of the United States as compared with the power of the States to tax property. It was observed that one State could not tax property in another without violating the Constitution, for where the power of one ends the authority of the other begins. But it was pointed out that this principle had no application to the Government of the United States so far as its taxing power was concerned: that power

> ". . . is co-extensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution, and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed, the existence of such a wide power is the essential resultant of the limitation restricting the states within their allotted spheres, for if it were not so, then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority, and thus destroying the rights of other states, and at the same time saving their rights from destruction by the other states, in other words, of maintaining and preserving the rights of all the states, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The Supreme Court thus declined to entertain objection based on due process clause of the Fifth Amendment to the effect that the attempt by the United States to tax the property of a citizen residing within its jurisdiction but whose property is beyond the territorial limits of the United States was unconstitutional and regarded it as being an objection which was opposed to the principles of justice and "was inconsistent with every conception of representative and free government." Thus the Constitution, although it is the instrument which effects grant of power in favour of the United States and to that extent cuts down the power of a state, has been so construed as not to operate as a limit upon the sovereign power of the United States as a nation, and its relation to its citizens, and their relation to it.

The position in the United States is thus radically different in that States possess every power that Government has anywhere exercised except only those powers which their own Constitution or the Constitution of the United States explicitly or by plain interference withhold. They are the ordinary Governments of the country; Federal Government is its instrument only for particular purposes.

A critical comment on Articles 106 & 110 of our Constitution.

Article 106 of our Constitution must be read in conjunction with the Fifth Schedule which in fact is a part of that Article. *ART.* 106 does not in terms make a reference to the Fifth Schedule, but there can be little doubt that the Fifth Schedule which itself makes a reference to *ART.* 106 and contains the Federal, Provincial and the Concurrent Lists is an integral part of *ART.* 106. Besides, interpretation clauses of *ART.* 218 in terms refer us to the Fifth Schedule. (See the definition of Federal, Concurrent and Provincial Lists in *ART.* 218).

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament "

Section 109 of the Australian Constitution provides

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid "

That section taken in conjunction with covering clause 5 of the Constitution (which says This Act, and all laws made by the Parliament of the Commonwealth under the Constitu [illegible] les of every State and of every part of [illegible] 'aws of any State, and the laws of the [illegible] the Queen's Ships of War excepted, whose first port of clearance and whose port of destination are in the Commonwealth) argues for the constitutional supremacy of the federal laws In the exercise of concurrent powers the law of the Commonwealth is supreme but the concept or the doctrine, by appeal to which inconsistency between the Commonwealth law and the State law is resolved by giving effect to Federal law, is not one of *ultra vires* in other words, in the theory of Australian Constitutional Law, the State Law to the extent of inconsistency with Federal law becomes *inoperative* but is not *ultra vires* Its legal status, that is, its authority, as law, is thrown in a state of suspended animation and is restored back to life the moment Commonwealth law, by virtue of whose existence it has been rendered inoperative, ceases to be as and when it expiresor is repealed The State law, inoperative by reason of its conflict with Commonwealth Law, revives if the Commonwealth law happens to vacate itself from the concurrent field (See the case of *Carter v Egg* and *Egg Pulp Marketing Board*, (*Vict*) (1942) 66 *C L R* 557, *at* 573)

The inconsistency as between the Federal and the State law might be gathered from the conflict in the actual terms of the competing statutes And if there be no such direct conflict, the State law might yet give way to Commonwealth law, *if the latter is intended to be a complete and exhaustive code upon the subject* or there might be a case in which inconsistency might arise if the competing State and the Commonwealth laws seek to legislate in respect of an identical subject matter (For an instance of the first type of inconsistency see *King vs Licensing Court of Brisbane*, (1920) 28 *C L R page* 23, as to the second, see *Clyde Engineering Company, Limited v* Cowburn, (1926,) 37 *C L R* 466, and as to the last see *Wenn v Attorney General*, (*Vict*) (1948) 77 C L R 84)

The principle of Federalism, as adopted in America, is realised in the division which the Constitution purports to effect in the matter of the exercise of political powers between two levels of Government The Federal Government obtains its powers by way of a grant, and the remaining powers, unless expressly denied to the states, are expressly declared to be vested in the States and the people (see the Tenth Amendment) There is a clear cut division of authority between the Federal and State Governments and it should be remembered that powers granted to one or the other of two Governments are not necessarily exercised exclusively by either There is a field common to both Governments which is administered concurrently, the grant of taxing power to the Congress does not amount to the denial of this power to the States It was certainly intended that both Governments should be able to use such a power **The position in the U S A.**

The position has been summed up by Robert K Carr in his book, "*The Supreme Court* and *Judicial Review*" as follows

"As a result of this exercise of concurrent powers the line between central and state power becomes somewhat blurred However, the resulting uncertainty, so far as our description has gone, is not too serious a matter It is true that many of the powers granted to Congress are not exclusive and may be considered in the technical sense as belonging to the state governments as well But there is, at this point, a subsidiary consti

(2) Where the conflict between the *Provincial law* and *the existing law* is to be found with respect to matters falling in the *concurrent list*; then, if the Act of the Provincial Legislature having been reserved for the assent of President, has received the assent of the President, the Act of the Provincial Legislature shall prevail in the territory of the Province or part thereof; but it is competent to the Parliament to enact any law with respect to the same matter amending or repealing it. In the absence of such assent the existing law will prevail over the Provincial Law.

summary of the combined effect of ARTS. 106 and 110.

Let us now sum up the combined effect of *Articles* 106 *and* 110:

Competence to legislate is provided for in ART. 106. If any legislature in Pakistan is at all to pass a constitutionally valid law it must, to begin with, show that it is *competent* to do so by appeal to the provisions of *ART.* 106. Where there is a lack of initial competence, the question of resolving inconsistencies between the law passed by that legislature with that passed by another legislature by appeal to *ART.* 110, does not arise. *ART.* 110 postulates the existence of laws passed by competent legislatures in the manner provided by *ART.* 106, and proceeds to say how conflicts discoverable between those laws are to be resolved. ART 106 deals with the powers of rival legislatures *inter se* to make laws; ART 110 declares the principles by resort to which clashes between laws passed pursuant to powers conferred under ART 106 are to be dealt with.

It is essential to keep this difference between the two Articles always in view or else confusion is likely to result in the matter of applying the provisions of the two Articles in determining the constitutionality of the laws passed by the two rival Legislatures in Pakistan. *ART.* 110 talks of *repugnancy* of Legislation resulting from conflicts of competently exercised jurisdictions by the Federal and Provincial Legislatures to pass laws in the spheres of authority reserved to them by Article 106. ART. 106, in effect, distributes legislative authority between the Federal and Provincial Legislatures by marking the boundaries subject-wise.

Although a resolute attempt had been made by the British Parliament, while enacting the *Government of India Act*, 1935, to bring about a sharp and clear-cut division of legislative jurisdiction between the two Legislatures subject-wise, it was all the same felt that there was every likelihood of laws competently enacted by the two rival Legislatures in conformity with the requirement of S. 100 (corresponding to ART. 106) nevertheless being found repugnant to each other. Parliament, therefore, provided in S.107 (corresponding to ART. 110) the technique by resort to which certain types of repugnancies could be resolved.

It would appear that in ART 110, only two types of repugnancies have been taken care of :

(1) Conflict of Provincial law with Federal Law (irrespective of the fact whether or not the Federal law has been passed before or after the passing of Provincial law).

(2) Conflict of Provincial law with existing law with respect to a matter in the concurrent list.

And the answer it has given to each of these cases is that in *both* of these cases the Federal law and the existing law will prevail *unless the Provincial law having been reserved for the assent of the President has received the assent of the President*, in which case, of course, it will be the Provincial law that will prevail in the Province concerned although the Federal Legislature will, thereafter, be competent, at any subsequent stage, to modify or repeal such provincial law.

This is then the effect of ART. 110 of our Constitution.

It must be clearly borne in mind that the existing law whose conflict with Provincial Law is visualised by ART. 110, *must be with respect to any matter in the concurrent list*: if it is not some such law, then, ART. 110 will *not* assist in the resolution of repugnancy and one

This Article imposes limitations on the legislative powers of the Federal and Provincial legislatures and its analysis would reveal the following essentials

(1) Parliament, that is the Federal Legislature, has exclusive power to make laws with respect to any of the matters enumerated in the Federal List This power is not encumbered by anything contained in clauses (2) and (3), for these clauses themselves are expressly limited by and made subject to the *non obstante* clause (1) of ART 106 The combined effect of this assessment of the provisions contained in ART 106 is no more and no less than this that in respect of any matter falling within *all* the three Lists, the Parliament has exclusive power of legislation

(2) The Provincial Legislature has, in respect of the territory within its jurisdiction, the power to make laws with respect to any of the matters enumerated in the concurrent list and has *exclusive* power to make laws for the same territory or any part thereof with respect to any of the matters enumerated in the Provincial List (ART 106, clauses (2) and (3))] The Provincial Legislature has the exclusive power also to make laws with respect to any matters not enumerated in any list in the Fifth Schedule (ART 109)

(3) Both the Parliament and the Provincial legislatures have concurrent powers of legislation with respect to any of the matters enumerated in the concurrent List [(*ART* 106—clause (2))]

(4) Parliament has also the power to make laws enumerated in the Provincial List, but in relation to their territorial application they cannot have any operation either for the whole or any part of the Province

ART 110 provides the guidance for

(a) resolving inconsistencies between laws made by Parliament and the laws made by a Provincial Legislature, and

(b) the laws made by a Provincial Legislature and "existing laws' with respect to matters falling in the concurrent list

That Article reads as follows —

"110 —(1) If any provision of an Act of a Provincial Legislature is repugnant to any provision of an Act of Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the Act of Parliament, whether passed before or after the Act of the Provincial Legislature, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Legislature shall to the extent of repugnancy, be void

(2) Where an Act of a Provincial Legislature with respect to any of the matters in the Concurrent List contains any provision repugnant to the provisions of an earlier Act of Parliament or an existing law with respect to that matter, then, if the Act of the Provincial Legislature, having been reserved for the consideration of the President has received his assent, the Act of the Provincial Legislature shall prevail in the Province concerned, but nevertheless Parliament may at any time enact any law with respect to the same matter, amending or repealing the law so made by the Provincial Legislature"

The analysis of this Article would show that

(1) If the *Provincial* law is found *repugnant* to any provisions of an *Act of Parliament* which it is within latter's competence to enact, then, the Act of Parliament whether passed before or after the Act of the Provincial Legislature, shall prevail and the Act of the Provincial Legislature *shall, to the extent of the repugnancy*, be *void* But if the same Provincial Act having been reserved for the assent of the President has received his assent, it will, within the Province, prevail over the Federal Law

These doctrines will be illustrated by an analysis of some of the important cases. The first two doctrines will be lumped up together and discussed as such in one and the same argument whereas the remaining three would be discussed separately.

Re C.P. Motor Spirit Act.

In the case of *C.P. Motor Spirit Act*, reported in A.I.R. (1939) *F.C.* 1, which reflects the opinion delivered by the Federal Court of India upon a reference made to it by the Governor-General, the question was: Is the *Central Provinces and Berar Sales of Motor Spirit and Lubricant Taxation Act*, 1938, or any of the provisions thereof, and in what particular or particulars, or to what extent, *ultra vires* of the Legislature of the Central Provinces and Berar?

We have furnished to us in this case, a concise statement of the principles which we are to apply to the interpretation of provisions that bear on the question of conflicts between the Central and Provincial legislative powers, and this guidance is given to us by no less a person than the Chief Justice of India, Sir Maurice L. Gwyer, who was before his appointment in India as its First Chief Justice, serving as His Majesty's Procurator-General and Treasury Solicitor and had a great deal to do with the actual drafting of the Government of India Act, 1935.

The distinctive feature of the Government of India Act, 1935, according to the learned Chief Justice, lay in the attempt that had been made in that Act to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects. This was a unique feature of the Act indeed and "whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution by enumeration, time alone will show; at least this Court will not be confronted with the additional problems created by the interlacing provisions of Ss. 91 and 92, *British North America Act*, and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject matter of litigation." The Chief Justice then proceeded to notice "two decisions of the *Judicial Committee* which in his opinion had laid down most clearly the principles which should be applied by Courts in the matter of deciding upon the competence of the two rival legislatures that had been set up under the Indian Federal system.

Those cases were summarised by the Learned Chief Justice as follows (at p. 5):—

"In (1912) *A.C.* 571 (*Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada*), at page 583, the Committee observed that in the interpretation of the British North America Act, if the text is explicit, the text is conclusive, alike for what it directs and what it forbids. When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

"In the earlier case in (1882) 7 *A.C.* 96, *The Citizens Insurance Company v. William Parsons*, at page 108, the same principle had been more fully expounded. After pointing out that with regard to certain classes of Dominion (or Central) subjects, generally described in S.91, *British North America Act*, legislative power may nevertheless reside as to some matters falling within that general description in the legislatures of the Provinces, under Section 92, the Committee proceeded thus:

"In these cases it is the duty of the Courts, however, difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two Sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a

must then resolve the problem by appeal to other principles as for instance it could then be said on general principle that the Provincial law being a later law will prevail, etc

The case law in India and Pakistan, that has a bearing on the interpretation of Ss 100 and 107 of the Government of India Act, 1935, would in terms apply to the interpretation of ARTs 106 and 110, as it must equally apply to ARTs 246 and 254 of the Indian Constitution—and this for the simple reason that all these constitutional provisions are couched in almost identical language

What happens if a case arises in which there is repugnancy between two laws passed by competent Legislatures for the resolution of which ART 110 of the Constitution does not provide an answer? It is the view of the present author that in such a case the only way to resolve the problem would be to fall back upon ART 106 and see whether or not the *pith and substance* of the impugned law falls within the permitted field exclusively reserved to a given Legislature if it does then the extent to which it invades the forbidden field would be condoned upon the doctrine of "incidental trespass'

91. Limitations upon competence to enact laws

In the matter of interpreting the competence of the two rival Legislatures in Pakistan to enact laws there are three distinct questions that arise for determination

Limitations upon competence to enact laws

(1) Is legislation competently enacted under ART 105, which talks of territorial jurisdiction of the two Legislatures? (A question of territorial competence)

(2) Is it competently passed by appropriate Legislature within the meaning of ART 106, which talks of legislative competence in relation to the matters mentioned in the three Lists in the Fifth Schedule? (A question of competence as to the subject matter)

(3) If it survives all these tests, the last question would be Are there still repugnancies discoverable in the exercise of these legislative jurisdictions?

If the answer to the third question be in the affirmative, one has then to go to ART 110, to see if the kind of repugnancy that has arisen is the one which is visualised by that Article In such a case ART 110 will govern the situation But if that Article does not apply in terms, in that the repugnancies that have arisen cannot be resolved by appeal to its provisions, we will have to fall back upon other principles for resolving these conflicts

It is the view of the present writer that the doctrine of 'incidental trespass' or of 'pith and substance' has no relevance once the repugnancy that has arisen is embraced by the kind of repugnancies for the resolution of which ART 110 has been designed

92 Review of some decided cases

These principles are illustrated by some of the cases decided by Privy Council in the pre partition days of India and considerable light is shed upon the question relating to their application by such case law as has developed in the two countries even after the partition

These principles are illustrated in some of the cases decided by the Privy Council etc

The rules relevant for the interpretation of ARTs 106 and 107 have received certain well defined nomenclatures and these are

(1) The doctrine of pith and substance
(2) The doctrine of incidental trespass
(3) The doctrine of occupied field
(4) The doctrine of implied powers
(5) The doctrine of the original package

a case in which the Bombay High Court had declared certain parts of the *Bombay Prohibition Act*, 1949, as unconstitutional legislation. The judgment in that case contains a concise and clear enunciation of the principles in the light of which the legislative powers of the Federal and Provincial Legislatures are to be understood and applied. Justice Fazl Ali summed up the principles which govern the interpretation of legislative lists after making a careful study of all the prior cases, e.g. (1) *United Provinces v. Atiqa Begum, 1940 Federal Court Reports p. 110 at 134*: A.I.R. (1941) F.C. 16); (2) In re the *Central Provinces and Berar Act No. XIV of 1938, reported in (1939) Federal Court Reports, p. 18*: A.I.R. (1939) *F.C.* 1), as also (3) *Governor-General-in-Council v. Province of Madras, reported in 1945 Federal Court Reports, page 179, at 191*: A.I.R. (1945) *Privy Council 98) etc.*

These principles are :—

(1) "that none of the items in each list is to be read in a narrow or restricted sense, (F.C.R. 1940 p. 110);

(2) "that where there is some seeming conflict between Provincial and Federal Lists an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction, (1939 *F.C.R.* 18);

(3) "It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore it is necessary to enquire in each case, what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature". (See *Gallagher v. Lynn*, (1937) *A.C.* 863 *at* 870, and also the cases of (1) *Ralla Ram v. Province of East Punjab*, (1948) *Federal Court Reports, p.* 207 *at* 225; and (2) *Miss Kishori Chetty v. The King*, in (1949) *Federal Court Reports, p.* 650, *at* 655).

Doctrine of Pith and Substance.

In determining what is the *pith and the substance* of an impugned Act, we have to look at the *essential burden of Legislation* and not merely the *form* of legislation much less the *name* given to it by the Legislature A.I.R. [(1955) *Supreme Court of India, p.* 504 the case of *Amar Singhji v. State of Rajasthan*]. This can only be done by examining the provisions of the impugned Act in an effort to see what it is that the legislature has attempted to achieve.

Incidental Trespass.

Closely allied to the rule of pith and substance is the doctrine of what is called *incidental trespass*: if on the view of the statute as a whole you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. Limitation upon the application of this rule is that legislation must not, under the guise of dealing with one matter, in fact be designed to encroach upon the forbidden field. (*See Gallagher v. Lynn*, (1937) *A.C., p.* 863) In this case reliance was placed on the observations contained in the case of *Russel v. Queen*, (46 *Law Times, p.* 889), to the effect that the true nature and character of the legislation in each particular case under discussion must always be determined in order to ascertain the class of subjects to which it really belongs.

Colourable Legislation would be struck down.

All colourable legislation must be carefully X-rayed in order to discover the real object underlying its enactment. Cases may arise in which several Acts in their totality may be interpreted to give rise to the inference that the Legislature is endeavouring to contravene some constitutional limitation upon its power, although each Act taken by itself out of this totality may appear to be an innocuous and harmless legislation. A case in point is the one reported in (1940) *Appeal Cases, p.* 838, *W. R. Moran Proprictary Ltd. v. Deputy Commissioner of Taxation for New South Wales.* In this case, the problem presented to the

reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best as they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand

With regard to the interpretation of the *non obstante* clause appearing at the commencement of S 100, the position was stated as follows (at p 10)

"It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another and therfore we must read them together and interpret or modify the language in which one is expressed by the language of the other '

The learned Chief Justice further remarked (p 11)

"In discussing the possible overlapping of the federal and provincial jurisdictions, I assumed for the moment that a tax on the retail sales might be the duty of excise Whether it is so or not must depend upon the circumstances

"In all cases of this kind the question before the Court," according to the learned Chief Justice is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitutional Act This is a very different problem and one on which cases decided under other Constitutions can never be conclusive

Following were the principles that were laid down in a concurrent opinion delivered by Jayakar J principles that may be deemed as useful guides to the proper elucidation of the points involved in this reference Observat ons of Jayakar J

"(1) That the provisions of an Act like the Government of India Act 1935 should not be cut down by a narrow and technical construction, but, considering the magnitude of the subjects with which it purports to deal in very few words should be given a large and liberal interpretation, so that the Central Government, to a great extent but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent but again within certain fixed limits, are mistresses in theirs (See *Henrietta Muir Edwards v Attorney General for Canada*, reported in (1930) *A C* 124, *at pp* 136 *and* 137)

"(2) In an enquiry like the one before us in this Reference, the Court must ascertain the true nature and character of the challenged enactment its *pith and substance* and *not* the *form* alone which it may have assumed under the hand of the draftsman (See *Attorney General for Ontario v Reciprocal Insurers reported in* (1924) *A C* 328 *at p* 337)

"(3) Where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed But where the law making authority is of a limited or qualified character, obviously it may be necessary to examine, with some strictness, the substance of the legislation for the purpose of determining what it is that the Legislature is really doing (See (1924) *A C* 328 *at p* 337)

"(4) Even where there has been an endeavour to give pre eminence to the Central Legislature in cases of a conflict of powers, it is obvious that, in some cases where this apparent conflict exists, the Legislature could not have intended that powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Central Legislature "

We may next observe, in this context, some of the remarks contained in the case of *State of Bombay v F N Balsara* decided by *Supreme Court, AIR* (1951) *p* 318 This was State of Bombay vs F N Balsara

is of considerable importance; and the Constitution should be construed bearing in mind that it is the result of an agreement between six high-contracting parties with, in some respects, very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under S.96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be *ultra vires* the Commonwealth Parliament. Their Lordships are using the language of caution because such a case may never arise, and also because it is their usual practice in a case dealing with constitutional matters to decide no more than their duty requires. They will add only that, in the view they take of the matter, some of the legislative expedients—objected to as *ultra vires* by Evatt J. in his forcible dissenting judgment—may well be colourable, and such Acts are not receiving the approval of their Lordships."

In an earlier case (*Ladore v. Bennett*, (1939) *A.C.* 468, *at p.* 482), Lord Atkin emphasised the same principle: "It is unnecessary to repeat", said he, "what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail." And this approach of the Courts is based upon the view that it is a familiar principle that you cannot do that indirectly which you are prohibited from doing directly. (*See Madden v. Nelson and Fort Sheppard Railway Co.* (1899) *A.C. p.* 626).

Doctrine of Incidental Trespass: Prafulla Kumar v. Bank of Commerce of Khulna.

The problem posed by the doctrine of incidental trespass was lucidly and comprehensively stated by their Lordships of the Privy Council in the case of *Prafulla Kumar v. Bank of Commerce Ltd., Khulna*, [A.I.R. (1947) *P.C.* 60). This was a case in which their Lordships had also the occasion to consider by way of comparison the provisions of *British North America Act* and the *Australian Commonwealth Act*, that are analogous to *S.* 100 *of the Government of India Act* in order to determine the validity of the argument advanced at the Bar, namely:—

(a) whether in cases where entries in the Legislative Lists overlap each other the Courts were duty-bound merely to apply the rule of priority stated in *S.* 100, and further

(b) whether there was any legislative sanction for supporting the view that the Court must try, and if it can reconcile them by giving interpretation to some of the entries which is narrower than is warranted by the words used by the Legislature.

This was a case in which *S.*107 of *the Government of India Act* also formed the subject-matter of their Lordships' consideration. The facts in that case were that a Provincial Act, (*The Bengal Money Lenders Act*) had limited the amount recoverable by a money lender on his loans for principal and interest, and had prohibited the payment of sums larger than those permitted by the Act. The Provincial Legislative List, *item* 27, enabled the *Provincial Legislature* to make laws with respect to "Trade and Commerce within the Province.. money lending and money lenders." The contention in the case was that this legislation was in conflict with the exclusive jurisdiction of the *Federal Legislature*, in that, *Items* 28, 33 *and* 38 provided for "cheques, bills of exchange, promissory notes and other like instruments, Corporations; banking and the conduct of banking business." The Courts in India considered the *Bengal Money Lenders Act* to be one that dealt in pith and substance with the money lenders and money lending, a view with which their Lordships agreed, but as this was not sufficient in their Lordships' opinion to dispose of the controversy before them, they proceeded to deal with the following two questions (that is Nos. 2 and 3).

(1) Does the Act in question deal in pith and substance with money-lending?

(2) If it does, is it valid though it incidentally trenches upon matters reserved for the Federal Legislature?

Court was the following It was alleged that the two impugned Acts together with several other Acts were passed to give effect to a scheme agreed between the Prime Minister of the Commonwealth of Australia and the Premiers of the six States, and the object and purpose of which scheme was to ensure that the wheat growers of all the States got a payable price for wheat and to raise the necessary sum to do this, a tax was imposed upon flour sold in Australia for home consumption The Premiers on behalf of the States undertook to co operate in the scheme by passing Acts in the States fixing prices for flour sold for home consumption and providing for the distribution of the proceeds of the tax among wheat growers in proportion to the quantities of wheat respectively produced by them In Tasmania, however, where the quantity of wheat grown was relatively insignificant the result of the scheme would have been that while having to bear the excise duty on flour by paying an increased price for bread and other wheat products, the people of Tasmania would receive very little advantage from the distribution of the proceeds of the taxes which were being imposed on flour That difficulty was by agreement, met by a scheme to provide that the tax on flour was to be levied on flour consumed in Tasmania at the same rate as flour consumed in the other States, but provision was to be made for the relief of Tasmania as a State to an amount not greater than the tax on flour collected in Tasmania 1940 A C 838

It was contended by the appellants that the several Acts passed by the Commonwealth Parliament taken in conjunction with certain State Acts were 'part of a scheme of taxation operating and intended to operate, by way of discrimination between Tasmania and the other States and that such Acts and taxes were contrary to the provisions of S 51 (ii) of the Constitution which had provided that the Commonwealth Parliament s power would not be used to pass discriminatory laws between States or parts of States It was contended that the arrangement was that while the Commonwealth would by their taxing Acts, impose an equal tax on all flour consumption whether in Tasmania or in the other States, the tax so collected was to go to the Central Fund and out of that Fund there was to be refunded to Tasmania a special sum for distribution by the Tasmanian authorities to the tax payers Thus it was simply giving back to the tax payer the money which the Central Government had collected It was submitted that the legislation must be looked as a whole, as a part of a scheme, and looking at its substance and real nature looking behind the form to the reality, the Commonwealth Government were clearly imposing what purports to be a uniform tax but what in effect was a tax upon flour in all States other than Tasmania—thus virtually contravening the prohibition contained in Section 51 against discriminatory legislation Cases of *Attorney General for Ontario v Reciprocal Insurers*, (1924) *A C* 328, and *Ladore v Bennett*, (1939) *A C* 468, were relied upon in support of the proposition that one must look behind the form at the reality of the impugned legislation in determining its constitutionality

The Full Court of High Court of Australia, with one of its Judges dissenting, held that the taxation Acts were not discriminatory [See Deputy Federal Commissioner of Taxation (N S W) v R Mo an Proprietary Ltd (1938 39) 61 *C L R p* 735], and upon appeal their Lordships of the Privy Council found that what had been done by the Commonwealth Parliament under S 51 (ii) and S 96 of the Constitution was correct and constitutional but made certain observations which are significant Their Lordships observed (1940) 63 *C L R* 338, at 349) —

"In coming to this conclusion their Lordships wish to make it clear that, as at present advised they do not take the view that the Commonwealth Parliament can exercise its powers under S 96 with a complete disregard of the prohibition contained in S 51 (ii), or so as altogether to nullify that constitutional safeguard The prohibition

"Subjects must still overlap and where they do the question must be asked what in *pith and substance* is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial Legislation could never effectively be dealt with.

"(3) Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, *has it trespassed more or less*, but *is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking?* Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

"This view places the precedence accorded to the three lists in its proper perspective. No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, *priority in what respect?* Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may *incidentally* affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

A comment on the doctrine of incidental trespass in the light of Privy Council case (1947 P.C. p. 60).

It would be noticed that their Lordships of the Privy Council looked at the problem of *incidental trespass or invasion of the forbidden field* not as a primary consideration relevant for determining the validity or otherwise of an impugned Act but merely for the purpose of determining the pith and substance of the impugned Act. The crucial question in their Lordships' words is not, "Has the Provincial Legislature trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking."

It is, however, not clear from the judgment of the Lordships of the Privy Council whether this approach on the basis of which their Lordships decided the case is admissible only for the purpose of determining the question of competence under Section 100 (corresponding to our ART. 106), or is it also relevant for the purpose of applying the principle of S.107 (which corresponds to our ART. 110). This is a very important question and in the Indian case law at least there seems to be no unanimity in the judicial pronouncement upon any particular mode of construing these Sections.

One view is that Section 100 merely talks of the competence of the Legislature to enact law "with respect to" any matter appearing in the relevant List. To that extent it is permissible to apply the rule of pith and substance and since the doctrine of permissible incidental trespass is a mere variant of the rule of pith and substance, the question of incidental trespass is examined merely with a view, once again, to finding out whether or not a certain subject, which has been legislated upon, substantially falls in a given List. Those who hold this view deny that the rule of pith and substance has any application when they proceed to consider the question of repugnancy between the Provincial law on the one hand and the Federal law or the existing concurrent law with which it is in conflict, on the other. The doctrine of pith and substance or incidental encroachment, it is claimed, has restricted application: that it applies only in relation to the interpretation of the expression "with respect to" occurring in S.107 of the *Government of India Act*, but *not* in relation to

(3) Once it is determined whether the pith and substance is money lending, is the extent to which the Federal field is invaded, a material matter?

They addressed themselves to question numbers (2) and (3) as follows (at p 64) (Question No 1, as has been stated above, was conceded in the course of the argument, namely that the impugned Act did deal in pith and substance with money lending)

"(2) The second is a more difficult question and was put with great force by Counsel for the respondents The principles it was said, which obtain in Canada and Australia have no application to India In the former instances either the Dominions and Provinces or the Commonwealth and States divide the jurisdiction between them the Dominion or as the case may be the States retaining the power not specifically given to the Provinces or the Commonwealth In such cases it is recognised that there must be a considerable overlapping of powers But in India it is asserted the difficulty in dividing the powers has been foreseen Accordingly three not two lists have been prepared in order to cover the whole field and these lists have a definite order of priority attributed to them so that anything contained in List I is reserved solely for the Federal Legislature and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act is *ultra vires* in whole or at any rate where in any place it affects an entry in the Federal List

"Similarly, any item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters specifically mentioned in List II over which the Province has complete jurisdiction, although s i l ng is any item in the Concurrent List has not been dealt with by the Federal Legislature the Provincial Legislature is binding

"In their Lordships opinion this argument should not prevail To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions It is not possible to make so clean a cut between the powers of the various legislatures they are bound to overlap from time to time '

"Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the *British North America Act* and the *Australian* Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap As Sir Maurice Gwyer C J said in (1940) *F C R* 188 (*Supra*) *at page* 201

'It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list and the different provisions of the enactment may be so closely intertwined that blind adherence

the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that '

"Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion Legislation No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental But the overlapping of subject matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions

In other words, for a constitutionally valid law both the tests of competence under ART. 106 and freedom from conflict of the kind visualised in ART. 110 must be fulfilled. There would be cases in which although a law is competently enacted it would fail (and fail only to the extent of its repugnancy) on the ground of repugnancy. The "offending repugnancy", as remarked above, is between the Provincial law and the law which the Federal Legislature is competent to enact on the one hand, and between the Provincial Law and the existing law on the other. This conflict will be immaterial if the law having been reserved for the assent of the President has received the assent, in which case *ART.* 110 will be thrown out of gear.

92. Analysis of ART. 110

The problem stated:

Confining our attention now to the textual analysis of *ART.* 110, following problem arises for our consideration. In the salutary clause of *ART.* 110 we read the following:—

> "If any provision of an Act of a Provincial Legislature is repugnant to any provision of an Act of Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent List . . . ."

The Article goes on to say that if that condition be fulfilled certain consequences will follow. Now, must the repugnancy of any provision of an Act of Provincial Legislature be in regard to "any provision of an Act of Parliament, which Parliament is competent to enact", or must it be confined to the cases where there is a "provision of an Act of Parliament, which Parliament is competent to enact *with respect to any of the matters enumerated in the Concurrent List.*" Textually, if we were to omit the comma after the word "enact", appearing in ART. 110, and proceed to apply the usual rules of grammatical construction, it would be permissible to construe the expression "with respect to any of the matters enumerated in the Concurrent List" as limiting and qualifying not only the *existing law* but also "any provision of an Act of Parliament, which Parliament is competent to enact."

It would be recalled that in the case of *Atiqa Begam v. Maghni*, reported in A.I.R. (1940) *Allahabad p.* 272, the repugnancy under S.107 of the *Government of India Act*, 1935, was construed to have been provided for between the Provincial Law and a law passed by the *Federal Legislature with respect to a matter in the Concurrent List.* It was there said (at p. 277):

> "Sec. 107 affects the relations between the Federal Legislature and Provincial Legislature where the laws passed by the two Legislatures are among the subjects in the Concurrent Lagislative List and are repugnant to each other. It has no application to cases of repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and Concurrent Lists on the other. If such overlapping exists in any particular case the Provincial Legislation will be *ultra vires* because of the *non obstante* clause in sub-sec. (1) of S.100 read with the opening words in sub-ss. (2) and (3) of S.100. In such cases the Provincial Legislation will fail not because of repugnance to Federal Law but in consequence of being repugnant to the Constitution itself. In the present case, however it is not argued that there is any repugnance between a law passed by the Federal Legislature (which according to S.316 Constitution Act, means the present Indian Legislature) and a Provincial law, and, as such, the question decided in the Patna case does not arise. I am, therefore, relieved from the necessity of giving my reasons at length for the view that the repugnance contemplated by sub-section (1) of S.107 between Federal and Provincial law is only concerning matters in the Concurrent List."

This view taken of the scope of S.107 is in conflict with the view taken by the

interpretation of the concept of repugnancy mentioned therein Here, that is, in the latter case, conflict no matter how trivial, must be given full effect to This was, for instance, the view of *Varadachariar J* in the case of *Megh Raj v Allah Rakhia*, reported in A I R (1942,) *Federal Court page* 27, (at p 30) where it was observed Megh Raj vs Allah Rakhia

"In the judgment of the High Court there is some discussion of the question of the 'pith and substance' of the Act, but that question does not arise when objection is taken not under S 100, Constitution Act, but under S 107(1) Counsel for the appellant made it clear that it was not his contention that any of the provisions in the impugned Act were beyond the competence of the Provincial Legislature, because he recognised that it made no difference on the question of competence, whether the subject matter fell under List II or under List III of the Seventh Schedule But he contended that the High Court erred in holding that the subject matter of the Act was wholly covered by List II "

Then his Lordship proceeded to deal with that contention which was based not on the question of competence but of repugnancy Although the remarks cited above are *obiter* on the point and anyhow proceeded upon the concession made by the Counsel who appeared in the case, they seem clearly to show that the doctrine of pith and substance cannot be resorted to in meeting an argument based on the ground of repugnancy of a Provincial law either with the Federal law or existing law "with respect to matter in the Concurrent List '

From the case of *Prafulla Kumar v Bank of Commerce, Khulna* A I R (1947) *P C*, *p* 60)] it would appear that the case was disposed of by appeal to the doctrine of pith and substance in relation to the competence of Legislature to pass the relevant law under S 100 The conflict in that case was *really* between the *Provincial law* and an *existing Indian law* which fell under the category "with respect to matter in the Concurrent List ' The Bengal Act had actually received the assent of the Governor General under clause (2) of S 107, therefore, the question of repugnancy under S 107 was not a matter in issue By process of elimination, the only other ground on which the case could have been disposed of was to determine by appeal to the rule of pith and substance whether or not the subject matter of impugned legislation was competently enacted under S 100 Their Lordships laid down, as we have seen already, that the question of incidental trespass is not directly relevant in the determination of that question but is so only in so far as it assists ain pplying the rule of pith and substance

In another case of the *Privy Council*, *Megh Raj v Allah Rakhia* A I R (1947) *P C*, *p* 72)] it was laid down that Section 107 has no application in a case where the Province could show that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by Concurrent List and accordingly questions of repugnancy do not arise in such a case Privy Council case of Megh Raj versus Allah Rakhia

In that case the main points of objection to the validity of the *Punjab Restitution of Mortgaged Lands Act* [*IV of* 1938,] were based on Ss 100 and 107, and upon the arguments made at the Bar both the parties according to their Lordships, "rightly construed S 107 as having no application to a case where the Province could show that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by the Concurrent List "

The question that arises in this context is whether even if a Provincial law survives the test of competence on the grounds contained in S 100, it is open to a further ground of attack based on the provisions of S 107 in a situation where it is in conflict with a law which Federal Legislature has passed or which is an existing law with respect to one of the matters in the Concurrent List

construed to mean as involving a suggestion or inference that the Parliament is competent to enact laws *only* with respect to *some of the matters mentioned in the Concurrent List.* It would, therefore, appear that the words of limitation, namely, "with respect to one of the matters enumerated in the Concurrent Legislative List" control only the expression 'existing law' and not expression 'any provision of law which Federal Legislature is competent to enact.'

But if the doctrine of *pith and substance* is to be given a due place in any scheme of interpretation of ARTs. 106 and 110 we ought not to confine the operation of ART. 110 to cases of conflict of Federal and Provincial laws only to the Concurrent Field. If a Provincial Law in its pith and substance falls in the Provincial List and only incidentally trespasses into the forbidden Federal Field, two courses of action would, in principle, be available to Courts: either to say that to the extent to which it trespasses into the federal field it is void—and the rest of the law is saved,—or to say that, since ART. 110 does not avail to render the offending portion as void, the impugned law *as a whole* must go as being contrary to ART. 106 (upon the view that clause 3 of that article is subject to clause 1 thereof) for there is no method of saving the part that is valid by appeal to ART. 106 itself.

Besides, even the title of the S. 107 was 'inconsistency between Federal Laws and Provincial or State Laws', and not 'inconsistency between Federal Laws and Provincial or State Laws in respect of matters in the Concurrent List.' It is true that the title does not materially affect the construction of the Section, the principle involved being the one which says that *title is no part of the Section.* But neither is *the punctuation in a statutory* language of much relevance in the analysis of a Section. Their Lordships of the Privy Council said in *A. I. R.* (1929) *P.C.* 69 *at p.* 71 (*Lewis Pugh v. Ashutosh Sen*) that statute must be read without the comma appearing in its provisions, for it is no part of the statute.

There is, however, one more argument in favour of the view that repugnancy visualised by *ART.* 110 is one between Federal and Provincial Law in regard to the matters mentioned in the Concurrent List, which might be stated as follows: it is no doubt true that the expression "Any provision of law which Federal Legislature is competent to enact", would also include reference to matters mentioned in the Federal List, but if the whole Article is read it would be seen that that Article is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List—in other words, if clause 2 is to be the guide in the determination of the scope of clause (1) the repugnancy between the Federal and Provincial law must be taken to refer only to the Concurrent field.

But in principle there is no valid reason why clause (2) should at all be allowed to cut down the plain meaning of the first clause which does not limit itself to repugnancy between Federal and Provincial Laws to the concurrent field. That is why Dhavli J. in the Patna case felt that that is not a conclusive argument—there is no warrant for taking clause (2) to be providing for all the conflicts mentioned by clause (1) and it may well be that the Federal laws would all the same prevail ("assent" or "no assent") if they are in conflict with a Provincial Law in respect of matters mentioned in the Federal List.

Subrahmanyan Chettiar v. Muttuswami Goudan.

In the end, in order to appreciate the primacy of Federal Parliament's jurisdiction we might notice the case of *A.L.S.P.P.L. Subrahmanyan Chettiar v. Muttuswami Goudan*, reported in A.I.R. (1941) *F. C. p.* 47, where it was observed the *pith and substance* of the Madras *Agriculturists' Relief Act* cannot be said to be legislation with respect to negotiable instruments or promissory notes: it is quite immaterial that many, or even most, of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect its validity. The validity or invalidity of the Act cannot be affected by the money-lenders' practice of evidencing the debts of those to whom they lend money.

Patna High Court in Sadanand Jha v Aman Khan, A I R (1939) *Patna 55 at p 65*, where it was observed by Dhavle J as follows —

"It has been urged for the appellant that the words following 'an existing Indian law' in sub sec (1), namely, 'with respect to one of the matters enumerated in the Concurrent Legislative List', should also be read with the expressions any provision of a Provincial law' and 'any provision of a Federal law' occurring earlier in this sub section, and the reason given is that the expression 'subject to the provisions of this Section' in the same sub section, has, so it is argued, the effect of making the repugnancies dealt with in sub sec (1) identical with those dealt with in sub sec (2) The construction contended for is opposed to the plain grammar of the sub section, and there is nothing in the scheme of legislation laid down in the Act to indicate that Parliament intended it As we have already seen, the enumeration of items in the three lists itself

of 'notwithstanding' and subject to' Further, if Parliament had intended to provide in sub sec (1) of S 107 for conflicts in the concurrent field alone it could easily have done so by adopting the language of sub sec (2) which is unmistakably confined to action in the concurrent field Nor can I agree that the expression 'subject to the provisions of this Section' in sub sec (1) has the effect of confining the conflicts dealt with in this sub section to conflicts in the concurrent field That expression no doubt refers to sub sec (2), *which is confined to legislation in the concurrent field But is the provision* of this exceptional procedure for the concurrent field any reason for supposing that Parliament either was not aware of or decided to ignore possible conflicts between Provincial legislation in the exclusive field and Federal or the existing Indian law in the concurrent field? As we have seen already from S 100, the powers of the Provincial Legislatures are subject to the powers of the Federal Legislature S 107 may be regarded as a supplement to that provision In sub sec (1) it deals with the effect of repugnancies between Provincial and Federal legislation (whenever passed) without any reference to the fields to which the conflicting enactments may relate, and it also deals with repugnancies between Provincial legislation and the existing Indian law which has not been referred to in S 100 and is here in the concurrent field only put on the same footing as Federal law irrespective of whether this relates to its exclusive or the concurrent field

"The sub section provides in effect that in either case the Provincial Law shall, to the extent of repugnancy (and no
section provides an exception limit
tion, all in the concurrent field
no reason for restricting the scope of the general rule "

Which of the above two conflicting interpretations will apply to the language of ART 110 of our Constitution, which is a verbatim reproduction of S 107, plus, of course, one comma which appears in it after the word 'enact', but which does not appear in S 107? Quite apart from any importance that might or might not be given to the presence of comma after the word 'enact' in ART 110, it is a matter for serious consideration if the repugnancy could at all be confined to conflicts only between Provincial and Federal Law in the Concurrent field, that is, in the way in which it was looked at in the Allahabad case

The argument in favour of the contrary view may be stated as follows The expression "any provision of law which Federal Legislature is competent to enact with respect to one of the matters enumerated in the Concurrent Legislative List" might in effect be

determining the category in Lists I, II and III, with respect to which the subject matter of a particular Act of the Provincial Legislature falls, resort to the residual power under S.104 should be the very last refuge. "It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a the nondescript." (See Sulaiman's judgment *in Subramanyan vs Mutterswami AIR* 1941. *F. C.* 47 at p. 55).

It is a matter which yet remains to be decided by courts in Pakistan whether in *view of the residuary field of legislation having been now reserved exclusively to the* Provincial Legislature, the strict rule, viz., of regarding the Provincial Legislature to be supreme only in respect of cases where the pith and substance of the legislation falls in the Provincial List, would still apply. It is true that the countervailing consideration which will not be lost sight of would be to take notice of the primacy of the laws passed by Parliament, in that the field of legislation in respect of matters which, although covered both by the Provincial List as well as by the Federal List, is nevertheless, having regard to the *non obstante* clause in sub-section (1) of Art. 106, to be deemed to be within the exclusive competence of the Federal Legislature. But the problem is no longer as simple as it was under the scheme of the Government of India Act where the method of settling the constitutionality of a Provincial Law as stated by *Sullaiman* was as follows (at p. 54):

> "So long as it can be shown that all the provisions contained therein (in a Provincial Law) fall within List II or List III (that is Provincial List and the Concurrent List respectively), the Province would have *prima facie* an authority to legislate, unless it can be shown that it is with respect to any matter in List I, or is void on account of any repugnancy."

Under our Constitution, a Province can also legislate in the undefined reserved field and the approach to the question of settling the constitutionality of a Provincial Law would on that account be somewhat different.

The enumeration of the various subject-matters of Legislation in the Fifth Schedule is fairly exhaustive, and the existence of a matter not covered by any of the cases is not to be lightly inferred, but this is not to say that residuary field reserved by *ART.* 109 for Provincial Legislature is an illusory or a non-existing entity. It is the view of the present writer that ART. 109 will, to a considerable extent, dominate the interpretation of entries in the Fifth Schedule when the rule relating to pith and substance is sought to be applied to discover whether a given subject-matter of legislation falls within the Provincial List or Federal List, and to that extent, considering that the residuary powers of legislation in the Indian Constitution are vested in the Indian Parliament, even the interpretation of *ART.* 246 by the Indian Courts, which corresponds to our *ART.* 106, is bound to be somewhat different from that conferred upon parallel sections of the Govt. of India Act, 1935.

In the very same case which has been referred above, it is further observed with regard to the interpretation of *S.* 100 of the Government of India Act: (at p. 50) "Hence, though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided, *ex majori cautela*, that if the two sets of legislative powers should be found to overlap, then the Federal Legislation is to prevail. And the reason for this is clear. However, carefully and precisely lists of legislative subjects are defined, it is practically impossible to ensure that they never overlap; and an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory".

But the principle of the priority of the legislative power of Federal Legislature should be invoked only as a last resort. A support for this preposition could be derived from a case reported in A.I.R. (1945) *Privy Council p.* 98, *Governor-General in Council v. Province of Madras.* While admitting that the effect of words "notwithstanding anything in the two next succeeding sub-sections", and the opening word of section 100(3), "subject to the

The Act cannot be challenged as invading the forbidden field of List 1 of Schedule VII, Government of India Act and, therefore, is *intra vires* of the Provincial Legislature (The following cases were relied on —

(1881) 7 AC 96 *Citizens Insuranc Co of Canada v Parsons*

(1882) 7 AC 829 *Russel v The Queen*

(1899) AC 580 *Union Colliery Company of British Columbia v Bryden*

(1930) AC 111 *Attorney General for Canada v Attorney General for British Columbia* ,

(1940) AC 513 *Board of Trustees of Lethbridge Irrigation District v Independent Order of Foresters*

Section 100 of the Government of India Act, which corresponds to ART 106 of our Constitution contains a warrant for upholding the primacy of the Federal Legislature, it was held in this Federal Court case that the maxim *generalibus specialia derogant* cannot be applied to the three competing Lists I, II and III of the 7th Schedule "In its fullest scope" said Sullaiman, J, "S 100 would then mean that if it happens that there is any subject in List II which also falls in List I or List III, it must be taken as cut out from List II On this strict interpretation there would be no question of any real overlapping at all If a subject falls exclusively in List II and no other list, then the power of the Provincial Legislatures is supreme But if it does also fall within List I, then it must be deemed as if it is not included in List II at all Similarly, if it also falls in List III, it must be deemed to have been excluded from List II The dominant position of the Central Legislature with regard to matters in List I and List III is thus established But the rigour of the literal interpretation is relaxed by the use of the words 'with respect to which as already pointed out only signify 'pith and substance', and do not forbid a mere incidental encroachment But, even if such an incidental encroachment may be ordinarily permissible, the field may not be clear There may be competency and yet repugnancy also The question is how to prevent a clash if the trespass is on a field already occupied by a central legislation " As regards the principles upon which S 107 was drawn up, Sullaiman J, rightly observed that they reflected an acceptance of what in Canada had been done by the Judges to solve the problem of repugnancy The doctrine which had been evolved by those who have judicially interpreted the provisions of the *British North America Act* is that if the encroachment is merely incidental then there is no defect so long as the trespass is upon an unoccupied field Engrafted upon the doctrine of incidental encroachment is the doctrine of unoccupied field (See (1) 1894 *A C* 189, *Attorney General of Ontario v Attorney General for the Dominion of Canada*, (2) 1907 *A C* 65, *Grand Trunk Railway of Canada v Attorney General of Canada*)

93. S. 104 of the Govt. of India Act and ART. 109 of our Constitution

S 104 of the Govt of India Act and Art 109 of our Constitution

It is necessary to note that under *Section 104 of the Government of India Act*, the Governor-General had the power to empower either the Federal Legislature or the Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists in the 7th Schedule of that Act Instead of this section our Constitution has designed ART 109 to provide for the residuary power of the legislature being exercised by the Provincial Legislature On comparing the two provisions it would appear that since in our Constitution exclusive legislative power has been given to the Provincial Legislature to pass laws with respect to any matter not enumerated in any list of the Fifth Schedule, the rule for interpretation laid down in the Federal Court case would not strictly apply The rule of construction applicable to the Government of India Act was that for the purpose of

the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at *Quebec* in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the *Australian Commonwealth Act* in a recent case, *Attorney-General for the Commonwealth v. Colonial Sugar Refining Company*, (1914) *A.C.* 254) that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attend the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision."

The principles that were to apply to the interpretation of Sections 91 and 92 were then stated by their Lordships at p. 177:

"The structure of Ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. v. Parsons*, (7, *Appeal Cases at* 109), to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers which they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the Statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of Ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts, if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."

Their Lordships, upon the interpretation they bestowed on the language of the entry No. 11 of section 92 and the expression 'Civil rights in the Province', and the language of S.91, came to the conclusion that the *Parliament of Canada* had the power to enact sections relied on in that case in the *Dominion Companies Act* and the *Interpretation Act*, but they proceeded to add a word of caution:

"They do not desire to be understood as suggesting that, because the status of a *Dominion Company* enables it to trade in a province, and thereby confers on it civil rights

two preceding sub sections" argue for the primacy of the power of the Federal Legislature, their Lordships proceeded to observe (at p 100)

[illegible]

ing which it can properly bear

The moral of this observation may be stated as follows that in cases of overlapping entries we must concentrate upon the pith and substance of the impugned Act to determine the list into which it falls If such an examination reveals that the power of the Federal and the Provincial Legislature cannot fairly be reconciled then the latter must give way to the former—unless it can be said that the Provincial Law trenches upon the field only incidentally and that also in the unoccupied area of the forbidden field of legislation when of course it would be allowed to stand

94. Mode of Construing entries in the Fifth Schedule

While construing the scope of the legislative entries appearing in 5th Schedule Courts will bestow upon their language a broad and liberal interpretation Viscount Haldane in the case (*John Deere Plow Company Ltd v T F Wharton*), reported in A I R (1914) *Privy Council* p 174, discussed the relevant provision of *British North America Act* 1867 with reference to the competing powers of the Dominion Parliament and the Provincial Legislatures in Canada This was the case in which respondent Wharton sued to restrain the plaintiff Company (appellants in the case) who had been incorporated by letters patent under the *Companies Act* of the *Dominion* with power to carry on throughout the Dominion and elsewhere the business of dealing in agricultural implements from carrying on business till it was licensed to do so under Part VI of the *Companies Act of British Columbia* The requisite licence having been refused by the Registrar under S 18 (for the reason that a company had already been registered in the Province under the same name) their Lordships were called upon to decide whether it was competent to the Province to legislate so as to *interfere* with the carrying on of the business in the Province of a Dominion Company under the circumstances of that case Referring to the scheme of the *British North America Act*, their Lordships observed (at p 176)

Mode of Construing entries in the Fifth Schedule

"The general power conferred on the Dominion by S 91 to make laws for the peace, order and good Government of Canada extends in terms only to matters not coming within the classes of subject assigned by the Act exclusively to the Legislatures of the Provinces But if the subject matter falls within any of the heads of Section 92 it becomes necessary to see whether it also falls within any of the enumerated heads of S 91, for if so by the concluding words of that section, it is excluded from the powers conferred by S 92"

It is hardly necessary to say that broadly considered the same is the scheme of distribution of powers between the Federal and the Provincial Legislature in our Constitution

Viscount Haldane then refers to the difficulty of the draftsman who is called upon to embody in statutory form the terms of a political agreement

"Before proceeding to consider the question whether the provisions already referred to of the *British Columbia Companies Act*, imposing restrictions of the operations of a Dominion company which has failed to obtain a provincial licence, are valid it is necessary to realize the relation to each other of Ss 91 and 92 and the character of the expressions used in them The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody

ture has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject-matter of 'interest' to the *Dominion Legislature* under Head 19 of S.91, *British North America Act.* There is another qualification to the otherwise unrestricted power of the Provincial Legislature to deal with civil rights in Head 18 'Bills of Exchange and Promissory Notes'. The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the *United Kingdom* in 1854 (17 and 18 Vict. c. 90). So restricted a construction was rejected by the Judicial Committee in *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters and Attorney-General of Canada*, (1940) *A.C.* 513: (1940) 2 *All E.R.* 220), for reasons stated by *Viscount Caldecote* at pp.530,531. The validity of the *Interest Act of the Parliament of Canada* (*Revised Statutes*, c.120) has not been challenged in any particular. Section 2 of this Statute provides:

> 'Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.'

"It is, therefore, clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.

"There thus remain two questions to be considered: first, does the provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenched upon, the subject of interest is not the pith and substance of the Act ?

"The first of these questions must be answered in the light of an established rule of construction in such cases, viz., that regard must be had to the substance and not to the mere form of the enactment, so that 'you cannot do that indirectly which you are prohibited from doing directly' (per *Lord Halsbury in Madden v. Nelson* and *Fort Sheppard Ry. Co.*, 1899, *A.C.* p. 626 at p. 627; (68 L.J. P.C. 148). If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest."

Having stated these principles their Lordships proceeded to examine the language of the impugned provision in an effort to find out *how far it had trespassed upon the forbidden field* and whether it was merely an incidental exercise of a valid power:

"These considerations lead their Lordships to confirm the conclusion to which the majority of the Supreme Court has arrived, that para. 3 of sub-s.(2) of S.6 trenches upon the Dominion field. It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of their Lordships the endeavour is not successful. This view of the matter renders it unnecessary to determine what would be the correct application of the words used in the difficult situation of successive years of suspension analysed in the judgment of Kellock J.

to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general No doubt this jurisdiction would conflict with that of the Province if civil rights were to be read as an expression of un limited scope But, as has already been pointed out, *the expression must be construed con sistently with various powers conferred by Sections 91 and 92, which restrict its literal scope* "

This decision was referred to with approval in the case in *Re C P Motor Spirit Act*, A I R (1939) *Federal Court p* 1, as being relevant for the purpose of applying the principle of Ss 100 and 107 of the *Government of India Act*, 1935—and would equally be of much assistance in understanding and applying the provisions of ARTs 106 and 110 of our Constitution

95. Doctrine of Occupied Field

Doctrine of Occupied Field

We might now advert more fully to the doctrine of "occupied field" This doctrine is stated in the case of *Attorney General of Saskatchewan v The Attorney General of Canada and others*, reported in A I R (1949) *Privy Council p* 190, where it was observed that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in the Provincial List and is properly within one of the subjects

petent unless

is was a case

to the Sup

reme Court of Canada in which the opinion of the Court was sought on, among others, the following question

> "(1) Is Section 6, *Farm Security Act* 1944, being Chapter 30 of the *Statutes of Saskatchewan* (1944, 2nd session) as amended by section 2 of Chapter 28 of the *Statutes of Saskatchewan*, 1945, or any of the provisions thereof, *ultra vires* of *Legislative Assembly of Saskatchewan* either in whole or in part and if so in what particular or particulars and to what extent"

And from the opinion delivered by the Supreme Court of Canada, the appeal went to their *Lordships of the Privy Council* It was contended on behalf of the respondent that para 3 of sub section 2 of S 6 was *ultra vires* of the Provincial Legislature because it was an enactment in relation to "interest", a matter which, by section 91, head 19, of *British North America Act* is within the exclusive legislative powers of the Dominion Parliament It was also contended that the impeached provision was in conflict with the provision of

ction 91, which

elation to bank-

the second point

raised on behalf of the respondent They then proceeded to deal with what they considered was the real difficulty in the way of accepting the appellant's case It was contended on behalf of the appellant that pith and substance of the impugned provision was "property and civil rights" a matter in relation to which Provincial Legislature had an exclusive legislative power and that, in so far as para 3 affects "interest", it does so only incidentally Reliance was placed upon the remarks of Lord Atkin in the case of *Ladore v Bennett*, (1939) *A C p* 468 (1939) 3 *All E R p* 98 Dealing with that contention their Lordships observed as follows (at p 193)

> "A more difficult question is raised by the alternative contention that the legis lation is in relation to civil rights in the Province Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to 'interest', the argument that the Provincial Legisla

Constitution and organisation of all courts excepting Federal Court and fees taken therein . . . . (2) Jurisdiction and powers of all courts excepting the Federal Court with respect to any of the matters in this list; procedure in Rent and Revenue Courts. As against this, was a counter contention that entry No. 3 of the Federal List which provides for "jurisdiction and power of all courts excepting the Federal Court" and entry 15 of the Concurrent List which provides for jurisdiction and powers of all Courts excepting the Federal Court with respect to any of the matters in this list, covered the substance of the impugned legislation.

The impugned Act had conferred jurisdiction on a Civil Court for Greater Bombay to try and dispose of all suits and other proceedings of a civil nature not exceeding a certain value, subject to certain exceptions, and it was contended that jurisdiction with respect to matters within Federal List, like Promissory Notes etc., had been conferred by the Provincial Legislature by means of the impugned Act and thereby it had trespassed into the forbidden field. The other contention on the footing of which the Act had been attacked was that it constituted a case of unconstitutional delegation of legislative power, in that it had conferred authority on the Provincial Government by means of a notification to confer jurisdiction on that civil court of such value not exceeding Rs. 25,000/- as may be specified in that notification, but that is a contention with which at present we are not concerned. This case came in appeal from the case reported in A.I.R. (1951) *Bombay p.* 180. in which their Lordships of the Bombay High Court had held that section 4 of the *Bombay City Civil Court Act* was *ultra vires* of the Provincial Legislature.

The following observations in the judgment of Das J. at p. 96, have reference to the enunciation of principles of interpreting the legislative entries with which we are here concerned:

> "A good deal of argument was advanced before us as to the applicability of the doctrine of pith and substance, and, indeed, the decision of the Bombay High Court in Jagtiani's case, *A.I.R.* (36) 1949 *F.C.* 175: (50 Cr. L.J. 897) (Supra) was practically founded on that doctrine. Shortly put, the argument, as advanced, is that under entry 1 in List II, the Provincial Legislature had power to make laws with respect to administration of justice; that therefore, the Provincial Legislature had power, under entry 1 itself, to make laws conferring general jurisdiction and powers on courts constituted and organized by it under that entry; that if in making such law the Provincial Legislature incidentally encroached upon the legislative field assigned to the Federal Legislature under entry 53 in List 1 with respect to the jurisdiction and powers of Court with respect to any of the matters specified in List I, such incidental encroachment did not invalidate the law, as in pith and substance it was a law within the legislative powers. In my judgment, this argument really begs the question. The doctrine of pith and substance postulates, for its application, that the impugned law is substantially within the legislative competence of the particular legislature that made it, but only incidentally encroached upon the legislative field of another Legislature. The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular Legislature, which made it. Therefore, if the Provincial Legislature under entry 1, had power to vest general jurisdiction on a newly constituted court, then if the law made by it incidentally gave jurisdiction to the Court with respect to matters specified in List 1, the question of the applicability of the doctrine of pith and substance might have arisen. I have already pointed out that, on a proper construction, entry 1 of List II did not empower the Provincial Legislature to confer any jurisdiction or power on the Court and the expression 'administration of Justice' had to be read as covering matters relating to administra-

"Secondly, can the remaining argument be upheld that this interference with the topic of interest none the less remains valid because it is merely incidental to the exercise of a valid power to legislate for a modification of principal debts? On this it is to be observed that there is not only an exclusive power to legislate in relation to interest vested in the *Dominion Parliament*, but that such legislation has been enacted in the *Interest Act* Viscount Maugham laid it down on behalf of this *Board* in *Attorney General for Alberta* v *Attorney General for Canada*, 1943, *A C* 356 *at p* 370 A I R (1943) P C 76), that

'Since 1894 it has been a settled proposition that, if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in S 91 and is properly within one of the subjects enumerated in S 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation' "

This doctrine of the occupied field applies only where there is a case of clash of jurisdiction between the State Law and the Federal Law and the encroachment is incidental in an unoccupied field In the words of Lord MacMillan in a Privy Council case, (*Forbes* v *Attorney General of Manitoba*), reported in (1937) 1 *All E R p* 249, the scope for the application of this doctrine was stated as follows

"The doctrine of the occupied field applies only where there is a clash between the Dominion Legislation and Provincial Legislation within an area common to both Here there is no conflict Both income taxes may co exist and be enforced without clashing "

It would thus appear that in substance the doctrine of occupied field just represents the conception which has been statutorily expressed in *ART* 110(1) of our Constitution

The doctrine of occupied field as an argument is often pressed in the service of a contention that in the cases of clash between a law passed by the Provincial Legislature, which merely incidentally encroaches upon the forbidden federal field, the Provincial Law be not allowed to be treated as valid law since the forbidden field is not vacant but occupied by the pre existing law Once again we see that the doctrine of occupied field, like the doctrine of incidental encroachment, is only another way of discovering what is the pith and substance of an impugned Act The law would be valid if in pith and substance it falls in the Provincial field but incidentally encroaches upon the forbidden field with the limitation that only to the extent of repugnancy those incidental provisions will be knocked out if they come in clash with the previously enacted law which occupies the forbidden field The Provincial law will however be fully valid if, in relation to the incidental encroachment upon the forbidden field it could be said that it has only trenched upon the unoccupied portion of that field This is precisely what *ART* 110 of our Constitution says in respect of conflict between the Provincial Laws and the Federal or Existing Laws with respect to matters in the Concurrent List The controlling words in *ART* 110 are that the Provincial law will be void but only to the extent of repugnancy The pith and substance rule helps us t [illegible] *ART* 110 which deals with repugnant [illegible] us to determine what portions of the [illegible] occupied field within the forbidden sphere of the Legislature

We may in this context notice a recent case of the Supreme Court of India— State of Bombay vs. Narottamdas.
State of Bombay v *Narottamdas Jetha Bhai ard another*, reported in A I R (1951) Supreme Court p 69 In this case the question was whether the *Bombay City Civil Court Act of* 1948 was *ultra vires* of the legislature of the *State of Bombay* and in particular whether section 4 was *ultra vires* of the State Legislature It was claimed that the subject matter of legislation was covered by the entries Nos 1 and 2 of the Provincial List (1) Administration of Justice,

In yet a third Australian case of Stock Motor Ploughs Ltd. v. Forsyth reported in (1932) 48 *C.L.R.* 128, it was laid down that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. The principle as to this inconsistency was explained by Evatt J. who after reviewing all the previous decisions observed (at p. 147):

"It is now established . . . . that State and Federal Laws may be inconsistent, although obedience to both laws is possible. There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main, been reached, by ascribing 'inconsistency' to a State Law, not because the Federal law directly invalidates or conflicts with it, but because the Federal law is said to 'cover the field'. This is a very ambiguous phrase, because subject-matters of legislation bear little resemblance to geographical areas. It is no more than a *cliche* for expressing the fact that, by reason of the subject-matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority." [See further (1) (1943) 68 *C.L.R.* 151, *Colvin v. Bradley Bros.*, (2) (1948) 77 C.L.R. 84, *Wenn v. Attorney General (Victoria)*.]

In an Indian case decided by Madras High Court (in re: *Adhilakshmi Ammal*) reported in A.I.R. (1941) Madras p. 533, the Full Bench was called upon to decide the question of repugnancy in relation to a Provision of a certain *Madras Act*, which made possession of *ganja* punishable regardless of the quantity possessed by the offender, as this was alleged to be in conflict with *Abkari Act*, which did not punish possession of *ganja* up to 5 tolas. The question involved interpretation of section 107 of the Govt. of India Act, 1935, and the contention was that as the Madras Act was not reserved for the assent of the Governor-General, it could not prevail over *Madras Abkari Act*. It was held:

"Consequently S.4 (1) (a) *Madras Prohibition* Act is completely *ultra vires* the Provincial Legislature in so far as it relates to 'dangerous drugs' and, therefore, *Madras Abkari Act* and rules made thereunder remain in force in relation to dangerous drugs such as *ganja*."

This was a case of conflict of Provincial Law with that of an existing Indian Law.

Repugnancies between special procedural laws, whether civil or criminal, with respect to matters in the concurrent field must be carefully scrutinised in view of the fact that in the Codes of Civil as also Criminal procedure the provisions exist that have expressly made the entire content of those Codes yield place to special and local laws. In the criminal Procedure for instance we have the following:

"S.1. This Act may be called the Code of Criminal Procedure, 1898; and it shall come into force on the 1st of July, 1898.

"(2) It extends to all the provinces and the Capital of the Federation of Pakistan; but in the absence of any specific provisions to the contrary nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

Similarly, S.5(1). "All offences, under the Pakistan Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences, under any other law shall be investigated, enquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for

tion of justice other than jurisdiction and powers of court and, if that were so, the discussion of the doctrine of pith and substance does not arise at all I find it difficult to support the reasoning adopted by the Bombay High Court in Jagtiani's case, *A I R* (36) 1949, F C 175 (50 Cr L J 897) (Supra)"

96. When are Laws said to be Repugnant to each other?

Ordinarily the laws could be said to be repugnant when they involve impossibility of obedience to them simultaneously (See 8 C L R 465 and 10 C L R 266) But there may be cases in which enactments may be inconsistent although obedience to each of them may be possible without disobeying the other In an Australian case, (*Clyde Engineering Co Ltd v Cowburn* (1926) 37 *C L R p* 466) it was held that inconsistency is created also when one statute takes away rights conferred by the other In that case the Federal law prescribed a 48 hours week and by its several provisions established the procedure for payment of overtime on that basis The State law on the other hand prescribed a 44 hours week It was ruled that the two statutes were inconsistent with each other (See the illuminating judgment of Isaacs, J under Inconsistency' at p 489 "If an Act of Parliament", says the learned Judge ' for instance prescribed 25 lashes for robbery under arms and a later Act prescribed that such an offender should be punished with 20 lashes it could, of course, with equal truth be said that both provisions could be obeyed, and therefore, applying the suggested test, the offender must receive 45 lashes But surely the vital question would be Was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect at all to the first Act, because the second was intended entirely to exclude it The suggested test, (namely that both Acts can be obeyed) however useful a working guide it may be in some cases, or in other words, however it may for some cases prove *a* test, cannot be recognised as *the* standard measuring rod of inconsistency ")

In another Australian case (ex parte McLean reported in (1930) 43 *C L R* 472,) yet another test of inconsistency was formulated Two Statutes could be said to be inconsistent if they, in respect of an identical subject matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties as for example in a case where one statute imposed a duty and provided for a sanction of a certain type to secure compliance with that duty, and another statute dealt with the same subject matter but while imposing the same duty provided a different kind of sanction, the two laws could not stand together as a person obliged to follow one law could not at the same time be expected to submit himself to another This was a case in which the State law (*Master and Servants Act* 1902) had prescribed a certain kind of punishment for misconduct towards their employees but the Federal law (*Commonwealth Conciliation and Arbitration Act* 1904 28) dealt with the same kind of misconduct under a somewhat different sanction Under S 109 of the *Australian Constitution* the conflict was resolved and the Commonwealth law was made to prevail over the *State Law* (This case has been approved by the Privy Council in the case of *Thomas O Sullivan v Noarlunga Meat Ltd* (1957) *A C* 1) The principle that was laid down was stated by Dixon J at p 483 as follows

"The inconsistency does not lie in the mere co existence of two laws which are susceptible of simultaneous obedience It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed When a Federal Statute discloses such an intention, it is inconsistent with it for the law of the State to govern the same conduct or matter "

that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, *and all means which are appropriate, which are plainly adapted to that end, which are not prohibited*, but consist with the letter and spirit of *the Constitution, are constitutional*."

Now it must be remembered that the Congress in the United States has no doubt conferred upon it "enumerated powers" which have been listed in S.8 of ART. 1, under 17 heads, but in the last clause of that section we have the following power expressly affirmed by the Constitution:

"to make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers, and *all other powers listed by this Constitution in the Government of United States or in any department or office thereof*."

It was largely as a result of appeal to this provision that United States Supreme Court has been able to give to the doctrine of implied powers a somewhat abnormal content in the case of *McCulloch v. Maryland*, (1819) 4 *Wheaton* 316: 4 *L.Ed.* 579. In this case it was urged that this clause, though not in terms, a grant of power which might otherwise be implied, conferred power merely of selecting means for executing the enumerated powers. This argument, however, did not find much favour with the learned Judges:

"The result of the most careful and attentive consideration", said the Court, "bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional. . . . ."

Nine years later Marshall, C.J., introduced yet another concept, "Resulting Powers", that is of powers that result from the whole mass of the powers of National Government and from the nature of political society. (See *Storey* on *Commentaries ART.* 1256. See also *United States v. Curtiss-Wright Export Corporation*, (1936) 299 *U.S.* 304.)

The United States Supreme Court by resort to this widely defined doctrine of implied powers has been able to find warrant in the legislative list contained in the 8th section of Art 1 for upholding the validity of several legislative measures which in the strict rule of interpretation known to our jurisprudence it would have been difficult to do.

In a recent case of *United States v. S.E. Underwriters Association* decided in the year 1944 (322 *US* 533) we have, what may be regarded as, the high-water mark of the reach of the doctrine of implied powers in the United States. This was a case in which the United States had obtained an indictment against S.E. Underwriters Association on the basis of the allegation that that Association had violated the provision of the *Sherman Act*. In the District Court the defence "that business of the insurance is not commerce either *intra-*

the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences "

From the foregoing provisions it would be seen that the rule of priority in favour of the special or local procedurable law is enacted in the Code itself Consequently the validity of a special or local procedural law, even if it is in conflict with the code of criminal procedure would not be dependent upon the assent of the President, for that assent is neces sary to save the provincial law only in cases of "repugnancies", not merely apparent but real repugnancies This view has been followed in the decisions of pre partition cases by the Courts of un divided India and has received the support of the Supreme Court of our Country in the case of *Chief Secretary, East Pakistan v Moslemuddin Sikdar, P L D* (1957) *S C (Pak), p 1* *After referring to Ss 1(2) and 5(2), Cornelius J*, who delivered the judgment of the Court remarked in that case as follows (at p 8)

"The wording of these two sub sections make it clear that nothing in the Code of Criminal Procedure Code can be deemed to be repugnant to any law providing for jurisdiction and powers of Courts, and for the procedure in the trial of offences, where such law relates to a special subject, which in this case is the Control of Movement and Distribution of Foodstuffs We are satisfied that the provisions of S 11, 12(2) 13, 14 and 18 of the Ordinance to which particular reference has been made by the learned Judges constitute special law relating to a special subject, and as such, there is no question of these provisions having 'to give way to the Code of Criminal Procedure' for the simple reason that that Code itself provides that its provisions shall not apply to such a case "

Similar reasoning would apply to a case where the repugnancy complained of is between a Provincial Special or Local Procedural Law on the one hand and the Code of Civil Procedure, which is a subject in the concurrent field, on the other For this see the cases of Atiqa Begam, A I R (1940) *All p* 272, *at* 277, and *Megh Raj v Allah Rakhia*, A I R (1942) *F C* 27 (30)

97. Doctrine of implied powers

Powers may be divided into (1) express powers, and (2) implied powers Express powers are those that are expressly provided for by a statute and implied powers are those which are implied or derived from the powers expressly granted or conferred by a statute For the proper exercise of a statutory power there are certain incidental or implied powers which must be assumed to have been conferred on the donee of the power In the words of that great American Chief Justice, Mr Marshall, (whose statement on the American law relating to the doctrine of implied powers has come to be regarded as *locus classicus*), uttered by him in the famous case of *Marbury v Madison*, "This provision (referring to the express power) is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to various crises of human affairs To have prescribed the means by which the Government should in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur" (See p 26 *Supra*) In the case of *M'Culloch v Maryland* (1819), (4 *Wheat* 316, 4 *Law Ed* 579), the same Chief Justice observed as follows(at p 605)

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended But we think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable

"The question therefore for me settles down to this: What role ought the judiciary to play in reversing the trend of history and setting the nation's feet on a new path of policy? To answer this I would consider what choices we have in the matter."

After considering what he felt were the choices open in the matter before the Court he proceeded to remark :

"A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress." (At page 594).

He further continued:

"Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance business is more than I can reconcile with my view of the function of this Court in our Society." (pp. 594-595).

These extracts from the dissenting judgment serve to show the extreme reluctance upon the part of the dissenting Judges to upset a consistent and well established course of the decisions which supported the view of the problem taken by the District Court. The majority opinion of the Supreme Court however shows the extent to which the doctrine of implied powers can be stretched in America.

The doctrine of implied powers—and our Constitution

It should be obvious that this doctrine of "Implied Powers", stated in these broad terms, can have no application to the interpretation of the provisions relating to legislative competence of our national and provincial legislatures.

The approach of the High Court of Australia.

The High Court of Australia no doubt have, at one stage, applied this doctrinal approach but the Privy Council have firmly negatived it.

In an Australian case, *H. L. D'Emden v. Pedder*, (1904) 1 *C.L.R.*, 91, the question relating to the constitutionality of Tasmanian Stamp Act was considered by the High Court of Australia. The contention was that the Act interfered by way of taxation and consequent control, with a federal agency or instrumentality; that it attempted to impose a condition which must be complied with by the officer before he can receive the salary allotted to him by the Commonwealth; and that such a condition cannot be constitutionally imposed by a State; that the imposition of stamp duty on a receipt for a federal salary is, in effect, taxation of the federal salary, which taxation, it was urged, was not within the competence of the State. Chief Justice Griffith dealt with these contentions in the light of the provisions of the *Australian Constitution Act* and stated the principle of interpretation as follows:

"In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connexion and to the provisions of the Constitution, either expressed or necessarily implied. That this is so as regards the Commonwealth, apart altogether from the express provisions of the Constitution, appears too plain to need elaborate argument. It is only necessary to mention the maxim '*quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest*'. In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and with-

state or *inter state*', was accepted The United States appealed from this decision to the Supreme Court Mr Justice Black began his judgment by acknowledging that for seventy five years, whenever the question has been presented, it has been held by the Supreme Court that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories But he proceeded to draw distinction between all prior determinations and the case before him upon the ground that Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines To day for the first time in the history of the Court that issue is squarely presented and must be decided " (p 534)

He then went on to observe (at p 539) ' Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written To hold that the word commerce as used in the Commerce Clause does not include a business such as insurance would do just that Whatever other meanings commerce may have included in 1787, the dictionaries encyclopaedias, and other books of the period show that it included trade business in which persons bought and sold bargained and contracted And this meaning has persisted to modern times Surely therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate 'Commerce among the several States does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines

The learned Judge then dealt with the case law cited at the bar and observed

"Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it That power is held by this Court from the beginning is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause We cannot make an exception of the business of insurance " (At page 552)

The result was that the decision of the District Court was upset

In his dissenting judgment, *Chief Justice Stone* made no secret of the fact that he was disturbed at the departure from the rule of *stare decisis* which the authors of the majority judgment were making In his words

"To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view But the rule of *stare decisis* embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right This is especially so where as here Congress is not without regulatory powers (*Cf Penn Dairies v Milk Control Comm s*, 318 U S 261, 271, 275) The question then is not whether an earlier decision should be overruled, but whether a particular decision ought to be And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity " (At page 579)

To the same effect were the observations of Justice Jackson, who in his dissenting judgment remarked

sometimes the phrase "unconstitutional" is used to describe a Statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the Statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned *Chief Justice* suggests. The enactments to which attention has been directed do not seem to leave any room for implied prohibition, '*Expression facit cessare tacitum*'. And the language of the Commonwealth Act indicates with sufficient clearance that its framers had not overlooked, as indeed it would be impossible to suppose they could have overlooked, the Constitution of each State of the new Commonwealth as declared and enacted by the Statutes under which they were created. It is quite true, as observed by *Griffith C. J.* in the above mentioned case of *D' Emden v. Pedder* that:

> 'When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later Statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them.'

"But it is an extraordinary extension of such a principle to argue that a similarity, not of words, but of institutions, must necessarily carry with it as a consequence an identity in all respects. It is to be observed that the principle is variously stated in two of the cases to which their Lordships were referred as containing the reasons for the judgment under appeal. In *D'Emden v. Pedder* the learned *Chief Justice* says:

> 'We cannot disregard the fact that the Constitution of the Commonwealth was framed by a convention of representatives from the several colonies. We think that, sitting here, we are entitled to assume—what after all is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the *Constitution of the United States*, but with that of the *Canadian Dominion* and those of the British Colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the *Constitution of the United States* which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.'

"The first observation that arises upon this argument is that the Chief Justice does not state what are the provisions 'undistinguishable in substance, though varied in form." And it is extremely difficult to understand the application of the principle involved unless the comparison is made clear by the juxta-position of the provisions. The same learned judge, in *Deakin v. Webb* and *Lyne v. Webb*, 1 C.L.R. 585 at p. 606, says, as justifying his rejection of the relevancy of the distinction between the governments of the *United States* and the *Constitution of the English monarchy*, 'It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English-speaking federations and deliberately adopted with regard to the distribution of powers the model of the United States in preference to that of the Canadian Dominion.'

"Again, it is somewhat difficult to know what it is to which the learned Judge refers, and the only explanation he gives is that 'they used language not verbally identical but synonymous for the purpose of defining that distribution.' It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who

out special mention, every power and every control the denial of which would render the grant itself ineffective This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of Government (At page 109)

He then considered numerous decisions of the Supreme Court of the United States and in particular referred reverentially to the case of *McCulloch v Maryland* (1819) 4 *Wheaton, p* 316, 4 *Lawyer's Ed page* 579

"We are not, of course, said he, "bound by the decisions of the Supreme Court of the United States But we all think it would need some courage for any judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a judge and so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide but as a most welcome aid and assistance (At page 112)

The learned Chief Justice then stated in his judgment that the view of the law taken in McCulloch's case had been adopted and followed in the interpretation of the *Constitution of the Dominion of Canada* by the Courts of the *Provinces of Ontario* and *New Brunswick* since the year 1878, and that their decisions, though uniformally adverse to the Provincial Governments have not been made the subject of appeal either to the Judicial Committee or to the Supreme Court of Canada In the end, he held that the general words of Tasmanian Act ought to be interpreted restrictively, so as to exclude federal officers from the pale of its operations This Australian case was followed in *Deakin v Webb* and *Lyne v Webb* 1904 1 *C L R* 585 where it was decided that an employee of the federal government was not liable to income tax under the *State Income Tax Act* The principle of the case formed the subject matter for the consideration of the *Privy Council* in the case of *Webb v Outrim*, (1907) *A C p* 81, and the doctrine invoked by the High Court of Australia to the effect that where a State law interferes with the free exercise of the legislative and executive powers of the Commonwealth such interference must be impliedly forbidden by the Constitution of the Commonwealth although no such express prohibition can be found therein, was rejected Their Lordships saw no warrant in the extension of the doctrine invoked by the Australian High Court to the interpretation of the Australian Constitution Act for there was in their Lordships' view, no analogy between the two Constitutions just ' in the very matter which is under debate'

Their Lordships further observed

' No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to it becomes an *Act of Parliament* as much as any Imperial Act, though the elements by which it is authorised are different If indeed it were repugnant to the provisions of any Act of Parliament extending to the colony, it might be inoperative to the extent of its repugnancy (See the *Colonial Laws Validity Act*, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached *The American Union*, on the other hand has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional But in the British Constitution, though

held that the Colonial Legislature had the power to remove any obstruction offered to its deliberations and not the power to punish members for contempt. The power to punish must be expressly conferred and it cannot be implied as it was not necessary for self-preservation of the Legislature but the power to remove obstruction must be considered as an ancillary power for in the absence of such power the purpose for which Colonial Legislature was constituted will be stultified. (See also the Canadian case of *Cushing v. Dupuy*, reported in 5 *Appeal Cases p.* 409, of the year 1880, where it was held that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates (Section 91 (2)) without interfering with and modifying some of the ordinary rights of property and other civil rights, Section 92(13), nor without providing some special mode of procedure, Section 92(14), for the vesting, realization and distribution of the estate.)

99. Doctrine of the "original package"

The doctrine of the "original package" in its application to the interpretation of the provisions of the *Government of India Act* was considered in the case of *State of Bombay v. F.N. Balsara by the Supreme Court of India*, reported in A.I.R. (1951) *Supreme Court p.* 318, and it was declared that this doctrine "has no place in this country, having regard to the scheme of legislation that has been outlined in the *Government of India Act*, 1935, and in the present Constitution, in which the various entries in the Legislative Lists have been expressed in clear and precise language."

This doctrine was stated in an American case, *Brown v. Maryland*, 1827, 25 *U.S.* 419 by Chief Justice Marshall. In order to understand the scope of the application of this doctrine in the system of *American Constitutional Jurisprudence* it is necessary to state the facts of this case:

The State in question required that importers of foreign goods by bale or package and sellers of such goods take out a licence for 50 dollars or pay a penalty. And the point that arose for consideration in the case was whether the legislature of a State could constitutionally require the importer of foreign articles to take out a licence from the State before he shall be permitted to sell a bale or package so imported. Chief Justice Marshall, in the opinion he rendered, affirmed the well known constitutional principle to the effect that there is a presumption in favour of the constitutionality of every legislative Act and remarked that the whole burden lies upon him who denies its constitutionality.

With regard to the interpretation of the U.S. Constitution, which provides that "No State shall without the consent of the Congress lay any imposts, or duties on imports, or exports except what may be absolutely necessary for executing its inspection laws", Chief Justice Marshall observed :—

"Whether the prohibition to lay imposts, or duties on imports or exports, proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which

framed the Constitution and their supposed preferences for this or that model which might have been in their minds Their Lordships are not able to acquiesce in any such principle of the interpretation The legislature must have had in their minds the Constitution of the several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed The 114th section of the Constitution Act sufficiently shows that protection from interference on the part of the federal power was not lost sight of It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the legislature For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court judgments governing the judgment under appeal '

Doctrine of implied powers and our Constitution

We have however a case of a Written Constitution in which the entries in the several lists are stated in meticulous details and where a great deal of care has been taken to provide a double enumeration of powers In our Constitution, let it be noted, there are two complementary powers couched in express, precise and definite terms and there can be no valid reason for the acceptance of a broader interpretation of them in the way Supreme Court of America would be justified in bestowing upon them while interpreting the Constitution of that Country (See the cases in India of—

(1) *Ram Krishna v Municipal Committee, Kamptee AIR* (1950) *Supreme Court p* 11,

(2) *Kishori v King* A I R (1950) *Federal Court p* 69,

(3) *Governor General in Council v The Province of Madras* A I R (1945) *Privy Council p* 98 cases which tend to show that the Indian Courts have refused to apply the doctrine of implied powers in such broad terms)

98 Doctrine of incidental or ancillary powers

We have in our jurisprudence instead however the doctrine of incidental or ancillary powers, which may be regarded as a mild concoction of the doctrine of implied powers Constitutional instruments have to be liberally interpreted and they must be deemed to have conferred incidental or ancillary powers in order that the expressed powers that have been enumerated may be effectively availed of Even in England, in a case *Small v Smith* reported in 10 *Appeal Cases p* 119, of the *year* 1884, this doctrine has been invoked in the matter of interpreting the scope of statutory powers (p 129)

"Now I entirely adhere", said Earl of Selbourne to what was said in this House in the case of *Attorney General v Great Eastern Railway Company*, (1880) 5 *Appeal Cases* 413, that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *prima facie*, to follow from the authority for effectuating the main purpose by proper and general means "

There must be for this doctrine to apply such a necessary connection between the expressed power and the power claimed to be implied that it could validly be said that the implied power is such as might reasonably be assumed to be incidental to the execution of the expressed power, or in the words of *Earl of Sebbourne*, whether the presumed power can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it (See also the Australian case, *The Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* of the year 1940, reported in 63 C L R 278 at p 315)

The Privy Council, for instance, in the case reported in 4 *Moo Privy Council p* 203,

exports'; the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wider terms; and it does not appear to us that it would necessarily follow from the principle of the *Maryland* decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of licence or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in the Maryland case and it was a view adopted and argued before us. The analogy with the American case is an attractive one; but for the reasons which we have given we are wholly unable to accept it." (pp. 106-7).

Justice Mr. Fazal Ali, in the case referred to above (*State of Bombay v. F. N. Balsara, 1951 S.C. p. 318*) after reviewing the case-law in America and India, concluded by observing, as has been indicated earlier, that the "original package" doctrine has no application to this country. "In the United States", he observed, "the widest meaning could be given to the Commerce Clause, for there was no question of reconciling that Clause with another Clause containing the legislative power of the State. Under the provisions of the Government of India Act, a limited meaning must be given to the word "import" in entry 19 of List I, in order to give effect to the very general words used in entry 31 of List II. (Entry 31 in List II reads as follows :—

'Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other norcotic drugs, but subject as respects opium to the provisions of List I, and as respects position and dangerous drugs, to the provisions of List III').

For provision as to the freedom of inter-provincial trade contained in our constitution see Act. 119.

100. Doctrine of Severability

The Doctrine of severability has reference to the practice of the Courts to declare the whole Act as void, if portions of the Act that are clearly shown to be *ultra vires* are such that when they are struck down the rest of the Act would not be able to survive. This doctrine has been stated in the case *Attorney-General for Alberta v. Attorney-General for Canada, in 1947 Appeal Cases p. 503, at p. 518*. Their Lordships of the Privy Council in that case observe:—

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, weather on a fair review of the whole matter it can be assumed that the Lagislature would have enacted what survives without enacting the part that is *ultra vires* at all." (at p. 518).

In each case, therefore, it is a question for argument whether or not upon the Court coming to the conclusion that certain portions of the Act are beyond the law-making powers of the Legislature, the whole of the Act will be declared void. The test laid down by their Lordships of the Privy Council, in any case is not easy to apply, but that it is the only test that can be applied, appears to be a matter beyond dispute:

See also: (*a*) A.I.R. (1950) *S.C.* 27, *Gopalan* v. *State of Madras*. (*b*) A.I.R. (1939) *F.C.* 74. *Shyamakant* v. *Rambhajan* (*c*)A.I.R. (1952) *Nag.* 111. *New Motor Transport Co.* v. *R. T. Authority*; *and* (*d*) A.I.R. (1952) *S.C.* 252. *State of Bihar* v. *Kameshwar Singh*.

In an earlier case, *Natural Products Marketing Act* case, (*Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1937) *A.C.* 377, the question with regard to the application of doctrine of severability arose in the following way:

imposes a light duty can impose a very heavy one, one which amounts to a prohibition Questions of power do not depend on the degree to which it may be exercised If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed (at p 439)

"The constitutional prohibition on the States to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding as colours perplex the vision in marking the distinction between them Yet the distinction exists and must be marked as the cases arise Till they do arise, it might be premature to state any rule as being universal in its application It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution (at p 441)

Thus in effect it was held that imported goods as long as they remained the property of the importers and in the original form or package any state tax imposed in respect of them was an unconstitutional inerference with Federal Taxing Power but that after these same goods had been mixed up with the mass of property in the States they became liable to the incidence of State taxation power Even the American writers have pointed out the difficulty which has arisen from time to time in applying the original package doctrine, since sometimes very intricate questions arise before the Courts such as whether the doctrine applied to the larger cases only or to the smaller packages contained therein or whether it applied to smaller paper packages of cigarettes taken from loose piles of packages at the factory and transported in baskets (See the case of *Leisy v Hardin* 135 *U S* 100 for a clearer statement of the *American Doctrine* of the *Original Package*)

In the case, *The Province of Madras v Boddu Paidanna & Sons (reported in (1942) Federal Court Reports, p 90) Chief Justice, Maurice Gwyer*, referred to the case of *Brown v Maryland* but indicated his support not of the view of Mr Marshall but to the reasoning of Thompson J contained in the dissenting judgment in that case The Chief Justice remarked

'Next, it is to be observed that the American Constitution also provides that Congress alone has power to regulate commerce with foreign nations among the several States, and with the Indian tribes, and it was held that the *Maryland tax* was no less repugnant to this provision also Marshall C J asked 'To what purposes should the power to allow importation be given unaccompanied with the power to authorise the sale of the thing imported? Congress has a right not only to authorise importation but to authorise the importer to sell What does the importer purchase, if he does not purchase the privilege to sell? On this view of the Commerce Clause, it would indeed be difficult to recognise the right of the State to impose a tax upon the first sale of the commodity, at any rate so long as it remained in the importer's hands In the *Indian Constitution Act* no such question arises, and the right of the Provincial Legislatures to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government Lastly, the prohibition in the *American Constitution* is against the laying of 'any imposts or duties on imports or

the Supreme Court of India has summarised the rules of construction laid down by the American Courts in cases where the question of severability has been the subject of their consideration as follows :

"1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. (Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177)

"2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable (Vide Cooley's Constitutional Limitations, Vol I at pp 360-361, Crawford on Statutory Construction, pp. 217-218).

"3 Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole (Vide Crawford on Statutory Construction, pp. 218-219)

"4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

'5 The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections, (Vide Cooley's Constitutional Limitations, Vol I, pp 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein

"6 If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. (Vide Sutherland on Statutory Construction, Vol 2, p 194)

"7 In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. (Vide Sutherland on Statutory Construction, Vol 2, pp. 177-178)"

101. The Constitutional Relationship of the President with the Governor

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The Governor of a Province is appointed by the President under *ART 70*, and holds office during his pleasure This virtually means that the Governor is a nominee of the Cabinet at the Centre Governor has certain constitutional responsibilities in the matter of appointment of the Chief Minister, his dismissal etc., and these are to be exercised by him in his discretion. He has practically the same relationship to the administration of Provincial affairs, as the President has to the administration of Federal affairs Under *7th Clause of ART 71*, it is declared :

"In the exercise of his functions, the Governor shall act in accordance with the advice of the Cabinet or the appropriate Minister, as the case may be, except in cases where he is empowered by the Constitution to act in his discretion, and except as respects the exercise of his powers under clause (6)"(which says that Chief Minister shall hold office

A certain portion of the *Act of Parliament*, which provided for the regulation of marketing of natural products, was declared invalid and the question was whether this could be severed and the remaining portion of the Act held *valid* Section 9 of the impugned Act purported to deal with provincial or export trade only, and Part II of the Act was attempted to be supported on the basis that it related to criminal law and was therefore valid There was another provision, namely section 26, which contained an indication of Parliament's intention to the effect that the valid portions should be treated as severable from the invalid provisions S 26 was in the following terms

"If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall, therefore, be held to be *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act, the intention of the Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act "

Lord Atkin dealing with the contention that effect should be given to S 26, observed —

"There appear to be two answers In the first place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither S 9 nor Part II can be contemplated as existing independently of the provisions as to the creation of a Board and the regulation of products There are no separate and independent enactments to which S 26 could give real existence In the second place both the Dominion and British Columbia in their cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation Their Lordships are of opinion that this is true and that as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it "

Reference may also be made to the cases of

(1) *In re The Initiative and Referendum case*, (1919) *A C* 935,

(2) *The Great West Saddlery Company v The King*, (1921) 2 *A C* 91 ,

(3) *Attorney General for Manitoba v Attorney General for Canada*, (1925) *A C* 561 *at p* 568, and finally,

(4) *Lymburn v Mayland*, (1932) *A C* 318, and to the following Indian cases

(5) *Gopalan* v *State of Madras*, *AIR* (1950) *S C* 27,

(6) *Shyamakant v Rambhajan*, *AIR* (1939) *F C* 74,

(7) *New Motor Transport Co v Regional Transport Authority*, *AIR* (1952) *Nagpur* 111, and

(8) *State of Bihar v Kameshwar Singh AIR* (1952) *S C* 252

In the case of *New South Wales and another v Commonwealth and another* (1915) 20 *C L R* 54, Isaacs J recalled the reliance he had placed on the observations of Lopes, L J in *Kearney v Whitehaven Coliery Co* in the case reported in (1911) 12 *C L R* those remarks are often cited (See (1893) 1 *Q B* 700 *at p* 713)) and represent, in the present writer's opinion the best that has been said on that subject

"Where some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another "

See also the case of *Muhammad Ali* & *Sons* v *The Chief Commissioner for Karachi PLD* (1957) *Karachi* 320, where doctrine of severability has been discussed by Waheedudin J

In the case of R M D *Chamarbaugwalla v Union of India*, *AIR* (1957) *S C* 628,

"The property and revenues of the Dominion are vested in the sovereign, subject to the disposal and appropriation of the Legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law and statute, is as extensive in her Majesty's colonial possession as in Great Britain. *In Exchange Bank of Canada v. The Queen*, (1886) *L.J.R.* 55, *P.C.C.*5, this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion Government upon the ground that, by the law of the *Province of Quebec*, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the *British North America Act* 1867, there was precisely the same relation between the Crown and the Province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connections between the Crown and the Provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the Provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority. Their Lordships do not think it necessary to examine, in minute detail, the provisions of the *Act of* 1867, which nowhere professes to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. The object was accomplished by distributing, between the Dominion and the Provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purpose of Provincial Government. But, in so far as regards those matters which, by S.92, are especially reserved for Provincial Legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

"Hodge v. e Queen".

"In *Hodge* v. *The Queen*, (1883) 9 *A.C. p.* 117, *L.J.R.* 53, *P.C.C.* 1, *Lord Fitzgerald*, delivering the opinion of this Board said :—

"*When the British North America Act* enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in S.92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S.92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, the local legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.

"The Act places the constitutions of all Provinces within the Dominion on the same level; and what is true with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick."

during the pleasure of the Governor but the Governor shall not exercise his powers under this clause unless he is satisfied that the Chief Minister does not command the confidence of the majority of the members of the Provincial Assembly)

The question that arises for determination upon the analysis of this provision is Whether when the Governor acts in his discretion, does he act on his own or is he to act under the superintendence and control of the President, that is the Federal Cabinet? There is no direct provision in the Constitution one way or the other which may throw light on this problem The Government of India Act, 1935, as adapted in Pakistan however, in the 5th clause of section 51 had provided as follows

"In the exercise of his functions under this section with respect to the choosing and summoning and the dismissal of Ministers the Governor shall be under the general control of, and comply with such particular directions, if any as may from time to time be given to him by the Governor General "

The substance of this clause is not reflected in any of the provisions of our Constitution, and the omission to incorporate the principle of it does give rise to the inference that the Governor under our Constitution is not, when acting in the exercise of his discretionary functions, under the directions and control of the Federal Cabinet He is while acting within this sphere, immune from interference from any extraneous source whatever That is the constitutional position But then, this position is somewhat anomalous in that the Governor holds the appointment at the pleasure of the President and what is more, unlike the President he is not elected by any electoral College, but appointed under Ministerial advice from the Federal Cabinet Could it be said under these cirumstances that when the Governor is to act in his discretion he is to act all on his own? If that is the case, then he is not responsible to any one save to his conscience and to the oath of office taken by him, which is "To faithfully discharge the duties of the office of the Governor of the Province according to law " He cannot even be impeached in the manner in which the President can be impeached and should he misconduct himself the only thing that can happen is that he would be removed from office

In such circumstances could it ever be said that the Governor is a *delegate* of the Federal Cabinet, to be more precise is he the agent, who derives his authority from and, therefore, owes loyalty to, the Federal Government whose nominee he admittedly is? Consideration of this question is, from the constitutional point of view, of utmost importance for upon the answer that we give to it, must depend our answer to another question namely whether or not the Provincial administration in so far as the Governor can deal with it in his discretion is in a subordinate position *vis a vis* the Federal Government

In the case of "*Liquidators of the Maritime Bank of Canada v The Receiver General of New Brunswick*", decided in 1892, (1892 *A C* 437), their Lordships of the Privy Council made certain observation with regard to the Constitutional relationship that subsists between the Government of the Dominion and the Government of the province It is submitted that the case is relevant and may, if applicable to the constitutional position on the same subject in our country, be of the utmost assistance Liquidators of the Mar t me Bank of Canada vs Receiver General of New Brunsw ck

[illegible]

New Brunswick as also the Supreme Court of Canada held that the claim of Provincial Government amounted to a *Crown debt* to which prerogative attaches and, therefore, it was entitled to receive a prior recognition Their Lordships of the Privy Council upheld this decision as being in strict accordance with constitutional law and proceeded to observe

perty, Contracts and Suits", we see the same position substantiated. All property, for instance, which has no rightful owner or which but for the enactment of the Constitution would have accrued to Her Majesty by escheat or lapse or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a Province, vest in the Provincial Government, and shall, in any other case, vest in the Federal Government. The property which at the date when it would have accrued to Her Majesty was in the possession or under the control of the Federal Government or a Provincial Government shall, according as the purposes for which it was then held were purposes of the Federation or of a Province, vest in the Federal Government or the Provincial Government, as the case may be. (See ART. 133). The same principle is affirmed in ART. 134 which acknowledges distinct authority of the Federation and the Provinces to acquire property for their respective purposes, to enter into contracts (ART. 135), sue and be sued in the name of Pakistan and the Government of a Province as the case may be respectively. (See ART. 136).

A unique feature of our Constitution consists in this that in so far as the machinery of election, as also the apparatus of administration, namely the public services, are concerned, they are controlled by the Federal Executive at several points and what is more the judiciary in our country is one and indivisible whole and we have not, in our Constitution any distinction made between the *Provincial* and the *Federal Judiciary* in the sense that administration of Provincial and Federal laws have been relegated to diverse and to two separate judicial systems, as is the case in the United States. These provisions make a serious departure from the requirements of the Federal Principle.

102. Immunity of the President and Governors from judicial process

t. 213

Both the President and the Governor enjoy immunity from judicial process. Under *ART.*213 neither the President nor the Governor of a Province "shall be answerable to any court for the exercise of powers and performance of duties of his office, or for any act done or purported to be done in the exercise of those powers and performance of those duties." In other words, the President and the Governor enjoy immunity in *respect of those acts or omissions that are connected with the exercise of powers* and performance of duties assigned to them by the Constitution. The protection is absolute and unqualified and is not limited to being made available only during the continuance of their office. The formulation of the Article is somewhat awkward and clumsy in that, strictly construed, the protection enjoyable by them is only in respect of their being answerable to any *court*. There may be *quasi-judicial* forums and administrative authorities that are not courts *stricto sensu*, but all the same the liability of the President and the Governor to be proceeded against in respect of the exercise of their powers and performance of their duties could be enforced by them. It is, however, clear that the word 'court' is loosely employed to indicate all judicial authorities that have under the law the power to finally dispose of rights and liabilities of the litigants before them. It is not clear whether the President or the Governor are suable as ordinary citizens in respect of crimes and misdemeanours committed by them. On the plain construction of the Article it would appear that what is protected from being enquired into by courts is a class of acts and omissions which has reference to the exercise, actual or professed, of their powers and performance of their duties and not in respect of their personal acts and omissions like contracting debts and not paying them, or committing offences punishable under law. It would, therefore, appear that the constitutional immunity of the President and the Governor under our constitution is of a restricted variety.

Position nder the ernment dia Act.

Under the Government of India Act, 1935, in Section 306 (1) it was provided as follows :

"No proceedings whatsoever shall lie in, and no process whatsoever shall issue

"It is clear, therefore, that the Provincial Legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word, and, within the limits assigned by *S 92 of the Act of* 1867, these powers are exclusive and supreme It would require very express language, such as is not to be found in the *Act of* 1867, to warrant the inference that the *Imperial Legislature* meant to vest in the *Provinces of Canada* the right of exercising [illegible] have no share [illegible] the terms of the statute, [illegible]iat, whereas the *Governor General of Canada* is directly appointed by the *Queen*, the *Lieutenant Governor of a Province* is appointed, *not* by *Her Majesty*, but by the *Governor General*, who has also the power of dismissal If the Act had not *committed* to the *Governor General* the power of appointing and removing Lieutenant Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the *Governor General*, and not the *Queen*, whose *Viceroy* he is, became the sovereign authority of the *Province* when ever the *Act of* 1867 came into operation But the argument ignores the fact that, by S 58, the appointment of a *Provincial Governor* is made by the '*Governor General in Council*,' or, in other words, by the *Executive Government* of the *Dominion*, which is, by S 9, expressly declared 'to continue and be vested in the Queen ' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the *Crown* *The Act* of the *Governor General and his Council* in making the appointment was, within the meaning of the statute, the act of the Crown, and a Lieutenant Governor, when appointed, was as much the representative of Her Majesty for all purposes of Provincial Government as the Governor General himself was for all purposes of Dominion Government "

If for the word "Crown" occurring in the judgment of their Lordships, we were to substitute the word "Constitution" then, it is the view of the present writer that the constitutional position described by their Lordships as subsisting between Crown and the Lieutenant Governor of Provinces in Canada would virtually be the same as in our Constitution subsisting between the Constitution and the Governor

A Governor is not then a delegate of the Federal Government and the administration of the Provincial affairs is no more subordinate to the authority of the Federal Government than is the *Lieutenant Governor of the Brunswick Province* under the *Canadian Constitution* to the *Governor General of that Dominion*

If the view taken of the constitutional relationship visualised by the framers of our Constitution is valid, it would follow that at least one of the essential requirements of the Federal principle would be deemed to have been complied with by the framers of our constitution, namely that the Provinces in normal times at least enjoy an autonomous status in the exercise of the powers (be they legislative or executive) that have been reserved to them under the Constitution

F] Both the Federal and the Provincial Governments' sphere of authority, executive and legislative, is controlled by the terms of the Constitution and each within its own sphere is completely independent of the other Both the President and the Governor are assigned the duty of operating the constitutional mechanism designed by the framers of the Constitution, and the spheres of their authority are distinct and at several points independent of each other If we see the provisions of Part VII which deals with "Pro

is only one court, or quasi-court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal, but one that sits in another chamber of this Capital. There he can be called and tried and punished, but not here while as President, and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then, for any wrong he has done to any individual, for murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people."

These submissions were made by the counsel who appeared in the above case where a perpetual injunction to restrain the President from executing *Reconstruction Acts* was sought from the Court on the ground that the Acts, the President was about to execute, were unconstitutional. The argument proceeded on the pre-supposition that there was no allegation that the President was about to do anything of his own motion which *as* President he was *not* authorised to do. The allegation which was the foundation of the action was that the President was about to execute certain laws passed by the Congress. The court disposed of the controversy by refusing to issue the necessary writ declaring that "An attempt on the part of the Judicial Department of the Government to enforce the performance of such duties by the President might be justly characterised, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance'. In a later case, *Georgia v. Stanton, (6 Wall. 50)*, a similar prayer to restrain the *Secretary of War* and other military officers from executing *Reconstruction Acts* was also turned down by the court.

As to the right of the citizen to proceed against the Government, Provincial or Federal, this Article not only imposes no fetter upon it but makes it clear that the immunity it has extended to the President and the Governor will not be so construed as to restrict such a right as is otherwise available to bring action against the appropriate Government.

103. Administrative Relations between the Federation and the Provinces

ARTS. 125 to 132. *ARTS. 125 to 132* provide for the administrative relations between the Federation and the Provinces. The Federal Government has been charged with the duty of protecting each Province against external aggression and internal disturbance, and to ensure, subject to the provisions relating to emergency, that the Government in every Province is carried on in accordance with the provisions of the Constitution (ART. 125). It is inherent in the concept of overall responsibility for defence of the country that has been imposed upon the Federal Government that it should also be made responsible in the matter of safeguarding the Provinces against external aggression. Considering that in the Fifth Schedule the defence of Pakistan and any part thereof, and all acts and measures in connection therewith, as also the control over the Naval, Military and Air Forces of Pakistan, are matters with respect to which the Federal legislative and executive authority is empowered to take action, the only provision which ART. 125 makes is that it imposes upon the Federal Government the duty of protecting Provinces against external aggression. Similarly, the requirement that the Provinces be safeguarded against internal disturbances, as being within the legislative and executive authority of the Federation, could be inferred from entry 18 of List I, of Fifth Schedule, which provides for the preventive detention for reasons in connection with defence, foreign affairs, or the security of Pakistan and persons subjected to such detention.

Under *Article* 126 the Provinces are required to exercise their executive authority in such a manner as to ensure compliance with Acts of Parliament and existing laws which apply to that Province, and further they are directed so to act as not to impede or prejudice

from, any court in India against the Governor General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any court in India against any person who has been the Governor General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance, or purported performance, of the duties thereof

Act (S 306) 1935

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act "

This provision was calculated to render the person of the President and the Governor sacrosanct and inviolable so long as the relevant office was held by them under the *Constitution Act*, and their liability to be dealt with under the law was expressly made subject to the condition regarding production of sanction of His Majesty in Council for the initiation of any proceedings in respect of anything done or omitted to be done by any of them during his term of office in the performance or purported performance of the duties thereof Thus in order that acts and omissions committed in their *personal* capacity could at all be enquired into by a court of law, it was essential that they should not at the relevant time be in office After they cease to hold office they could be proceeded against as though they were ordinary citizens But if it was sought to proceed against them in respect of the performance of their official duty, sanction of *His Majesty in Council* was necessary

The present *Indian Constitution* makes elaborate provisions regarding the protection of the *President* and the *Governors* of the State apart from giving to them the kind of immunity extended to the *President* and the *Governor* in our *Constitution* The *Indian Constitution* further provides that no criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State in any Court during his term of office and no process for their arrest shall issue from any court during their term of office (See ART 361(2) and (3)) In respect of civil proceedings in which relief is claimed against the President or the Governor, it is the requirement of the Indian Constitution that no proceeding shall be instituted against them during their term of office in any court in respect of any act done or purporting to be done by them in their personal capacity, whether before or after they entered upon their office as such President or Governor, until the expiration of two months next after a notice in writing has been delivered to them or left at their office stating the nature of the proceedings, the cause of action therefor the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims (See ART 361, Cl (4))

Position under the US Constitution

The position in the *American Constitution* may now be briefly stated There is no clear *provision in the United States Constitution with regard to the immunity* of the President from compulsory judicial process, but the judicial pronouncements of the *United States Supreme Court in Marbury* v *Madison*, (1803) 2 *L Edn p* 60, referred to earlier as also during the trial of *Aaron Burr* for treason (see *Burr's Trial* 111,37, *published at Washington*, 1807) make it plain that the President enjoys complete immunity from the reach of judicial process In the case of *Mississippi v Johnson decided in* 1867, (4 *Wall* 475) the basis of the immunity of the President was stated by the counsel as follows —

"It is not upon any peculiar immunity that the individual has, who happens to be President, upon any idea that there is any particular sanctity belonging to him as an individual, as in the case with one who has royal blood in his veins, but it is on account of the office that he holds that I say the *President of the United States* is above the process of any court, or the jurisdiction of any court, to bring him to account as President There

104. Emergency Relations between Federation and the Province

ment on art XI of the titution.

Part XI of our Constitution should, logically considered, have been included in the Part entitled 'Relations between the Federation and the Provinces', because practically all its provisions have reference to the abnormal powers which, under the stress of emergency proclaimed in the manner required by those provisions, are made available to the Federation with respect to matters that ordinarily fall within the jurisdiction of legislative and executive authority of the Provinces. ART. 196, which empowers the Parliament to pass what are called "Indemnity Acts", does not, strictly speaking, fit in with the scheme of that Part for the simple reason that the competence of the Parliament to pass laws of indemnity has nothing to do with the existence of emergency. Martial Law can supplant the ordinary law although the proclamation of emergency is not in force. Similarly, the provision with regard to the President's power to suspend fundamental rights during emergency period should have been more appropriately located in Part II relating to Fundamental Rights.

There are, under our Constitution, three kinds of proclamations of emergency:—

Type of iergency mations.

(1) *Proclamation of Emergency arising out of War etc.*
To be issued upon the President being satisfied that a grave emergency exists in which the security or economic life of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control. (*ART.* 191 (1)).

(2) *Proclamation consequent upon the failure of Provincial Constitutional Machinery.*
To be issued by the President upon being satisfied on a report from the Governor of a Province that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of the Constitution. (*ART.* 193 (1)).

(3) *Proclamation of Financial Emergency* :
To be issued upon the President being satisfied that a situation has arisen whereby the financial stability or credit of Pakistan, or any part thereof, is threatened. (*ART.* 194 (1)). This proclamation can issue in the province only after consultation with the Governor of the Province concerned.

Any of the foregoing proclamations of emergency may be varied or revoked by a subsequent proclamation, and the validity of any such proclamation issued or order made under this Part shall not be questioned in any Court. (*ART.* 195).

The consequences resulting from and the extent of power that gets vested in the Federation in each of the foregoing types of proclamation of emergency are different.

We will take them in the serial order.

(1) *First type of Emergency:*

(a) While this type of proclamation is in operation, Parliament acquires the power to make laws for a Province or any part thereof with respect to any matter not enumerated in the Federal or the Concurrent List. In other words, the Parliament invades the Provincial field as it is defined by S.105 read with relevant List in the Fifth Schedule as also the residuary field which has been vested in the Provinces under our Constitution. (*ART.* 191(2) (a)).

The power of the Parliament to make laws for a Province with respect to any matter "shall also include the power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties upon the Federation, or officers and authorities of the Federation as respects that matter." (ART. 191 (3)).

The capacity or the competence of the Federal Legislature to invade the Provincial legislative and executive authority does not prejudice the right of the Provincial Legislature to make any law which ordinarily under the Constitution it has the power to make,

the exercise of the authority of the Federal Government The executive authority of the Federation extends to the giving of such direction to a Province as may appear to the Federal Government to be necessary for confining the executive power of the Province to the limits put upon it by the foregoing provisions Directions could also be given to Provinces with regard to matters enumerated in sub clauses (a) to (d) of clause (2) of *ART* 126 Provision has also been made to reimburse the Provincial Government in cases where Federal directions are being given under sub clauses (a) and (b) of clause (2) of *ART* 126 Any differences and disputes with regard to the quantum of amounts payable shall be decided according to the procedure prescribed in ART 129 The President may, with the consent of the Provincial Government, entrust either conditionally or unconditionally to the Provincial Government, or to any officer thereof, functions in relation to any matter to which the executive authority of the Federation extends Even by an *Act of Parliament* such powers could be conferred duties imposed upon a Provincial officer or authorities thereof, that is, powers and duties in respect of matters outside the normal Provincial legislative and executive competence In any such event, however, the Provincial Government shall be paid such sums as may be agreed to and in default of such agreement, procedure under ART 129 would be resorted to, for the determination of the amounts payable in respect of expenditure incurred by the Province in connection with the carrying out of duties that are thus imposed on the Provincial Government (*ART* 127) *ART* 128 confers power on the Federal Government to acquire any land situate in any Province provided its acquisition is connected with a matter with respect to which Parliament has the power to make laws It can also require the Provincial Government to acquire land on its behalf and at the expense of the Federal Government In the event of any disputes with regard to terms on which this acquisition of land could be secured, procedure prescribed in *ART* 129 will be resorted to

ART 129 mentions the procedure for resolution of disputes between the Federation and Provincial Governments in respect of matters which under the law or the Constitution are not within the cognizance of the Supreme
tion The Chief Justice of Pakistan is empow
and the Supreme Court has the power, subje
rules regulating the practice of any such Tribunal The Chief Justice on receiving the report "shall determine whether the purpose for which the Tribunal was appointed has been carried out, and shall return the report to the Tribunal for reconsideration if he is of the opinion that the purpose has not been carried out " If however, the report is in order he shall forward it to the President who shall make such order as may be necessary to give effect to the report Any law made by the Provincial Legislature, which is repugnant to the order of the President, shall, to the extent of the repugnancy be void The order made by the President may be varied by him in accordance with the agreement made by the parties to the disputes (ART 129) ART 131 makes special provision with regard to broadcasting, and ART 132 provides for the method for the transfer of Railways to Provincial control

ART 130 provides for the establishment of Inter Provincial Council charged with the duty of investigating and discussing subjects in which the Provinces or the Federation and either one or both of the Provinces, have common cause for making recommendations for the better co ordination of policy and action with respect to that subject This Council can be established by the President at any time it appears to him that the public interest demands the establishment of such a Council One fails to understand the necessity of having the ART 130 at all incorporated in the Constitution—for even in its absence such a Council can always be established by the President in pursuance of the powers of the Federal Government to secure co ordination in the administrative fields reserved to it and the Provincial Governments under the Constitution

situation has arisen in which the government of a Province cannot be carried on in accordance with the provisions of the Constitution, is made, following consequences result:

The President may, by proclamation :

(a) Assume to himself, or direct the Governor of the Province to assume on his behalf, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any Body or Authority in the Province, other than the Provincial Legislature, as also other than the High Court. (See ART. 193 (1) (a) and the proviso thereto).

(b) Declare that the powers of the Provincial Legislature shall be exercisable by, or under the authority of, Parliament. It would appear that by virtue of this provision Parliament can legislate for the Province or direct another external agency to exercise such legislative functions as may be delegated. It is not necessary that the Parliament should directly exercise the legislative powers vested by the Constitution in the Provincial Legislature; instead, it can by passing a law create the necessary agency and charge it with the duty of exercising the powers of Provincial Legislature. (ART. 193 (1)(b))

(c) Make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province other than the High Court. (ART. 193 (1) (c)).

A Proclamation issued under ART. 193 is to be placed before the National Assembly and "shall cease to operate at the expiration of two months, unless before the expiration of that period it has been approved by a resolution of the National Assembly." The National Assembly can also extend the life of the Proclamation for a further period not exceeding four months. No such Proclamation, however, can remain in force for more than six months, unless of course, during the continuance of such a Proclamation, the National Assembly stands dissolved, in which case, its life gets prolonged until such time as the National Assembly meets *and 30 days thereafter.* This period of 30 days can be further shortened by a resolution. But such a Proclamation would continue to operate if a resolution approving the Proclamation has been passed by the Assembly. In any case such a period cannot extend the total life of the Proclamation which is six months. That period gets extended only when the National Assembly having been dissolved is not able to prolong the life of the Proclamation, in which case, however, the Proclamation can get indefinitely prolonged and its life would expire only after the expiration of a period of 30 days after its first meeting. (ART. 193 (2))

The language of the second clause of ART. 193 is of doubtful import and incapable of being defended. Obviously there is a great deal of confusion introduced by the idea conveyed in the following words.

A Proclamation . . . shall cease to operate at the expiration of 2 months "unless before the expiration of that period it has been *approved* by a resolution of the National Assembly."

The ordinary life of the Proclamation of Emergency under this clause is two months: that is understandable—but what is not understandable is the clause that follows: "unless before the expiration of that period it has been approved by a resolution of the National Assembly". Why should this life of 2 months be interfered with by a resolution of *approval* passed by the Assembly? Is the word "approved" occurring in the second clause not a mistake for the word *disapproved*? One can see the *reason* for the pre-mature termination of the period of emergency if the Assembly happens to disapprove it—but not when it approves it.

Besides all this the succeeding part of the sentence does not contribute much to-

but should there be inconsistency between any provisions of Federal law which Parliament enacts in consequence of the proclamation of emergency and the provisions of Provincial Law, the Federal law, no matter whether passed before or after the Provincial law, shall prevail and the Provincial law to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void Such a law has the further attribute of remaining alive throughout the period of the existence of emergency and six months after the cessation of the operation of the proclamation of emergency, whereafter it lapses, except in respect of things done or omitted to be done before the expiration of the said period (ART 191 (3), (4), (5))

(b) The executive authority of the Federation gets extended to the giving of directions to a Province as to the *manner* in which the executive authority of the Province is to be exercised (ART 191 (2) (b))

(c) The President may by order assume to himself, or direct the Governor of a Province to assume on behalf of the President, all or any of the functions of the Government of the Province and all or any of the powers vested in, or exercisable by any body or authority in the Province other than the Provincial Legislature He can make such incidental or consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part, the operation of any provisions of the Constitution relating to any Body or Authority in the Province (ART 191 (2) (c))

But all this authority is subject to the limitation that the powers vested in or exercisable by a High Court cannot be taken away by the President (See proviso to ART 191 (2) (c))

(d) If a Proclamation issued under ART 191 is in operation, the President may by Order, declare that the right to move any court for the enforcement of such of the rights conferred by Part II as may be specified in the Order, and all proceedings pending in any court for the enforcement of any such right, shall remain suspended for the period during which the Proclamation is in force (ART 192 (1))

(e) The President, while the Proclamation is in operation, also has the power to order that the proviso to clause (1) of ART 50, (which says that at least one session of the National Assembly in each year shall be held at Dacca), shall be suspended (ART 192 (2))

(f) A Proclamation issued under ART 191 is to be laid before the National Assembly as soon as conditions make it practicable for the President to summon that Assembly, and if approved by the Assembly, shall remain in force until it is revoked, or if disapproved, shall cease to operate from the date of disapproval (ART 191 (6)) It would appear that the expression ' as soon as conditions make it practicable do refer to what might be called a justiciable issue, although the discretion of the President in this behalf that is, his discretion to determine whether or not conditions exist in which the summoning by him of the National Assembly is practicable, would not be lightly disregarded by the Courts Courts would interfere only in the clearest of cases where it is made to appear to them that the delay made by the President in summoning the National Assembly is indefensible and altogether unjustified

(g) A Proclamation of emergency declaring that the security of Pakistan or any part thereof is threatened by war or external aggression may be made before the actual occurrence of war or any such aggression, if the President is satisfied that there is an imminent danger thereof (ART 191)

(2) *Second type of Emergency*

When the Proclamation of the kind mentioned in ART 193, to the effect that a

1914, and (2) *Emergency Powers (Defence Act of* 1939). During the existence of emergency, like wars and internal disturbances, the laws remain silent and the individual liberty to a considerable extent gets curtailed by reason of the overall control which the Government acquires for the purpose of combating abnormal conditions that supervene in the wake of war or internal civil commotion. In a recent article, *Lord Macmillan* has observed:

> "We have had good reason to realise the truth of *Cicero's* adage that amidst the clash of arms the laws are silent. The still, small voice of the law is quelled while men kill and destroy in defiance of its dictates. What we have to do is to restore the reign of law, to reseat justice on her throne, to cause right once more to prevail over wrong. The process of re-establishing the rule of law once it has been shattered is slow and difficult; it is so much easier to destroy than to rebuild. But until the world once more becomes law-abiding it cannot hope to regain peace and happiness." (*53 Calcutta Weekly Notes p.* 133).

During the time of peace the *Emergency Powers Act of* 1920 enabled, in appropriate cases, the *Crown in England* to declare a *State of Emergency* and to issue regulations by *Orders-in-Council*. The provisions of this Act are as follows :—

> 1. (1) If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists. No such proclamation shall be in force for more than one month, without prejudice to the issue of another proclamation at or before the end of that period.
>
> (2) Where a proclamation of emergency has been made, the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by such adjournment or prorogation as will not expire within five days, a proclamation shall be issued for the meeting of Parliament within 5 days, and Parliament shall accordingly meet and sit upon the day appointed by that proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.
>
> 2. (1) Where a proclamation of emergency has been made, and so long as the proclamation is in force, it shall be lawful for His Majesty in Council, by order, to make regulations for securing the essentials of life to the community, and those regulations may confer or impose on a Secretary of State or other Government department, or any other person in His Majesty's service or acting on His Majesty's behalf, such powers and duties as His Majesty may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and or any other purpose essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to His Majesty to be required for making the exercise of those powers effective:
>
> Provided that nothing in this Act shall be construed to authorise the making of any regulations imposing any form of compulsory military service or industrial conscription:
>
> Provided also that no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

wards the understanding of what the intention of the framers of the Constitution could be If the life of the Proclamation could be extended by 4 months, the total life of the Proclamation would be six months Why should then the immediately following injunction of confining the life of the proclamation to six months be at all necessary!

Where, by a Proclamation issued under ART 193, powers of the Provincial Legislature have been declared exercisable by or under the authority of the Parliament, it is competent —

(a) to the Parliament to confer on the President the power of the Provincial Legislature to make laws,

(b) to Parliament or the President when he is empowered under sub clause (a) to make laws conferring powers and imposing duties, or authorising the conferring of powers and imposition of duties upon the Federation or officers and authorities thereof

(c) to the President when the National Assembly is not in session to authorise expenditure from the *Provincial Consolidated Fund*, whether the expenditure is charged by the Constitution upon the Fund or not, pending the sanction of such expenditure by the Parliament

(d) to the National Assembly by resolution to sanction the expenditure authorised by the President under sub clause (c) of ART 193(3) Any law made in the exercise of the power of the Provincial Legislature by President or Parliament, which such an authority would not but for the issue of a Proclamation under this Article have been competent to make, shall to the extent of incompetency cease to have effect on the expiration of the period of six months after the Proclamation under this Article has ceased to operate, except as to things done or omitted to be done before the expiration of the said period (See Art 193(4))

(3) *Third type of emergency*

When the Proclamation of financial emergency is issued, the executive authority of the Federation gets extended to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions and to the giving of such other directions as the President may deem necessary for securing the financial stability or credit of Pakistan or any part thereof (See Art 194)

It would be appreciated from the foregoing analysis of the provisions relating to the various types of the Proclamations of Emergency and the resulting consequences therefrom, that by resort to these provisions the federal character of our polity gets transformed into one of unitary form and that the National Government becomes the paramount and supreme authority within the country These are certainly abnormal powers but they appear to have been conferred on the executive in conformity with requirements of the pattern of Government that was visualised under the provisions of Government of India Act, 1935 Provisions of section 93 as also the section 102 of that Act reflect more or less the provisions that have been embodied as Articles 193 *and* 191 in our Constitution Of course the provisions of Art 194 are new in the sense that they were not introduced in the Government of India Act, 1935

105 Emergency Provisions under other Constitutions

It will be useful to make brief references to the Constitutional provisions relating to emergency measures which prevail in other countries of the world (a) England

In England there are no emergency powers with the executive The Crown, of course, has the prerogative power of proclaiming emergency The state of emergency was declared, for instance, during the last two wars The extraordinary character of the legal measures that were adopted can be seen if a look is had at (1) *the Defence of Realm Act*,

come in effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character." (841-842).

An appreciation of the point made in Russel's case was given by *Viscount Haldane in Toronto Electric Commissioners v. Snider, (1925) Appeal Cases p. 396:* In this case Lord Haldane was dealing with the question concerning the validity of *Industrial Disputes Investigation Act*, 1907. The Act was to apply throughout Canada and its object was to enable *Industrial Disputes in Canada* to be referred to a Board of Conciliation. It was contended that the Act was void as it dealt with "civil rights", which were under the exclusive jurisdiction of the Provinces. Viscount Haldane upheld the contention and explained the remarks in Russel's case as follows :—

"It appears to their Lordships that it is not now open to them to treat *Russel v. The Queen*, as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in S.91. Unless this is so, if the subject-matter falls within any of the enumerated heads in S.92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some *extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency*. Such cases may be dealt with under the words at the commencement of S.91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and Power Co. v. Manitoba Free Press*, (1923 *AC* 695), are highly exceptional. Their Lordships think that the decision in *Russel v. The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of S.91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russel v. The Queen, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster.* An epidemic of pestilence might conceivably have been regarded as analogous." (at p. 412).

These observations will show that in an emergency the Dominion Parliament of Canada can invade the Provincial field. To the same effect are the views expressed in other cases (*Fort Frances Pulp & Power Co. v. Manitoba Free Press Co. Ltd.* reported in 1923 *Appeal Cases* 695, as also in the Board of Commerce case, in re *The Board of Commerce Act*, 1919, and the *Combines and Fair Prices Act*, 1919, (1922) 1 *A.C. page* 191, *at* 197).

In a somewhat more recent case, *Attorney-General for Ontario v. Canada Temperance Federation, reported in* 1946 *Appeal Cases p.* 193, where the validity of *Canada Temperance Act*, 1927, was challenged, *their Lordships of the Privy Council*, following the principle decided in Russell's case, commented on the appreciation given by Lord Haldane of that case in the *Toronto Electric Commissioners v. Snider* as follows :—

"The first observation which their Lordships would make on this explanation of Russell's case is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the Provincial Legislatures, merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no

(2) Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of 7 days from the time when they are so laid unless a resolution is passed by both Houses providing for the continuance thereof

(3) The regulations may provide for the trial, by courts of summary jurisdiction, of persons guilty of offences against the regulations, so, however, that the maximum penalty which may be inflicted for any offence against any such regulations shall be imprisonment with or without hard labour for a term of 3 months or a fine of one hundred pounds, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed Provided that no such regulations shall alter any existing procedure in criminal cases or confer any right to punish by fine or imprisonment without trial

(4) The regulations so made shall have effect as if enacted in this Act but may be added to, altered or revoked by resolution of both Houses of Parliament or by regula

(5) The expiry or revocation of any regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty

It would be noticed that a proclamation issued under S 1, remains in force only for one month in the first instance and when made, the occasion thereof has to be communicated to the Parliament and in terms of Clause 2 of S 1, Parliament has to be summoned to consider the matter

(b) Canada In Canada there are no direct provisions enabling the Governor General of the Dominion to issue proclamation of emergency, but there have been several pronouncements of their Lordships of the Privy Council which tend to show that emergency powers are inherent in the general authority reserved to the Dominion Parliament to make laws for the peace, order and good Government of Canada In the case of *Russel v The Queen* (1882) 7 *AC* 829, their Lordships of the Privy Council upheld a law which provided for uniform legislation in all the Provinces in respect of traffic and intoxicating liquor, despite the fact that its prohibiting and penal parts were to come into force in any city upon the support of the majority of electors being given to the measure The reasoning, on which the validity of this law, although it encroached upon the Provincial field, was upheld is as follows —

"The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character Parliament deals with the subject as one of general concern to the Dominion, upon

with it

e Act in

olour of

general legislation, is dealing with a provincial matter only It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should

civil supplies and price structure within the country have been upheld by the Courts as being in consonance with the measures necessary to combat the nature of emergency confronting the Administration and Legislature of the Country.

106. Proclamations of Emergency—unchallengeable in a court of law

clamations f mergency ichallenge-able in a urt of law.

Turning now to our Constitution it would appear that a proclamation of emergency issued under Arts. 191, 193 and 194, unlike the constitutional position in the U.S.A., are immune from being challenged in a Court of Law. President is the sole judge of the situation and it is he who has to decide whether or not the proclamation would issue. Of course, as he is bound by the ministerial advice in the field of the exercise of power relating to the issue of a proclamation, his powers under these Articles are virtually the powers of the Federal Government to smother the authority of the Provinces. The validity of the Proclamations can be challenged only on the ground of the *mala fide* exercise of power—but the proof of circumstances on which the *mala fides* of Government could be exhibited is necessarily a difficult matter.

While the proclamation of emergency under Arts. 191 and 193 is in force, the Provincial field of legislative authority gets annexed to the federal field, and the ordinance making power of the President under Art. 69 gets *pro rata* enhanced, with the result that by means of the mere issue of executive decrees, the Government at the Centre can carry on the Administration in the Provinces. The situation can become intolerable in case, either during the continuance of the proclamation of emergency or immediately after its commencement, or at the time of its inception, the National Assembly gets dissolved; for then such indirect measure of control as the National Assembly has over the making of laws during the continuance of emergency proclaimed by the Cabinet also gets considerably diminished, if not practically eliminated.

It is for these reasons that it is idle to think that the federal principle has been retained in the fullness of its scope in our Constitution. To this might be added the consideration that the appointment of the Governor, who is the constitutional Head charged with the duty of directing the operation of constitutional processes in the Provincial field, is himself a person who is a nominee of the Federal Government and holds office at their pleasure. The Federal Government thus, in normal times, as also in times of emergency, has an unusual amount of *de facto* power over the provincial administration. The Governor may at any time make a report that the constitutional machinery has broken down. It is not clear whether in the making of such a report he is controlled by the advice of his own cabinet, but it does look odd that he should be so bound considering that the object of making a report to the President upon the premises of which the latter has to give a finding that constitutional machinery has broken down in the province, would hardly emanate from the Chief Minister and his Cabinet in the Province. And this for the reason that the Governor might remove the Chief Minister who gave such an advice on the ground that he no longer enjoys the confidence of the legislature.

107. The Legislative Powers of the President and the Governors

ARTS. 69 and 102. rdinance—making Power.

The legislative powers of the President are mentioned in *Art.* 69 and of the Governors of the Provinces in *Art.* 102 of our Constitution. These powers of making and promulgating Ordinances may well be described as the powers of the Cabinet, both at the Centre as well as in the Provinces, to make laws during the time when National Assembly at the Centre and Provincial Assemblies in the Provinces are not in session. The relevant Articles do not prescribe any "conditions precedent" to exist beyond the *satisfaction* of the President or the Governor "that circumstances exist which render immediate action necessary", but merely say that upon such satisfaction the power to make and promulgate

evidence before that Board that one existed The Act of 1878 was a permanent, not a temporary, Act and no objection was raised to it on that account In their Lordships' opinion, the true test must be found in the real subject matter of the legislation if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole [as for example in the Aero nautics case (Re *Aerial Navigation, Attorney General for Canada v Attorney General for Ontario*, (1932) *AC* 54), and the Radio Case (Re *Regulation and Control of Radio Com munication, Attorney General of Quebec v Attorney General for Canada*, (1932) *A C* 304] then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters especially reserved to the Provincial Legislatures War and pestilence, no doubt, are instances, so too may be the drink or drug traffic, or the carrying of arms *In Russell v The Queen*, Sir Montague Smith gave as an instance of valid Dominion legisla tion a law which prohibited or restricted the sale or exposure of cattle having a conta gious disease Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that province

"It is to be noticed that the Board in Snider's case nowhere said that *Russell v The Queen* was wrongly decided What it did was to put forward an explanation of what is considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed True it is that an emergency may be the occa sion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not "

In the Constitution of the United States of America Art 1, S 9, clause 2, we have the following (c) U S A

"The privilege of the writ of *Habeas Corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it '

There are no provisions in the U S Constition conferring the emergency powers on the Federal Government

Willoughby, in Art 1057 in the Third Volume of his treatise on *Constitutional Law of the United States* deals with the power of the President to suspend the writ of Habeas Corpus and after a consideration of the case law relevant for the determination of that question in America, quotes with approval, the following remarks of Chief Justice Taney in the case of *ex parte Merryman*

"With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the Presi dent, in any emergency or in any state of things, can authorise the suspension of the privileges of the writ of *habeas corpus* or arrest a citizen except in aid of the judicial power He certainly does not faithfully execute the law if he takes upon himself legisla tive power by suspending the writ of *habeas corpus*, and the judicial power also by arrest ing and imprisoning a person without due process of law Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self defence in times of tumult and danger The government of the United States is one of delegated and limited powers It derives existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of Government beyond those specified and granted " (Taney's Reports p 246)

Thus it would seem that the Bill of Rights contained in American Constitution cannot be suspended, no matter what the emergency may be Any assumption of police power during the existence of emergency by the executive is a matter for judiciary to control, and cases have arisen when Acts, like the *Espionage & Sedition Acts*, laws controlling

the Proclamation under this Article has ceased to operate, except as to things done or omitted to be done before the expiration of the said period.''

The expression Things done or omitted to be done.''

Thus the laws enacted during the period of emergency do not lapse absolutely in the sense in which the laws embodied in the shape of Ordinance, lapse—they only lapse with the reservation, namely, that ''things done or omitted to be done'' before the expiration of the said period are saved. That is to say, the Ordinances are alive and available for being applied to acts done, or omitted to be done before the expiry of the Ordinance. For instance, if a person is prosecuted in respect of any acts or omissions, which are declared offences by a temporary law, then his prosecution should ordinarily be concluded before the expiration of the temporary law. Thus, in the case of an Ordinance, since the Ordinance lapses on the conclusion of the period specified in the relevant Articles upon the happening of a certain contingency, if the prosecution is not concluded before the due date it cannot be continued thereafter. But in the case of emergency 'temporary laws', this would not happen because *Art.* 193, *clause* 4, reserves the posthumous effect of the law with regard to ''things done or omitted to be done'' before the expiration of the life of that law. In the case of ''In re Karumuthu Thiagarayan Chettier and others'' reported in *AIR* 1947 *Madras* 325, this expression, ''things done or omitted to be done'', (which also occurs in section 102 of the *Government of India Act*, 1935), was considered: it was held that the things done or omitted to be done are not to be construed as ''things done or omitted to be done'' *under the Act that has expired*. That was a case in which the *expiring Act* had itself made a provision for the saving of acts done or omitted to be done after its expiration:

Re: Karumuthu Thiagarayan Chettier & others vs Rex v.

•''It cannot be disputed'', the learned Judge remarked, ''that a temporary Act may contain provisions within itself for the consequences that will ensue on its expiration, and in our opinion, the provisions of Ordinance XII of 1946, which are substantially the same as the statutory provisions which govern all repealed Acts, cannot be regarded as extending the *Defence of India Act*, and the *Rules and Orders* made under it beyond the date of their expiration any more than Section 6 of the General Clauses Act, extends a repealed Act, beyond the date of its repeal.''

The learned Judge thereafter dealt with, what he called was, a vital question:

''The vital question is, therefore, whether the provisions of Ordinance 12 or at any rate those provisions which relate to legal proceedings taken under orders made under S.102, *Government of India Act*, for it cannot be disputed that some of the provisions will fall within the scope of the words 'things done or omitted to be done' are *ultra vires* the *Government of India Act*. Sir Alladi Krishnaswami Aiyar asks, why Ordinance No. 12 should have been promulgated at all if criminal proceedings instituted under an order made under the *Defence of India Act* with respect to subjects included in the *provincial Legislative List* could be continued after the expiration of the *Defence of India Act* under the terms of S.102(4), *Government of India Act, itself*; and why, if it was intended that provision should be made in respect of the expiration of a law made under S.102(4) similar to the provisions of S.6, *General Clauses Act*, or S.38(1), *English Interpretation Act*, the whole of these provisions should not have been included instead of only the words ''things done or omitted to be done?'' Whether Ordinance No. 12 was necessary or unnecessary, cannot affect the question of the construction of S.102(4), but it may be pointed out that the *Defence of India Act* and the rules made under it cover matters enumerated in the Central as well as the *Provincial Legislative List* and to matters enumerated in the *Central Legislative List*, S.102(4) *Government of India Act* will not apply. As regards the second question, it seems to us that elaborate provisions with respect to the effect of the expiration of a law made under S.102 would have been out of place. The section gives authority to the Indian Legislature to make laws in respect of provincial subjects in

Ordinances is available Since the President or the Governors can only act in relation to this power on ministerial advice, the Ordinances issued by them are really Cabinet made laws The legal effect of an Ordinance is the same as that of an Act of the relevant Legislature and the power of making these Ordinances is "subject to the same restrictions as the power of the relevant Legislature to make laws" (See Art 218) Ordinances made in this way can be controlled or superseded by an Act of the appropriate legislature

The life of the Ordinance made under these Articles is not fixed but the Constitution requires the Ordinances to be laid before the next session of the relevant Assembly and provides that they shall cease to operate at the expiration of the period of six weeks from the first meeting of the relevant Assembly, or if a resolution disapproving it is passed by the Assembly, upon the passing of that resolution

108 A comment on the implications of the lapsing of Temporary Laws

A comment on the lapsing of Temporary Laws

It would thus be seen that the Ordinances are what are called temporary laws, *i e* they die with the efflux of time and contain within their own wombs seeds of their own destruction Such laws when they expire have not the kind of posthumous effect which, for instance, is to be predicated of a permanent enactment that is repealed (See *Crown vs Haveli* A I R (1949) *Lahore* 191) Under S 6 *of the General Clauses Act* we have the effect of the repeal of an Act described as follows —

S 6 of the General Clauses Act

"6 Where this Act or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect, or
(b) after the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or
(c) affect any right, privilege obligation or liability acquired accrued or incurred under any enactment so repealed, or
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the *Repealing Act* or *regulation* had not been passed"

To the same effect are also the provisions of S 38 of the *English Interpretation Act*

These sections will not apply in cases where the laws lapse of their own accord by the mere efflux of time *i e* without any external agency competent to repeal them, repealing them This position may be contrasted from the position that obtains in cases where other kinds of temporary laws, also provided for by the Constitution, lapse This happens, for instance, when during the continuance in force of a proclamation of emergency, laws are made which, by their very nature, are temporary laws in that they are fated to lapse immediately after the conclusion of a period of six months after the proclamation of emergency ceases to operate For instance Art 193 provides with respect to such laws in its 4th clause as follows —

"Any law made in exercise of the power of the Provincial Legislature by Parliament or the President, which Parliament or the President would not, but for the issue of a Proclamation under this Article have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after

contravention of such laws should go unpunished unless the punishments had been inflicted before the expiration of the law or that prosecutions instituted should lapse with the expiration of the law, and in our opinion, a construction of sub-section (4) of S.102, according to the ordinary meaning of the words used does not lead to so unreasonable a conclusion. The 'things done or omitted to be done' are not stated to be things done or omitted to be done 'under a law'. They are stated to be things done or omitted to be done *before the expiration of the law. As regards these things sub-s.(4) provides* that the law shall continue to have effect after the period when with respect to other things the law has expired; and it seems to us, on a reasonable construction, that the things done or omitted to be done before the expiration of the period of six months after which the proclamation has ceased to operate are things to which the law applies so that the law will continue to apply after the expiration of the period to things done or omitted to be done to which it applied before the expiration of the period. This construction is in *accordance with what may be presumed to have been the intention of Parliament and does* no violence to the ordinary meaning of the words used. In this view offences committed before the expiration of the six months' period can be prosecuted after the expiration of the period and proceedings instituted before the expiry of the period can be lawfully prosecuted to a conclusion. As regards prosecutions instituted under a law or order made under S.102, *Government of India Act*, indeed it can hardly be doubted that they are things done under the law as well as things done before the expiration of the law. *The particular prosecutions with which we are now concerned could only have* been instituted under the several orders under which they purport to have been instituted." (pp. 327-29)

Rex v. Wicks

In the case of *Rex v. Wicks*, (1946) 2 *All E. R. p.* 529, the Court of Criminal Appeal had occasion to interpret S.11 (3) *of the Emergency Powers (Defence) Act*, 1939, which had provided: "The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done." The question raised was whether notwithstanding the previous expiry of the Act the sub-section could be invoked to justify the conviction of the Appellant. The acts for which the prisoner was charged were committed between April 1943 and January 1944, and the *Emergency Powers (Defence) Act*, 1939, expired on February 24, 1946. The trial of the prisoner took place on May 27th and 28th, 1946. Lord Goddard, Chief Justice, summed up the legal position regarding the posthumous operation of repealed, as contra-distinguished from Temporary, Acts, as follows (at pp. 531-32):

> "The question is one of some difficulty and the court has had the advantage of very full argument on both sides in which all the relevant authorities have been brought to their attention. The first observation which the court would make is that they are in complete agreement with the decision of the *Divisional Court in Willingale v. Norris*, (1909) 1 *K.B.* 57: 14 *Digest* 203, 1826: 78 *L.K.J.B.* 69: 99 *L.T.* 830: 72 *J.P.* 495) that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act.

"Considering the position, first, at common law as to the expiration or repeal of a statute, in our opinion, the position may be taken as now settled. The leading authority

certain circumstances, and the law itself is the place where provision might be expected to be made to govern the effect of its expiration Moreover S 6, *General Clauses Act*, and S 38(1), *English Interpretation Act*, relate to repealed Acts and not to *Temporary Acts*, which have expired by efflux of time

We turn, therefore, to an examination of the meaning of the words in S 102 (4), *Government of India Act*, that

> 'A law shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said *Act*'

"In this connection Sir Alladi Krishnaswami has referred us to the case in 32 *ILL* 33 *at p* 43 In that case the question arose, among other things whether an acknowledgment of liability was a thing done in pursuance of an Act of the Legislature within the meaning of S 6, *General Clauses Act of* 1868 and it was held that it was not This decision was confirmed by the Privy Council in 35 *All* 227 Sir Alladi Krishnaswami argues that an offence committed in contravention of an Act is no more a thing done under or in pursuance of the Act than an acknowledgment of liability is a thing done under the Act The decisions in the Allahabad cases relating to the construction of an *Indian Statute* will not of course apply to the construction of an *English Act* but in any case the argument seems to us to assume without justification that provisions appearing in S 6, *General Clauses Act* or in S 38, *English Interpretation Act*, have been adopted in sub section (4) of S 102, *Government of India Act* As we are dealing with an *English Statute* it is the *English Interpretation Act of* 1889 that must be looked at and the argument is that the words of the saving clause in sub section (4) of S 102 *Government of India Act* are substantially the same as those contained in the second part of clause (b) of sub section (2) of S 38 *Interpretation Act*, which are that the repeal shall not affect anything duly done or suffered under any enactment so repealed Now, as we have already pointed out we are concerned in these cases with an act and orders made under the Act which have expired and not with an act and orders which have been repealed A Statute which is repealed in the absence of provision to the contrary becomes as if it had never existed, but in the case of a temporary Statute the restrictions imposed and the duration of its provisions after the expiration of the Statute are matters of construction vide *Halsbury's Laws of England, 2nd edition, Lord Hailsham Vol* 31 *p* 513, *Sec* 668 It might therefore be expected that if it was the intention of Parliament to adopt in respect of an Act and Orders which had expired one only of the provisions of S 38, *Interpretation Act* which affect the provisions of repealed Acts while excluding the other provisions it would have been made clear that this was its intention or that at least the precise words of the second part of clause (b) of sub section (2) of S 38, Interpretation Act would have been employed The words used in sub section (4) of S 102 are, however very different They are that a law made under S 102

> shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period '

"In our opinion these words should be construed in their own context and we see no reason why they should be construed with reference to clause (b) of sub section (2) of S 38, *Interpretation Act* Once any presumption in favour of a construction with reference to S 38, *Interpretation Act*, is removed there seems to us no real difficulty It would be highly unreasonable to suppose that Parliament intended, while giving power to the Indian Legislature to make laws for Provinces in respect of Provincial subjects in the event of the security of India being threatened by war or internal disturbances, that offences in

and if effect can be given by a short clause to what in another Act is achieved by language more comprehensive, there is no reason why this should not be done. If the intention appears, effect to it must be given by the court.

"Now, if this sub-section operates only on matters past and completed, it may well be asked what object there was in enacting it at all. A competent authority or administrator under the Act would not require it for his protection after the Act had expired, provided what had been done or omitted thereunder was authorised by the Act at the time of the act or omission. To take an example, if after the expiration an action of trespass, either to the person or to property, were brought against an officer of the Crown alleging detention without trial or the taking possession of land against the will of the owner, he could plead that, at the time he did the act complained of, it was justified by the law then in force. Accordingly, we do not think that we ought to construe the sub-section as one inserted merely *ex majore cautela*. While, no doubt, it does cover completed acts or transactions, we think the language is wide enough to make the provisions of the Act apply, or, in the language of the section, to operate, in respect of any act done before the expiration even though not perfected or completed till afterwards. Regulation 2A refers to an act and reg. 2B (2) refers to an omission. If, therefore, it is proved that before the expiration of the Act a person did an act likely to assist the enemy with intent, or omitted to do that which it was his duty to do in respect of matters dealt with in reg. 2B, in our opinion, the Act is to operate notwithstanding its expiry, and it operates by making the act or omission an offence for which the offender is liable to be convicted."

We have considered the posthumous effects of temporary laws in the context of the normal rules of interpretation. But it should be noted that all these observations are subject to the overall rule of limitation—namely that there is no express provision to the contrary. For instance, the Punjab General Clauses Act, 1898, which would apply to the interpretation of a provincial Ordinance, in its 27th section (which describes the application of the provision of that Act to Ordinances) provides the following:—

"The provisions of Section 4 of this Act shall apply on the expiry or withdrawal of any Ordinance promulgated by the Governor under (the Constitution) as if it had been repealed by a Punjab Act."

The natural result of this principle of interpretation would be that the lapsing of an ordinance or its withdrawal would have the same effect as if it had been repealed by another Act—and its lapsing would not have the normal consequences of the sort to which reference has already been made. Could it be argued in such a case that the General Clauses Act was conferring a status upon an ordinance which cannot be read into it by recourse to the words of the Constitution—and that to that extent the General Clauses Act itself is unconstitutional?

(As to the effect of the lapsing of temporary Act or Law upon the provisions it has repealed in the Ordinary Law, see the case *Gooderham and Worts v. Canadian Broadcasting Corporation*, reported in *A.I.R.* (1949) *Privy Council p.* 90).

109. Ordinance-making power available during the period when Assemblies stand dissolved.

This power of Ordinance-making is also available to the President and the Governor during the time when the National and the Provincial Assemblies stand dissolved and, what is more, during such periods the making and promulgation of an Ordinance includes the power to authorise expenditure from the Federal Capital Consolidated Fund; whether the expenditure is charged by Constitution upon that Fund or not pending compliance with the provisions of *Arts.* 63, 65 and 66 is available to the President in the case of

is *Steavenson v Oliver*, (1841), 8 *M & W* 234 42 *Digest* 774, 2019, 10 *L J Ex* 338) In that case, Parke B , said (8 M & W 234, at p 241)

'There is a difference between temporary statutes and statutes which are repealed the latter (except so far as they relate to transactions already completed under them) become as if they had never existed, but with respect to the former the extent of the restrictions imposed, and the duration of the provisions, are matters of construction '

"That passage was considered and approved by *Roche J* in *Spencer v Hooton*, (1920), 37 *T L R* 280, Digest Supp), and, in our opinion, is a correct statement of the law It is worth observing that in *Steavenson v Oliver*, there are dicta both by the *Chief Baron* and by Alderson, B , which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration, but, in our opinion, this is contrary to the older cases which were not cited to the judges, in particular, Miller's *Case* (1764), 1 *Wm Bl* 451 , 42 *Digest* 773, 20161 96 *E R* 259), and R V McKenzie ((1820), *Russ & Ry* 429, 42 *Digest* 766, 1932, 168 *E R* 881 At the present day it is most unlikely that any question of this nature will arise where an Act has been repealed because the position is sufficiently dealt with by the *Interpretation Act*, 1889, S 38 (2) (c) & (d), which provides that the repeal of an Act passed after the commencement of that Act shall not, unless the contrary intention appears, affect any liability incurred or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, and the section goes on to provide that any legal proceeding or remedy may be instituted continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed This section, however, has no application to statutes which have expired, and the question must, therefore, remain one of construction whether the provisions as to expiry are such as to make it impossible for a prosecution or other proceeding to be either instituted or brought to conviction or whether on a true construction of the Act, Parliament has provided that legal proceedings, whether of a civil or criminal character, can be prosecuted in relation to matters connected with the Act after it has expired In the present case, but for the provision in S 11(3) it could, we think, hardly be contended that a person could be convicted of an offence against the Act after its expiration, and, accordingly, as we have already said, the whole question is in the construction which ought to be placed on S 11(3)

' For the appellant it is argued that the words of that sub section are insufficient to carry the consequences that would have ensued had the section contained some such provision as it contained in the *Interpretation Act*, 1889, S 38 or if that section had been made to apply to the expiration as it would have done had the Act been repealed, and that the sub section must be read as referring only to things done and completed while the Act was in force The Crown, on the other hand, contends that from its terms it is clear as a matter of construction that Parliament did not intend the sub section to expire with the rest of the Act, as otherwise it would be meaningless The court can, therefore it is said, look at the sub section and not treat it as expunged from the *Statute Book*, and, if it finds that an act has been done or omitted to be done before the Act expired, it must allow the Act to operate in respect of that act or omission It is always presumed that Parliament knows the state of the law at the time when it is legislating It must also, we think, be presumed that Parliament knows what words are considered apt to effect a particular re

expiration of six weeks from the re-assembly of the Legislature, or, if b
the expiration of that period resolutions dis-approving it are passed by
Chambers, upon the passing of the second of those resolutions;

(b) shall be subject to the provisions of this Act relating to the power o
Majesty to disallow Acts as if it were an Act of the Federal Legislature ass
to by the Governor-General; and

(c) may be withdrawn at any time by the Governor-General.

"(3) If and so far as an ordinance under this section makes any pro
which the Federal Legislature would not under the Act be competent to enact, it sh
void."

It would be seen that this Section 42 provides a pattern of the ordinance law
has been retained under our Constitution. (See S. 88 for the Provincial Ordinanc

The Constitution of India in its ART. 123 provides for the legislative pow
the Indian President in the following terms :—

ART. 123 of the Indian Constitution.

"123.—(1) If at any time, except when both Houses of Parliament are in se
the President is satisfied that circumstances exist which render it necessary for h
take immediate action, he may promulgate such Ordinances as the circumst
appear to him to require.

(2) An ordinance promulgated under this Article shall have the same forc
effect as an Act of Parliament, but every such ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate a
expiration of six weeks from the re-assembly of Parliament, or, if befor
expiration of that period resolutions disapproving it are passed by
Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation: Where the Houses of Parliament are summoned to re-assembl
different dates, the period of six weeks shall be reckoned fron
later of those dates for the purposes of this clause.

(3) If and so far as an ordinance under this Article makes any provision v
Parliament would not under this Constitution be competent to enact, it shall be voi

111. Some features of Ordinance Law

Following features of the ordinance-law should be carefully noted :—

(a) Whether or not President or Governor is satisfied that circumstances exi
them to take immediate action is a matter which is not a justiciable one and the C
cannot be called upon to determine its existence by the application of any objective
(*Lakhi Narayan v. The Province of Bihar*, (1950) *Supreme Court Journal p.* 32 and
Prosanna v. The Province of West Bengal, *A.I.R.* (1949) *Calcutta page* 1. See also in
Kalyanam Veerabhadrayya, *AIR* (1950) *Madras page* 243, *at page* 256).

In the case of *Emperor v. Benoari Lal*, *A.I.R.* (1945) *P.C. page* 48, their Lordshi
the Privy Council, with respect to the scope of S.72 of 9th Schedule of the Govern
of India Act, ruled that the Governor-General was the sole judge as to the existen
emergency, and "assuming that he acts *bona fide* and in accordance with the statu
power, it cannot rest with the Courts to challenge the view that emergency exi
This would imply that *mala fide* exercise of power is subject to judicial review.

(b) The power of issuing ordinances is an extraordinary power and, as observe
A.I.R. (1950) *Patna page* 19, in the case *Bidya Chaudhary v. The Province of Bihar*, its exe
must be jealously guarded. This case contains a comment on section 88 of the *Govern*

Federal affairs and a similar power is available to the Governor in relation to the Provincial affairs The only constitutional requirement to be complied with in such cases is that any Ordinance promulgated under these circumstances shall be laid before the reconstituted Assembly and the provisions of *ARTs* 63, 65 *and* 66 in the case of Federal Ordinance, and *ARTs* 96, 98 and 99 in the case of Provincial Assembly shall be complied with within six weeks from that date

110. Legislative History of Ordinance-making Power

It is necessary to refer to the legislative history of this Ordinance making power of the executive in order that such case law as exists upon the point may be properly understood and applied to the language of *ARTs* 69 *and* 102 of our Constitution *The Government of India Act*, 1935, contained two provisions on the subject

(1) Section 72 of the old Government of India *Act*, 1919, which was preserved in its 9th Schedule entitled, Provisions of Government of India Act continued in force with amendments until the establishment of Federation' Section 317 of the Government of India Act 1935 had provided for the administration being carried on in accordance with the provisions of the 9th Schedule till such time the Federation visualised by the *Government of India Act* 1935, was established Section 72 of the 9th Schedule was in the following terms

> "The Governor General may in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature, but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws, and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act "

It would be noticed that the life of the ordinance was to be for six months from the day of its promulgation and there was no obligation cast upon the Governor General of placing the ordinance before the Indian Legislature upon its first meeting after the promulgation of such an ordinance

(2) Section 42 of the Government of India Act, 1935, which was in the following terms —

'42 —(1) If at any time when the Federal Legislature is not in session the Governor General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require —

Provided that the Governor General—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would, under this Act have required his previous sanction to the introduction thereof into the Legislature, and

(b) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty s pleasure thereon

"(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor General, but every such ordinance

(a) shall be laid before the Federal Legislature and shall cease to operate at the

whether such an ordinance could be denounced as emanating from a *mala fide* exercise of power, the learned Judge observed that it did not :

"On the question of *mala fides* the materials placed before us create suspicion but it is impossible to hold that there has been any colourable exercise of the power of detention. There is no evidence that any particular Minister had any animus against either of these two detenus or that they have been detained in jail because they were prospective rival candidates of any of the Ministers at an impending bye-election. . . . . "

The learned Judge further remarked: "It is strange and perhaps without any precedent, that anything should be done to render the deliberations of the Full Bench infructuous in that regard. We cannot agree with the contention that authority so exercised constitutes a fraud upon the Statute. Yet it is a cogent comment that nothing should be done which may tend to bring the authority or the administration of the law into disrespect. The Court has to discharge the function of deciding whether the statutory mandate had been exceeded and nothing should be done to make it difficult or impossible for the highest court of the Province to act as the great umpire on constitutional issues or to undermine the authority of the Court as the protector of the rights which are guaranteed to the citizens by the law of the land."

"The attitude to be expected of the executive towards the law of the land and towards those who have the duty to expound it has more than once been referred to in the *Supreme Courts in Great Britain* during recent times. Two instances may suffice as illustrative of the principle for which I contend."

His Lordships then dealt with the principle of the case in the *King v. Speyer and another*, (1916) 1 *K.B.* 595, in which *Lord Chief Justice had observed*:

"Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the *Attorney-General*, none of them would in truth occur. This is the *King's Court*; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority, it will be followed by the Crown."

In the similar strain were the remarks in *Eastern Trust Company v. Mc-Kenzie, Mann & Co. Ltd.*, 1915 *A.C.* 750,

"It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it."

The ordinance was nevertheless held as having been validly made and promulgated and therefore not vulnerable to the objection grounded on the allegation that it was a *mala fide* exercise of the power.

(d) Yet one more feature of "ordinance-making power" deserves consideration. When it is said that the "power to make the ordinance" shall be subject to the like restrictions as the power of Parliament to make laws, is it suggested that the President can do, by ordinance-making power, that which the Parliament under the Constitution is competent to do? The question herein raised is not a simple one and it is necessary to see the relevant constitutional provisions somewhat closely.

Legislative competence of the Parliament is provided for in the Article 106 with reference to the entries mentioned in the Fifth Schedule. The Parliament can also in pursuance of its power under other specific Articles of the Constitution pass what are called the organic

of India Act, 1935,—which provided for the Governor of a Province to make and promulgate ordinances The Governor of Bihar in that case had promulgated an ordinance on the 3rd of June when the Provincial Assembly was in session It was held that in making and promulgating the ordinance the Governor acted beyond the authority conferred on him by section 88 of the Government of India Act, in that the Legislature not having been prorogued was still in session and its adjournment was only an interruption in the course of one and the same session It was held that where the right or power is challenged, the duty of the Court is to keep close to the words of the constitutional instrument and see first whether the power is granted and second, whether there is anything else which restricts the right so granted On the authority of 1912 *Appeal Cases p* 571, *Attorney General for Ontario v Attorney General for Canada* it was observed that if the text is explicit, the text is conclusive alike in what it directs and in what it forbids Since the session of the Assembly had not been terminated an absolute condition precedent for the exercise of the power of making and promulgating an ordinance had not been fulfilled and, therefore, the ordinance under those circumstances was declared *ultra vires* and inoperative The learned Judge quoted with approval the following passage from the opinion of *Lord Shaw* in *Rex v Halliday* (1917) A C p 260 at p 287 —

"Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires* such as that which is now being tried In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny That way also would lie public unrest and public peril On all this there is no disputing "

(c) There are observations in the case of *Emperor v Benoari Lal Sharma*, 1945 *Privy Council p* 48, which tend to show that where a constitutional authority is proved to have acted *mala fide* in the making and promulgating of an ordinance the Courts of Law would be able to declare the exercise of the power as being invalid in law

In the case reported in 1949 *Calcutta p* 1, (*Jnan Prosanna Das Gupta v The Province of West Bengal*) the Provincial Government passed an ordinance (in a case before the *High Court of Calcutta* in which the arguments were concluded but the judgment had still to be announced) to the effect that S 61 of the Act which was under consideration by the High Court was vitally amended The section as it originally stood empowered the Provincial Government to make an order of detention if it was satisfied on reasonable grounds with respect to any person that with a view to preventing him from doing any subversive act it was necessary so to do The words 'on reasonable grounds' had been omitted by means of an amending ordinance from S 61 of the Act Similarly some other 'vital' amendments were also made and some of these amendments were given retrospective effect and the result of these amendments was that High Court's jurisdiction had been taken away under the provisions of S 3 of the ordinance which provided, "No

In substance the view of the *Division Bench* in Jyoti Basu's case has been given legislative sanction by virtue of executive legislation and the *Full Bench* is precluded from deciding the questions referred to it by the Division Bench " Upon the question

deemed to include an ordinance made and promulgated by the Governor-General (now President). . . . . .

Thus certain provisions of the General Clauses Act will not apply to Ordinances made and promulgated by the President and similar position will govern the interpretation of a provincial ordinance made and promulgated by the Governor of a Province under the relevant Provincial General Clauses Act.

112. Administration of Excluded and Special areas

So far we have been dealing with the administrative and legislative distribution of power between the Federal Government and the Provincial Government and have seen how both in the Federal and the Provincial spheres democratic and representative institutions of Parliamentary pattern have been established by the Constitution. It now remains to deal with some anomalous constitutional relationships that subsist between what are described as Excluded and Special Areas by the Constitution and the Provincial and the Federal Government in regard to their administration and legislative control.

RT 103. and 104. *ART.* 103 of the Constitution deals with Excluded Areas and *ART.* 104 with Special Areas. Excluded Areas are defined as those areas which were excluded areas immediately before the Constitution Day (*ART.* 103 (1)). That takes us to the relevant provisions of the Government of India Act as in force immediately before the Constitution Day. In *S.*91 of that Act the expression "excluded areas" was described to mean as areas that were excluded areas immediately before the establishment of Federation or such areas as may henceforward be declared by the Governor-General to be excluded areas. In *S.* 92 it was provided that "the executive authority of the Province extends to excluded areas therein but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area or to any specified part thereof have effect subject to such exceptions or modifications as he thinks fit." The Governor was also empowered to make *regulations* for the peace and good Government of any area in a Province which was for the time being an Excluded Area and any regulations thus made could even repeal or amend any Act of Legislature or Provincial Legislature or any existing law which was for the time being applicable to the area in question. These regulations were required to be submitted forthwith to the Governor-General and until they were assented to by him, had no effect as law.

It would also be seen from these sections that there were Partially Excluded Areas in addition to Excluded Areas and their administration was carried on under the over-riding powers of the Governor, *subject of course to the overall control* of the Governor-General.

These Partially Excluded areas as even the Excluded Areas were part of the territory of East Bengal Province and had reference to Chittagong Hill Tracts etc., and other tribal areas. Our Constitution has done away with the Partially Excluded Areas but has retained the concept of the excluded areas and with regard to their administration has provided as follows:—

"ART. 103(2). The executive authority of a Province shall extend to any excluded area therein but, notwithstanding anything in the Constitution, no Act of Parliament or of a Provincial Legislature shall apply to an excluded area unless the Governor by public notification so directs, and in giving such a direction with respect to any Act he may direct that the Act shall in its application to the area, or any specified part thereof, have *effect subject to such exceptions or modifications as may be specified in the direction.*

(3) The Governor may make regulations for the peace and good government

laws To illustrate this type of power, reference could be made to Article 144, which says,

"Subject to the provisions of the Constitution, Parliament may by Act provide for.—

(a) the delimitation of constituencies, the preparation of electoral rolls, the determination of objections and the commencement of electoral rolls,

(b) the conduct of elections and election petitions, the decision of doubts and disputes arising in connection with elections,

(c) matters relating to corrupt practices and other offences in connection with elections, and

(d) all other matters necessary for the due constitution of the National Assembly and Provincial Assemblies,

but no such law shall have the effect of taking away or abridging any of the powers of the Election Commission under this Part"

The question is whether an ordinance can validly be made and promulgated to exercise the power conferred by ART 144—(Similarly see ART 145 which mentions "Parliament may, after ascertaining the views of the Provincial Assemblies and taking them into consideration, by Act provide whether elections to the National Assembly and Provincial Assemblies shall be held on the principle of joint electorate or separate electorate, and may in any such Act provide for all matters incidental and consequential thereto") The one view could be that these and such other Articles show that it is the Parliament that has been specifically cha [illegible]
that this power having [illegible]
to the provision of AR[illegible]
is as yet *res integra* and is not free from difficulty What has complicated the problem is the existence of the last entry in the Federal List contained in the Fifth Schedule viz all matters which under the Constitution are within the legislative competence of Parliament, and matters incidental thereto This is a dangerously worded power and is capable of *being exploited by an irresponsible Cabinet It would seem to embrace even the power* to amend those provisions of the Constitution which can be amended by an Act of Parlia ment—that is with the sole exception of those powers of the Constitution which have [illegible]

Constitution The definition of "*Act of Parliament*" as given by ART 218, includes in that expression an ordinance made by the President in accordance with the Constitution, and therefore it could very well be argued that what under the Constitution can be done by an Act of Parliament can also be done by an "Ordinance" If this argument were accepted, certain startling results would follow For instance, the requirement of the Constitution that no tax shall be levied for the purposes of the Federation (ART. 60) and also for the purposes of a Province (ART 93), except by or under the authority of an Act of relevant Legislature, could be circumvented by the passing of an Ordinance. Appropriation Bills which enable the Government to appropriate money and carry on the work of administering laws could also be passed by an Ordinance

General Clauses Act, 1897, applies for the purpose of interpreting the Constitution as it applies to a Central Act (See ART 219) But in the General Clauses Act itself, "Ordinance" has not the same meaning as Act of the Central or National Legislature or Parliament, for under S 30 it is provided

> In this Act the expression "Central Act" wherever it occurs, except in S 5, and the word "Act" in cl 9, 13, 25, 40, 43, 52 and 54 of S 3, and in S 25, shall be

unless the Governor, with the previous approval of the President, so directs, and in giving such a direction with respect to any Act the Governor may direct that the Act shall, in its application to a Special Area, or to any specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

(2) The Governor may, with the previous approval of the President, make regulations for the peace and good government of a Special Area, or any part thereof, and any regulation so made may repeal or amend any Act of Parliament, or of the Provincial Legislature, or any other law in force in the Area.

(3) The President may, from time to time, give such directions to the Governor relating to the whole or any part of a Special Area as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

(4) The President may, at any time, by Order direct that the whole or any part of a Special Area shall cease to be a Special Area, and any such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper:

Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the area concerned."

It would be noticed that broadly speaking the constitutional status of *Special Areas* with minor exceptions covering inconsequential points is practically the same as that of Excluded Areas under the Constitution. In the field of judicial administration, however, there are radical departures established as between those citizens of Pakistan who live outside the Special Areas and those who remain within the Special Areas. Excluded Areas have the benefits of normal judicial procedure that is available in the High Court of East Pakistan and in the Supreme Court of Pakistan, whereas the people belonging to Special Areas, as will be apparent from what is stated in the Constitution in ART. 178, are denied this much benefit of a liberal rule established by the law and the Constitution of our country.

dministration of Justice nd Special Areas.

Confining our attention, however, to the administration of justice as it now obtains in these Special Areas we notice that before the Constitution Day the administration of justice as it was being worked out in these areas was more or less controlled by Tribal and *Jirga* System. After the Constitution Day this position continues unaltered.

In the Establishment of West Pakistan Act under its 7th Section the High Court was given complete jurisdiction over all the specified territories but by means of a later Amendment the jurisdiction of the High Court was taken away (see the Establishment of West Pakistan (Amendment) Act, 1955, section 2, which took effect from 14th October, 1955). The result of this Amendment has been that pre-West Pakistan Establishment Act jurisdiction of the Judicial Commissioner of Quetta in certain areas of Baluchistan has now been taken away: to be more specific, the Districts of Loralai and Zhob for instance were always under the jurisdiction of the Judicial Commissioner of Baluchistan, who used to exercise the powers of the High Court under the Code of Criminal and Civil Procedures, but in view of the fact that the West Pakistan High Court which has replaced the Court of Judicial Commissioner of Baluchistan has no jurisdiction in respect of any of the Special Areas, a very anomalous situation has been created indeed; although the West Pakistan High Court has replaced the Judicial Commissioner's Court at Quetta but by reason of constitutional restriction imposed upon its authority by ART. 178 it cannot exercise any jurisdiction even in relation to matters for which the Judicial Commissioner, Quetta, used to

of any excluded area in the Province, and any such regulations may repeal or amend any Act of Parliament, or of the Provincial Legislature, or any other law in force in the area

Provided that no regulation repealing or amending an Act of Parliament shall take effect until it has been approved by the President

(4) The President may by Order direct that the whole or any specified part of an excluded area shall cease to be an excluded area, and any such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper "

From an analysis of the foregoing provisions it would seem to follow that the pre existing constitutional position with respect to the administration of excluded areas has been retained under our Constitution

Over and above these excluded areas we have also, what are described by the Constitution as, "Special Areas" that have been defined in the interpretation clause (See ART 218) to mean "The areas of the Province of West Pakistan which immediately before the commencement of the Establishment of West Pakistan Act, 1955, were —

(a) the tribal areas of Baluchistan the Punjab and the North West Frontier, and

(b) the States of Amb, Chitral, Dir and Swat, '

In the 2nd Section of the Establishment of West Pakistan Act, in sub section (iv), the term used was "specified territories" *inter alia* about ' Tribal Areas of Baluchistan, the Punjab and the North West Frontier, and the States of Amb, Chitral, Dir and Swat" And the term 'special areas' was applied to "the tribal areas of Baluchistan and the North West Frontier or the State of Amb, Chitral, Dir and Swat ' (See S 2(3) of that Act,) thereby taking out from the ambit of the latter category the tribal areas of Punjab

It is very hard indeed to find out the real criterion for grouping only some of the ' Specified Territories" into "Special Areas , and in fact the exclusion of the tribal territories of the Punjab from "Special Areas seems to the present writer to be entirely arbitrary It cannot even be pretended that in the matter of political, economic and educational development the tribal areas of the Punjab represent a higher level of evolution The standards of living and education in the Tribal Areas of Baluchistan are comparatively much higher than those that obtain in the Baluchistan States Union and are in no way lower than those prevelant in the tribal areas of the former Punjab Indeed it can, for instance, be confidently asserted that the State of Swat judged by any standard is much more advanced in every material respect than the tribal areas of the former Punjab And despite this it is a part of Special Areas whereas Tribal Areas of former Punjab are not such areas Culturally also the people of Special Areas are not homogeneous they speak different languages, namely Pashto, Baluchi, Brohi, Sindhi etc

Nor do the people belonging to these areas follow the same custom or *rawaj* and the patterns of social behaviour and the ideas of tribal loyalty are different in different regions of these Special Areas

It cannot be even argued that the people in these areas wanted to be treated on a different footing from the rest of the Province of West Pakistan, because to do that would be going counter to the well known facts of Public History of our Country

The provisions with regard to the administrative arrangements with respect to Special Areas are contained in ART 104, which is as follows —

"(1) The executive authority of the Province of West Pakistan shall extend to the Special Areas, but notwithstanding anything in the Constitution, no Act of Parliament or of the Provincial Legislature shall apply to a Special Area or to any part thereof

Special Areas are really the "Black Areas" within the territory of Pakistan. The point of this remark becomes plain when regard is had to provisions of ART. 147 which takes Special Areas outside the benefit of franchise conferred by Part VIII and hands over their fate to the President, who by order is to make such provisions for the representation of the Special Areas in the National Assembly and the Provincial Assembly of West Pakistan as he may deem fit. Here too, the President would be controlled by advice tendered to him by appropriate Minister. Thus the result can be that even the right of adult franchise could be denied to the people of Special Areas. And in fact the actual working of the franchise provisions applicable to Special Areas tends to show that thoroughly unrepresentative bodies like *Jirgas* are called upon to send representatives to sit in the Provincial and the National Assemblies.

To sum up: the people of the Special Areas are denied their fundamental rights if only because they cannot enforce them by resort to the powers of High Court and Supreme Court; they have been denied the political status of the free citizen in the country in that they have no voice in the making and unmaking of Governments by means of the exercise of the right to vote as adult citizens; nor can they have any say in the administration of public affairs in the Special Areas because the laws in the making of which they may participate need not be extended to the areas they represent and for securing the extension of those laws to the areas they come from, the good will of the Provincial or the National Cabinets must be canvassed and obtained.

The population of these Special Areas would be roughly about 60 lakhs of people. Out of this, 50 lakhs are to be found in the tribal area of North-West Frontier Province. This territory is politically controlled by Federal Government through the Political Agent. Internally the area is administered by the people themselves through their archaic systems of tribal *Rawaj*, and the administration of justice is secured through the *Jirga* system. There are no civil or criminal courts of the sort that exist in the rest of the country. The *Rawaj* or customary practices prevalent in these parts are thoroughly un-Islamic and what is more, illiteracy, hunger, poverty and want, continue to menace the lives of these people.

The remaining Special Areas of the Frontier States and former Baluchistan stand on an altogether different footing, and it is hard to find any justification for treating them at par under the Constitution with the unsettled tribal areas of the North-West Frontier Province. As has been remarked earlier, they have always remained settled territories even during the British period of our History. There has been a well organised administration as also a civilised judicial system and procedure prevalent in this part which is almost equivalent to that prevalent in the Peshawar Division. In the tribal areas of Baluchistan the Government has complete control of the administration and political set-up. There are the usual executive as well as judicial officers of the Government of Pakistan who are working the administration in these areas. The *Jirga* system under the Frontier Crimes Regulation is functioning side by side with regular judicial courts. The Agent to the Governor-General was, before the establishment of the Province of West Pakistan, the final authority under the Frontier Crimes Regulation and he had complete, absolute and unqualified power to revise any order passed by the lower tribunals. The Judicial Commissioner of Baluchistan at Quetta used to perform the duties of a High Court on the regular judicial side. The functions of the Agent to the Governor-General are now performed by the Commissioner, Quetta Division, and although, as has been pointed out earlier, the High Court of West Pakistan has replaced the Judicial Commissioner's Court, its jurisdiction, its exercise of constitutional as well as ordinary judicial powers, has been limited under ART. 178 of the Constitution as it was done even under S.7 of the Establishment of West Pakistan Act of 1955.

exercise judicial power over these territories In the case of *Sher Muhammad vs State*, reported in PLD (1956) Lahore, page 1056, it was held by a Full Bench of the former High Court of Lahore that there is a lacuna in the law and this anomalous position is the result of oversight and is not intentional The Court has remarked that the Tribal Areas of Baluchistan cannot be placed on the same level with those of the Frontier Province because the Tribal Areas of Baluchistan were always settled areas which were used to a regular judicial system

ARTs 170 and 171 But in ART 178 our Constitution provides ' Notwithstanding, anything in the Constitution, neither the Supreme Court nor a High Court shall, unless Parliament by law otherwise provides, exercise any jurisdiction under the Constitution in relation to the Special Areas " Similarly the jurisdiction of Supreme Court in the exercise of its power under ART 22 to enforce, by means of appropriate writs fundamental rights guaranteed under Part II is expressly limited, for that Article mentions in its 4th clause that the provisions of that Article shall have no application in relation to the Special Areas The result, therefore, is that people belonging to these Special Areas cannot lay claim to the benefits of the constitutional rule To illustrate this point let us consider the follow ing if the Orders made by the President under ART 147 with regard to the representa tion of the people of Special Areas in the National or the Provincial Assembly are found constitutionally defective, no means exist by resort to which that issue can be brought up in the High Court or the Supreme Court, although it would appear that the issue can be raised by means of a civil suit in the Sub Judge's or the District Judge s Courts in Zhob and Loralai Districts of Quetta Division Similarly, the Orders issued under ART 104 by the President or the Provincial Governor, in so far as they affect Special Areas cannot by reason of the prohibition contained in ART 178 be challenged in a High Court

If the Constitution were construed strictly it would appear that even the ordinary appellate civil and criminal jurisdiction of the High Court is taken away by ART 178, for even that jurisdiction is after all exercised by the High Court *under the Constitution* It cannot be said that the High Court when acting say under S 410 of the Criminal Procedure Code, or S 96 of the Civil Procedure Code, (while entertaining appeals from the lower courts in criminal and civil matters) is not acting under the Constitution In fact ART 178 prevents the High Court of West Pakistan from exercising any jurisdiction under the Constitution in relation to Special Areas The result of this could be that a sentence of death cannot be confirmed by High Court nor again can appeals be entertained under the Code of Criminal and Civil Procedure from ordinary Courts situate in Special Areas The language of ART 178 is sufficiently wide to exclude the ordinary civil and criminal jurisdiction of the High Court which it exercises under laws continuance of which is sanctioned by the Constitution under its 224th Article

Political im plications an appreciation.

Even on the political side the situation is anomalous Although Special Areas can send representatives to sit in the Parliament and the Provincial Assemblies and to take part in

those constitutional authorities would be bound to act on *advice* tendered to them by the appropriate Minister So it would seem that the Cabinet which is responsible to the House has the power to advise what laws would be applicable in Special Areas, but the Legislature has no direct power to do so From the foregoing statement it would seem that the

Rights are not gifts from one man to another, nor from one class of men to another . . .

It is impossible to discover any origin of rights otherwise than in the origin of man; it consequently follows that rights appertain to man in right of his existence, and must therefore be equal to every man.

The principle of the Equality of Rights is clear, simple. Every man can understand it and it is by understanding his rights that he learns his duties; for where the rights of men are equal, every man must finally see the necessity of protecting the rights of others as the most effectual security for his own.

Thomas Paine
(On First Principles of Government 1795)

AT THE OUTSET it may be asked, what is meant by "liberty"? In the nineteenth century there was no difficulty in answering that question. Kant's idea of the liberty of each—the free self-assertion of each—limited only by the like liberty of all, was generally accepted. Liberty was a condition in which free exercise of the will was restrained only so far as necessary to secure a harmonious coexistence of the free will of each and the free will of all others. But I am not speaking of the Kantian idea of liberty, in which my generation was brought up. Whatever "liberty" may mean today, the liberty guaranteed by our bills of rights is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust relations and order conduct, and so are able to apply the force of that society to individuals. Liberty under law implies a systematic and orderly application of that force so that it is uniform, equal, and predictable, and proceeds from reason and upon understood grounds rather than from caprice or impulse or without full and fair hearing of all affected and understanding of the facts on which official action is taken.

Roscoe Pound
(The Development of Constitutional Guarantees of Liberty.)

History of liberty is the history of the limitations on governmental power not the increase of it. When we resist . . . . concentration of power, we are resisting the powers of death, because concentration of power is what always precedes the destruction of human liberties.

Woodrow Wilson
Speech in New York (1912)

CHAPTER V

INDIVIDUAL AND THE STATE (FUNDAMENTAL RIGHTS)

Holmes definition considered too narrow.

Justice Holmes of the Supreme Court of the U.S.A. defines a legal right as "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force" (see his *Common Law* p. 214 *Boston* 1951). But it is submitted that this is too narrow a view of the concept of right for the definition of it confines us to acknowledging *merely* those claims as being rights which enable us *to do* something; whereas there are rights that enable us to compel others to do certain acts or exercise forbearance from doing certain acts. Holmes' definition narrows down rights to being considered as 'liberties' but then there are certain other interests which law enables us to enjoy which are on the face of them unlawful but are nevertheless allowable in certain circumstances. These are usually called privileges.

C. K. Allen in his Essay on "Legal Duties" says:

"The essence of legal right seems to me to be not legally guaranteed power by itself, nor legally protected interest by itself, but the legally guaranteed power to realize an interest."

The extent of protection which the State affords to the rights of persons is of varying degrees. It may *recognise* a right without being able to *enforce it* directly. This happens, when, for instance, a party that is injured by the violation of a right recognised by the law of the State, cannot, in anticipation of such a violation insist upon the enforcement of his right by securing prohibition against the person who threatens the invasion of that right. Certain rights are incapable of being specifically enforced and their violation gives rise to an action only in damages. There are other kinds of rights, again, which the law recognizes but for which it does not provide any adequate machinery for enforcement. This happens when, for example, a debt due from A to B becomes time-barred due to the operation of law relating to limitation of actions. Although in such a case the debtor cannot be compelled to make a payment, yet to this extent is the right of the creditor to receive the money recognised, that if the debtor happens to pay the amount due, let us say, under a mistake, he cannot afterwards sue for the recovery of the money on the ground that it was a payment made without consideration. Similarly, if the debtor happens to acknowledge the debt, such an acknowledgement would be regarded, the law relating to limitation of action notwithstanding, as a basis for the inference that the debtor has promised to pay that debt. These rights are called imperfect rights. There are certain other species of rights for the enforcement whereof no adequate provision is made in the Constitution of a country. Professor A. V. Dicey refers to this distinction when he mentions as a special feature of the English Constitution, namely, that it recognises the *conventions* of the English Constitution which are not enforceable by action in courts of law as opposed to the law of the English Constitution which is so enforceable.

Bentham on atural Rights

In the statement of the *concept of legal right* attempted so far, no reference has been made to what are called *natural rights*, that is, rights that are acknowledged by positive morality or rights which are enforced by religious sanctions, rights which must be assumed to exist as being inherent in the very nature of man. *Bentham* in his *Principles of Legislation* denies that there is such a thing as a natural right. All rights, he says, are creatures of law. "Natural rights or natural law", says Bentham, "are two kinds of fictions or metaphors, which play so great a part in the books on legislation that they deserve to be examined by themselves." This remark is strongly reminiscent of the view of Greek Sophists who too asserted that distinction between right and wrong, justice and injustice, is not related to the nature of things but is a matter of convention, that is, a matter of human institution only.

113. Definition of 'Right' as a term of Jurisprudence

Sir John Salmond following Jhering defines 'right' as a legally recognised and protected interest Any interest which law recognises or enforces, whatever be the nature or extent of that recognition or enforcement, is a legal right

'Right' may also be defined as an interest the violation of which is a wrong Analysis of the concept of legal right would show that

(a) there is a *person* in whom the right inheres,

(b) there is the *corpus* of the right which invariably is either an *act* or an *omission*,

(c) there is the person who, by reason of the fact that a right inheres in some one, becomes *bound by a corresponding legal duty to act or refrain from acting in a certain way*

Some of the writers on jurisprudence also enunciate yet another element in the concept of legal right, an element which they describe as being the *object* of the right Thus when A has a right to receive payment from B, we notice the following four elements

(i) A, the *person* in whom the right inheres,

(ii) the *corpus* of the right which consist of an act to compel payment,

(iii) the *person B, who is duty bound to make the payment to A*, and finally,

(iv) the object of the right i e , the thing to which the right relates, namely, the amount of money

There may be cases in which the object of the right is intangible and incorporeal, as when a person has the right of way over some one's land, or he has a right to his reputation etc

The statement that 'X' has a right is, for instance, analysed by Professor Hart (see his "Definition and Theory in Jurisprudence" (1954) 70 L Q R 37) as follows

"(1) A statement of the form 'X' has a right is true if the following conditions are satisfied

(a) There is in existence a *legal system*

(b) Under a rule or rules of the legal system some other person 'Y' is, in the events which have happened, obliged to do or abstain from some action

(c) This obligation is made by law dependent on the choice of 'X' or some other person authorised to act on his behalf so that either 'Y' is bound to do or abstain from some action only if 'X' (or some authorised person) so chooses or alternatively only 'X' (or such person) chooses otherwise (2) A statement of the form 'X' has a right is used to draw a conclusion of law in a particular case which falls in such rules "

A right may thus be broadly defined as a legal relationship between two juristic persons recognised by courts concerning their conduct and, so regarded, it would appear to be the very stuff out of which the *legal order* is itself built up It is for this reason that for *Professor Holland* the essence of a legal right resides in the capacity of its owner "of controlling with the assent and assistance of the State, the actions of others" (See his *Jurisprudence 11th Ed pp* 61, 62) A legal right need not have been created by the State, but it must needs be such that the law courts would recognise it and would give to it the support of their decision, which would then be backed by the force of the State for its enforcement

vagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be void act of parliament; for it is impossible that one should be judge and party . . .; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature: but it cannot make one who lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A to lie with the wife of B : but it may make the wife of A to be the wife of B, and dissolve her marriage with A."

:. v. Earl Banbury

In yet another case *Rex v. Earl of Banbury* (Skinner, 527) the same learned Judge observed that the judge's daily business it was to construe and expound the Acts of Parliament and adjudge them to be void.

Different scholars in England and America have, however, taken a different view of the import of these decisions. The English critics, of whom Sir Carlton Allen and Holdsworth might be described as distinguished representatives, have taken the view that the observations in these decisions are all 'scattered dicta' and 'isolated statements' and that they, at no point of English Constitutional history, have been represented as reflecting the law on the subject and may be dismissed as 'gratuitous and nonsensical loose talk.' *Professor MacIlwain*, who might be described as a representative of the American School, in his monumental study concluded in the year 1910, entitled '*The High Court of Parliament*' (New Haven: Yale University Press) has, on the other hand, regarded these cases as representing continuance of ideas prevalent in mediaeval England, ideas that were later taken over by the American jurists and perfected into the doctrine of *judicial review of legislation*, which is the distinguishing feature of American constitutional jurisprudence.

It is true that all the 17th century English Judges and jurists extolled the common law and referred to it as the *fundamental law* and identified it with the *law of the nature.* It was, however, in the name of the common law as embodying something higher than what was reflected in the mere transient will of Parliament that limits to Parliament's legislative capacity were sought to be imposed. We may recall how Bacon, for instance, dealt with this question in his speech delivered on Calvin's behalf.

"A law favoureth three things:" said he, "life, liberty and dower".

He went on to argue that

"by the law of nature, all men in the world are naturalized one towards another; they are all made up of one lump of earth, of one breath of God . . .it was civil and natural laws that brought in these words of difference of 'civis' and 'exterus', 'alien' and 'native' and, therefore, because they tend to abridge the law of nature the law favoureth not them but takes them strictly and hardly on any point wherein they abridge and derogate from the law of nature."

It is however during the 18th century that we witness the dawn of enlightenment. This was an age of reason, an era that had been ushered in by the French Diests of that century. Men had, thanks to their philosophical writings, narrowly escaped from being crushed by the dead weight of tradition and authority represented by Aristotle and Bible, and had begun interrogating nature in an attempt to extort the secrets which lay locked in her breast. 'Back to nature' became the watchword of the philosophers and this in turn led to a great deal of emphasis being placed upon the powers of 'rationality'. Thus it was that mankind re-discovered the '*lex eterna*' of the Romans. The doctrine of sovereignty of the people was preached with a missionary zeal by philosophers like Locke and Rousseau, and we find *Deniel Defoe* in his address to the House of Commons saying that:-

Although in the strict theory of law, the question whether or not a legal right is founded on natural right is a matter of no consequence, nevertheless the fact remains that every legal right in some significant sense would, upon analysis, be found to be grounded on a natural right In the words of Salmond, "natural and legal wrongs, like natural and [illegible] p 227 of Salmond's Jurisprudence 10th Ed [illegible] of rights we could with equal justification [illegible] nd, and the 'legal rights' on the other, form intersecting circles, in other words, there are some moral rights that are not legally enforced and there would be some legal rights that cannot be morally defended—but nevertheless there would be rights which are covered both by moral as well as by legal orders

Whether or not an interest is legally protected is a question of *law* and can be resolved by appeal to some provision of a statute or to the principles of common law which have been judicially recognised and enforced A great deal would be said about this topic of the content of legal right, when a comment on ART 224 is made

114. The concept of Fundamental Right

For the present, however, conception of a legal right is set forth with a view only to defining, by way of contrast and comparison, the scope and content of those 'fundamental rights' that have been guaranteed in our Constitution These rights are called fundamental because no organ of the State power, whether it be Executive or Legislative, can act in violation of them, and they can be taken away only in the manner in which the Constitution provides for their suspension, abridgment or elimination This result can be achieved either by amendment of the Constitution itself or by the issue of a proclamation of emergency under ART 191 followed by an order of the President under ART 192 The effect of the latter kind of order, however, is to *suspend* the enforcement of the fundamental rights only during the period of proclamation of emergency, but the rights as such are not affected and can be duly enforced after the conclusion of the period of emergency

115. Notion of the Fundamental Law is foreign to the Law of the English Constitution.

Now, the notion of a fundamental right is foreign to the grammar of the English Constitution which is, as has been remarked earlier, based on the sovereignty of Parliament Although the doctrine of the sovereignty of Parliament now holds the field, in the sense that it is an indisputable rule of the English Constitution that once Parliament passes the law, no court can override that law and declare it void on any ground whatsoever, there have been, however, periods in the history of the development of English Constitution when this doctrine was not as firmly held as undoubtedly it is being held at the present day Reference has already been made in Chapter I of this book to the attempts that have been made by some American jurists to read into *Dr Bonham's case (The English Reports Vol LXXVII p* 638 (*8 Co Rep* 107*a*) affirmation of the principle of judicial review of Parliamentry legislation (See also article by S E Thorne "Constitution and the Courts" · a re examination of the famous case of Dr Bonham in 54 Law Quarterly Review (1938) p 543) Lord Coke countenanced in that case the existence of a law higher than the one that could be enacted by the Parliament, a law which because of its transcendent status must prevail whenever it came in conflict with parliamentary enactments In a later case (*City of London v Wood decided in the year* 1701) Holt C J commented on Dr Bonham's case as follows

City of London v Wood (1701) (12 Mod Reports p 669,)

"And what my Lord Coke says in Dr Bonham's case is far from any extra-

si-contract and law-merchant. justice. (see Blackstone's Commentaries Vol. III, 161, and the observations of Lord Mansfield in *Moses v. Macferlan* (1760) 2 *Burr.* 1005.) So also the growth of the *Law Merchant* can be explained as having been due to the influence of the principles of natural law.

117. Impact of Natural Law on the American Jurisprudence

The impact of the natural law on the system of American jurisprudence has been immense: we have already seen how the doctrine of *judicial review*, as it manifests itself in the enforcement of "due process clause" of the U.S. Constitution, reflects the paramountcy and predominance of the *natural law*, as also how frequently the American Judges invoke the principles of natural justice and make them virtually the foundation of their decisions in these cases. And, in fact, the incorporation of 'Bill of Rights' in the U.S. Constitution and the elasticity with which the clauses relating to 'due process' are interpreted, (an elasticity, illustrations whereof are often to be met with in the American decisions,) are in their turn but the echoes which the rebound of natural law continues to cause in the system of American jurisprudence. The doctrine of *natural law* did not thrive so much in the countries of their origin as it did in the soil of America. The ideas of the natural law were dominant in England and on the Continent throughout the 17th and 18th centuries and what is more they had received "authoritative form at the hands of Blackstone". But towards the close of the 18th century, however, their claim to being consulted as infallible oracles was suspected at least on the Continent, where the Historical School was gaining ground. And how strange that the twilight hour of the natural law on the Continent should have synchronised with the dawn of a new day in America—for there it was that these ideas in the words of Commager, "took root and flourished; institutionalized in state and federal constitutions, they took on not only sanctity but permanence".

And further, says our author:

> "The strength and persistence of natural law concepts is one of the most arresting phenomena in American intellectual history, but it is not inexplicable. Americans inherited those concepts in the eighteenth century, found them wonderfully useful in the struggle against Parliamentary pretensions, and wove them into their own constitutional fabric as a matter of course. The neat formulas of a ready-made system of law, symmetrical in appearance and mechanical in operation, fitted well enough the simple needs of an eighteenth-century society and furnished a convenient solution to what seemed the most pressing of all constitutional problems—the establishment of effective limitations on government. Their precepts erected into constitutional dogma and their authoritative interpretation entrusted to the least democratic branch of the government, they resisted all but judicial modification and frustrated all but extraconstitutional evolution. Their constitutional form gave them sanctity and invested them with a certain immunity from criticism, and the judicial gloss with which judges annotated them shared something of that sanctity: in time criticism of the natural law doctrines which judges read into the Constitution came to be looked upon as an assault upon the Constitution itself. No system of law was better fitted to restrict government to negative functions, to put property rights on a par with human rights, or to invest existing economic practices with legal sanction; and from the beginning the dominant forces of American economy gravitated to the support of natural law: slavery, corporations, and industrial capitalism. It was no accident that corporations should early take refuge in a natural law interpretation of the contract clause, that slavery should find protection in the natural law limitations of the due process clause, and that, after the Civil War, capitalism—speaking through corporation lawyers—should persuade the Court to read

"If the House of Commons in breach of the laws and liberty of the people do betray trust reposed in them, and act negligently or arbitrarily or illegally it is the undoubted right of the people of England to call them to account for the same"

It was obvious that this was a challenge to the legislative omnipotence of the Parliament

This is not the place in which history of the orderly development of these ideas could be traced in any measure of detail, but sufficient has been said to indicate that the *notion of fundamental law and of the natural rights of man* has inspired the entire development of constitutional history, not only of England but practically of all the civilised countries of the world The law of *nature* or the law of *God* or principles of *morality* and *natural justice have been the spurs that have brought about the development of nearly all our legal* institutions

116 Impact of Natural Law on the English Jurisprudence

(a) For a 'custom' to be upheld by courts it must be reasonable

The impact of the natural law on the development of English system of jurisprudence could be seen from the study of the manner in which the courts in England approach the questions relating to the enforceability of a 'custom' The test formulated is that a custom will not be enforced by courts if it is *unreasonable*, in particular, in each case, the issue to be raised is whether the custom pleaded is such as can be called fair and proper and is such as a reasonable honest and fair minded man would adopt it (*Produce Brokers v Olympia Oil and Coke Co* (1916) 2 *K B page* 296)

Produce Brokers v Olympia Oil and Coke Co

(b) Emergence of Equity Jurisprudence

The 'law of nature has found its way into equity jurisprudence

"Whatever you take Roman equity as administered by the praetors," says Denning L J in his paper on 'The Need for New Equity', "or English equity as administered by the Lord Chancellor in each case, equity involved the principles of natural justice Equity claimed that these principles had priority over all the laws then existing and therefore that the principles could be prayed in aid to mitigate their harshness or to soften their rigidity"

(c) Rules of Natural Justice applied by Courts

Similarly, the rules relating to natural justice are often invoked by courts when exercising their powers of *superintendence and control over the inferior judicial and quasi* judicial authorities, as they do when they are invited to issue *writs* of prohibition and *certiorari* The High Court in England exercises judicial control over certain classes of administrative acts, and in appropriate cases, quashes judicial and quasi judicial decisions of administrative authorities if they are shown to be contrary to rules of *natural justice*

(d) Recognition of Foreign Law by Courts

In the British system of law when a question arises about the application of *foreign law*, enquiry is made to see if certain principles of *natural justice* such as fair trial, freedom of person, freedom of action have been disregarded (*Cheshire, Private International Law, 3rd Edition, page 185*)

(e) Doctrine of unjust enrichment

The English courts have also evolved the doctrine of "unjust enrichment" in that they would refuse to permit any person to retain any advantage which he has gained *unjustly* Lord Mansfield was the first Judge who attempted to introduce the doctrine in *Moses v Macferlan* (1760) 2 *Burr p* 1005) The doctrine suffered a decline in the nineteenth century but appears to have been revived by the present day judges and jurists In the case of *Baylis v Bishop of London* (1913) *Ch* 127, Hamilton, L J, no doubt said, "Whatever may have been the case 146 years ago, we are not now free in the twentieth entury to administer that vague jurisprudence sometimes attractively styled 'justice between man and man'" But the later day pronouncements of English Judges tend to show a move in the counter direction

(f) Law of

The modern law of *Quasi-Contract* has been founded on the principles of natural

of Interpretation where Right to Property and Liberty is affected.

though they were the implied terms of the statute, with a view to securing 'fundamental' rights and liberties of citizens, are:

(a) The intention to take away property of a subject without giving him the legal right of compensation for the loss of it is not imputed to the legislature unless that intention is expressed in unequivocal terms. (See *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.* (1919) *A.C.* 744 *at p.* 752; See also observations of Du Parcq L. J. in *Foster Wheeler Ltd. v. E. Green & Sons Ltd.* (1946) 1 *All E.R.* 63 at pp. 66-67). In *Chester v. Bateson*, (1920), 1 *K.B.* 829, upon a case stated by Justices for Lancashire, Darling J. while dealing with the question regarding the validity of Regulation 2-A(2) of the Defence of the Realm Regulations (which provided that "no person shall without the consent of Minister take . . . . any proceedings for the purpose of obtaining an order or decree for the recovery of the possession of, or for the ejectment of a tenant of, any dwelling house in which a munition worker is living and which is situate in an area declared by order of the Minister of Munitions to be a special area") observed:

"But the Regulation as framed forbids the owner of the property access to all legal tribunals in regard to this matter. This might of course legally be done by parliament; but I think this extreme disability can be inflicted only by direct enactment of the Legislature itself and that so grave an invasion of the rights of all subjects was not intended by Legislature to be accomplished by a departmental order such as the one of the Minister of Munition." (See also remarks of Scrutton J. *in re Boaler* (1915), 1 *K.B.* 21 at p. 36).

Similarly, Sankey L. J. in the same case observed:

"It is true that the power to make a Regulation to prevent the successful prosecution of War being endangered is of a wide and sweeping character but I decline to hold that Parliament intended by these general words to give the Executive the right to close any of the King's courts against his subjects when they obtained the sanction of the Minister to resort thereto . . . . I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act."

But it must be carefully noted that in recent years, under the impact of growing need for social legislation, even the English Judges have become increasingly familiar with legislative interference with property rights and the strength of presumption against confiscation of property without compensation is no longer what it used to be and is, any how, frankly conceded to be weaker during times of national emergency (see *Edgington, Bishop and Withy v. Swindon Borough Council*, (1938) 4 *All E.R. p* 57). The Lord Chancellor, in the case of *Local Government Board v. Arlidge* (1915) *A.C.* 120, in the House of Lords, indicated that the whole trend of legislation was to sacrifice the rights of the few in order to improve the position of the many and at the same time Executive was undertaking functions which until recently were assigned to Judiciary. In his words:

"There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own. Such rights are not to be affected unless Parliament says so. But Parliament in what it considers higher interest than those of individuals has so often interfered with such rights on other occasions that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is today."

(b) Any legislative Act which purports to curtail the right of personal freedom ought to be construed strictly, (see *Rex v. Halliday, ex parte Zadig* (1917) *A.C.* 260 particularly the dissenting judgment of Lord Shaw of Dunfermline).

into the Fourteenth Amendment natural law restrictions upon the police power of the States

"Along with conservatism in law went veneration for the Law—a veneration which was enjoyed vicariously by its high priests and oracles and even by its acolytes Americans alone of western peoples made constitutionalism a religion and the judiciary a religious order and surrounded both with an aura of piety They made the Constitution supreme law, and placed responsibility for the functioning of the federal system upon courts The Supreme Court in time, became the most nearly sacrosanct of American institutions—became to Americans what the Royal Family was to the British, the Army to the Germans the Church to the Spaniards Criticism was sometimes acrimonious but rarely disrespectful In the mid 1930's, when conservatives were exhausting the vocabulary of billingsgate against the chief executive, those who criticized the Supreme Court were regarded as tainted with un Americanism, and the most instructive lesson to be drawn from Franklin Roosevelt's fight for judicial reform was to be found in the outpouring of quasi religious devotion to the Court which the hearings of the Senate Judiciary Committee evoked" (See pp 360—361 of his *American Mind*))

118. English Law and the Concept of Fundamental Rights

Rules of interpretation

In England of course there has been no express formulation of the law relating to fundamental rights in the sense of a law that would *limit* the legislative powers of the Parliament But the English Judges have attempted to interfere with parliamentary enactments upon the *assumption* that the legislature, in the total absence of any clear and express provision to the contrary, does not wish to interfere with the basic and natural rights of the people—rights like right to life, liberty and property Judges in England do not give effect to the doctrine of the abstract justice by declaring *void* parliamentary enactments but they nevertheless, do give effect to these very notions in the matter of *interpreting* the parliamentary enactments that prejudicially seem to affect these rights The clearest case on the subject is the one of *Lee and another v The Bude and Torrington Junction Rly Co* (1871) *L R 6 C P* 567 The remarks of Willes J in this case, to which reference has already been made, have become classical "It is further urged," said the Judge, "that the Company was a mere nonentity and there never were any shares or share holders That resolves itself into this, that Parliament was induced by fraudulent recitals to pass the Act which formed the Company" And he went on to remark

"I would observe, as to these Acts of Parliament that they are the law of the land, and we do not sit here as a court of appeal from Parliament It was once said —I think in Hobart—that if an Act of Parliament were to create a man judge in his own cause, the Court might disregard it That dictum, however, stands as a warning rather than an authority to be followed We sit here as servants of the Queen and the legislature Are we to act as regents over what is done by Parliament with the consent of the Queen Lords and Commons? I deny that any such authority exists If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it but, so long as it exists as law, the courts are bound to obey it The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them The Act of Parliament makes these persons shareholders or it does not If it does there is an end of the question

Having neglected to take the proper steps at the time to prevent the Act from passing into a law, it is too late now to raise any objection to it"

Illustration of the Rules

Some of the rules of construction evolved and applied by the courts of law, as

of Art. IV (The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States), and in Art. VI (. . . no religious test shall ever be required as a qualification to any office or public trust under the United States).

Examples from other countries

The fundamental rights have also been guaranteed by the Swiss Constitution (Arts. 4, 41, 44, 45, 49, 50, 55 to 58, 60 and 65) ; by the Constitution of the Union of Soviet Socialist Republic (Arts. 118—121); by the Constitution of Ireland (Arts 40 to 44), and in the Indian Constitution (Part III, Arts. 13 to 35). (For the text of the American Constitution and the Indian Bill of Rights, please turn to Appendix.).

Is it wise to have a Bill of Rights incorporated in the Constitution ? The view of English Jurists

The wisdom of incorporating a chapter on fundamental rights has been gravely doubted by those who have been nurtured in the British tradition of constitutional jurisprudence. Under the English Constitution, as we have seen, there are no guaranteed or absolute rights.

The classical statement on the constitutional position in England with regard to the rights and liberties that are available to English subjects is contained in *Dicey's Law of the Constitution*, (1952) *Ed. p.* 197.

"There is in the English Constitution", says this writer, "an absence of these declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English Constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or *dicta* of Judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament."

Liversidge v. Sir John Anderson

"Safeguard of British liberty", says Lord Wright in the case of *Liversidge v. Sir John Anderson and other* (1942) *A.C.* 206; (1941) 3 *All E.R.* 338; 110 *LJK* 724,—

"is in the good sense of the people and in the system of representative and responsible government which has been evolved".

That was the case in which the interpretation of Regulation 18-B of the Defence (General) Regulations, 1939, was the subject-matter of their Lordships' determination, and the question relating to the constitutional theory with regard to the liberties of the subjects came in indirectly for consideration.

In Halsbury's Laws of England, 2nd Ed., Vol. 6, para 435, following statement would be found on this subject:

"The so-called liberties of the subjects are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute. Where public authorities are not authorised to interfere with the subject, he has liberties. It follows that, apart from the general provisions ensuring the peaceful enjoyment of rights of property, and the freedom of the subject from illegal detention, duress, punishment, or taxation, contained in the four great charters or statutes which regulate the relations between the Crown and people, the liberties of the subject are not expressly defined in any law or code. Further, since Parliament is sovereign, the subject cannot possess guaranteed rights such as are guaranteed to the citizen by many foreign Constitutions. But it is well understood that certain liberties are highly prized by the people, and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them."

Mr. Smith's views

In the *Yale Law Journal* (1924, 34 *Yale L.J.* 277 *at* 285-286) Mr. Smith, writing under "Judicial Control of Legislation in the British Empire", observed as follows:

(c) Where the Act of Parliament is permissive, not imperative, and the power it confers is discretionary, the rule of construction to be adopted is that the discretion shall be so exercised so as to leave the private rights intact (See *Metropolitan Asylums Dist v Hill*, (1881) 6 *A C* 211)

119. Fundamental Rights and our Constitution

Part II of our Constitution entitled 'Fundamental Rights' contains a clear statement in regard to the rights of individuals (whether regarded *qua individuals* or members of a wider group like a community or a religious denomination), and these rights are fundamental not only in the sense that they have been mentioned in and guaranteed by the Constitution but are such as neither the Legislature nor the Executive can in any manner curtail or diminish These rights limit legislative and executive power and are a clog on the 'temporary' will of the 'simple' majority in the Legislature They embody a permanent and paramount law which cannot be disturbed by the will of Legislature or Executive It can only be undone by the *Nation* and the *People* by recourse to the extraordinary method of effecting constitutional amendment as provided in ART 216 of our Constitution

Suspension of the Fundamental Rights ART 192

It is true that when a proclamation of emergency has been issued by the President under ART 191, he can also under ART 192 declare that the right to move the courts for the enforcement of such of the rights conferred by Part II as have been specified in the order, and all proceedings pending in any court for the enforcement of any rights so specified, shall remain suspended for the period during which the proclamation is in force But this provision in our Constitution is calculated merely to *suspend* the right to enforce the fundamental rights fundamental rights themselves are not abrogated by such an order of suspension which can be passed under ART 192 and in fact after the conclusion of the period of emergency, subject, of course, to the passing of Acts of Indemnity by Parliament under ART 196, appropriate proceedings can be commenced for the enforcement of the rights which during the period of emergency could not be enforced

These fundamental rights that have been constitutionally guaranteed operate like a double-edged sword they not only destroy those portions of 'existing law' which are in conflict with these rights but they operate also to render void any State-action (whether in the legislative or executive field) which after the coming into force of the Constitution has the effect of taking away or abridging any of the fundamental rights Any law passed in contravention of the rights preserved by Part II of our Constitution to the extent of such contravention, would be void (See ART 4)

The specific mentioning of fundamental rights in constitutional documents [illegible] its genesis and historic orientation to the fashion set in that behalf by the American people They were the first who emphasized the necessity of incorporating these guarantees in, what they call the Bill of Rights a statement of these rights [illegible] in amendments to the U S Constitution (1 to 10, 13 to 15 and [illegible], as also [illegible] other specific provisions that are to be found scattered about in the main text of the original Constitution drawn by the Philadelphia Convention. These provisions from the original Constitution would be found in S 9 of Art 1, (. . privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it No bill of attainder, or *ex post facto* law shall be passed [illegible] in its 10th Section (No State shall . pass any bill of attainder, ex post facto law, or [illegible] impairing the obligation of contracts .), in Section [illegible] of Art III ([illegible] crimes except in cases of impeachment shall be by jury [illegible]), in Section [illegible]

not co-exist with judicial supremacy; for one or the other, comparatively speaking, ought to be supreme. The English judiciary has jealously guarded the rights of the individuals against governmental encroachments by adopting a rule of rigorous construction in regard to the interpretation of those statutes under which Executive exercises its power of interfering with people's right to life, to property and to liberty. But the courts in England are helpless in the matter of safeguarding the individual against what may be regarded as *legislative tyranny*: should the majority in the Parliament decide to pass laws that gravely imperil or take away the rights of the citizens, there is nothing that the courts can do to save the situation. In England the whole matter is left to the good sense of those representatives of the people who sit in Parliament, and it is for them to exercise that wise and tardy self-restraint upon their unfettered power of enacting any and every kind of law, without which the rule by the majority can become a source of grave menace to the rights of individuals and of the political groups that are in minority in the realm.

In those written Constitutions where fundamental rights are guaranteed, the underlying *assumption* is that the majority rule is likely to seriously interfere with the natural rights of the people. It is the view of some jurists that the Constitution should contain a statement of limitations upon the power of the Executive and Legislature, and further that the Judiciary should have the power, upon a case being presented to it, to decide whether or not the rights thus guaranteed have been abridged or taken away by an executive or legislative action. The written Constitutions, by and large are distrustful of legislative supremacy and have faith in the wisdom and sagacity of the Judges to uphold and defend the constitutional rights of the individuals against the executive and legislative assaults that are likely to be made against them.

Some Constitutions merely mention Fundamental Rights but do not make them justicible—case of France

But not all the written Constitutions that contain provisions relating to fundamental rights contain provisions in regard to their judicial enforcement. Constitution of France may be cited as an example in this context. The framers of the Constitution of the Fourth French Republic have declared the rights of individuals by giving to them a prominent place in the preamble to their Constitution. They have also set-forth in the preamble a long list of political, social and economic principles upon which the State is directed to conduct its management of public affairs, but they have not provided any machinery for their enforcement in courts of law. Here is the preamble to the *Constitution of the French Republic* adopted by the National Constituent Assembly on September 28th, 1946:

"On the morrow of the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people proclaims once more that every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and freedoms of man and of the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognised by the laws of the Republic.

"It further proclaims as most vital in our times the following political, economic and social principles:

"The law guarantees to women equal rights with men in all domains.

"Anyone persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic.

"Everyone has the duty to work and the right to obtain employment. No one may suffer in his work or his employment because of his origin, his opinions, or his beliefs.

"Everyone may defend his rights and interests by trade-union action and may join the union of his choice.

"The right to strike may be exercised within the frame-work of the laws that govern it.

"Broadly speaking, it is true to say that the 'British Commonwealth of Nations' notwithstanding the immense diversity of its constituent elements has been practically unanimous in rejecting the theory that it is the function of the courts to protect the people from the encroachments of Legislature Whether this theory be right or wrong, it clearly must stand as an original contribution to political thought of distinctly American origin Under the British scheme of government the general doctrine is that Judges have no control over the policy of Parliament, except when they are called upon to decide between the conflicting clauses of rival legislatures in a federal system If they hold that the particular statute is *ultra vires*, then the result automatically follows that it must fall within the proper competence of some other Assembly The current of law

Difficulty of securing precise formulation of Fundamental Rights —K C. Wheare

The real difficulty which is involved in the due maintenance of those constitutional guarantees that are mentioned in written constitutions, in the words of Professor K C Wheare, is

"*to define the nature and extent of these rights in such a way that something* significant and realistic is achieved"

None of the usual rights or liberties which are recognized in a written Constitution is capable of precise and scientific definition, and there are hardly any rights which can be statutorily set forth in the form of absolute propositions A declaration of fundamental rights, even if embodied in an absolute form in one of the Articles of Constitution, would be found encumbered by numerous provisos and other qualifying conditions which are calculated to control its scope and its application Since these rights are justiciable they have to be very rigorously defined, and in the formulation of these rights one would always discover with dismay that what is affirmed so categorically to be an inviolable right in one part of the Constitution has been, in another part, rendered devoid of appreciable content *Professor K C Wheare* illustrates this difficulty by making a reference to the Constitution of Ireland, and says

"No realistic attempt to define the rights of the citizen indeed, can fail to include qualifications Yet when we see the result it is difficult to resist asking the question what of substance is left after the qualifications have been given full effect ? The Constitution of Ireland provides an interesting example of this position It contains a series of articles—numbers 40 44—enunciating fundamental rights Consider this statement first 'No citizen shall be deprived of his personal liberty save in accordance with law ' A little later there follows The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law' What does this guarantee amount to? The answer must be 'It all depends on the law' If wide discretionary powers of arrest and forcible entry are given by the law to the forces of the state, then the right of the citizen will be severely restricted " (See his *Modern Constitutions p 57*)

The difference in the constitutional position resulting from the adoption of the attitude of the English Constitutional Law to these rights and liberties, and the one adopted in those written Constitutions where fundamental rights have been declared as justiciable rights, is thus basically one of 'approach' and it would not be incorrect to say that the English theory of rights is founded on the supremacy of Parliament as opposed to the theory of Judicial Supremacy which reflects itself in the doctrine of 'judicial review' of legislation and which is available under a system of written Constitution only, and that too in a restricted category of cases In England the courts have no power to declare a law passed by the Parliament as being void on any ground Parliamentary omnipotence can-

Difficulty of judicial enforcement

We might in the context of these considerations point out yet one more difficulty which besets all those who attempt to secure enforcement of fundamental rights by means of judicial process. Considering that the courts of law are called upon to interpret and *apply* such nebulous and woolly expressions as 'reasonable restrictions on freedom of speech', 'right to assemble peacefully subject to any reasonable restrictions imposed by law in the interest of public safety', 'right to form associations subject to any reasonable restrictions imposed by law', etc., they have, perforce, to embark upon an examination of the political and economic relevance of the legislation that is impeached before them as contravening the avowedly ill-defined rights, with the result that an impression is often created in the public mind that the courts of law are more in the nature of political institutions than independent and impartial tribunals for the enforcement and vindication of people's rights. Any one interested in investigating the kind of complications to which, what is called the 'Doctrine of Progressive Interpretation' of the Constitution has involved the United States Supreme Court, would do well to read cases decided by that court which clearly show that the expressions used in the United States Constitution have been, by a mere fiat of judicial decrees, accorded varying and different content from time to time.

K.C. Wheare's Illustrations from the American Experience —Meaning of liberty.

Professor K. C. Wheare illustrates this difficulty by referring to the cases that have a bearing on the interpretation of the word 'liberty': *(See his 'Modern Constitutions' pp. 64—67)*

"In 1940 the Supreme Court of the United States was asked to decide on the validity of a regulation of a school board in the state of Pennsylvania, which required children attending the state schools to participate in a ceremony of saluting the American flag (*Minersville School District v. Gobitis* 310 *U.S.* 586). Some children of parents who belonged to the sect known as 'Jehovah's Witnesses' had refused to salute the American flag on the ground that to do so was in conflict with their religious beliefs. The Supreme Court was asked to declare that the regulation was invalid because it attempted to prohibit the free exercise of religion. The Court decided, with only one dissentient, that the regulation was valid. The argument of the majority was that the regulation, in requiring a ceremony of respect for the flag, was attempting, however unwisely, to strengthen the foundations of American society, and thus, so far from infringing liberty, was supporting the basis upon which it existed. The Court refused to substitute its own judgment of what was desirable in a matter of this kind for the judgment of the legislature. The dissenting Judge, Mr. Justice (later Chief Justice) Stone declared that the regulattion was so clear a violation of liberty, both of speech and religion as guaranteed by the Constitution, that the Court was entitled to declare it invalid. In 1942, however, in the course of deciding a case, also brought by the Jehovah's Witnesses, concerning the validity of a requirement in the ordinances of certain American cities that sellers of various articles including books should be licensed, three of the judges of the Supreme Court, Justices Black, Douglas and Murphy, said that they had come to the conclusion that their view in the earlier case involving the saluting of the flag was wrong (*Jones v. Opelike* 316 U.S. 584 at pp 623-24). A year later, the decision in the case of 1940 was over-ruled, though by a majority. (*West Virginia Board of Eduction v. Barnette* 319 U.S. 624). It may be mentioned that two new judges sat on the Court in 1943, as compared with the Court of 1940, and that Mr. Justice Stone was now Chief Justice. No one need be surprised that judges find it difficult to agree or to be consistent or certain in their interpretation of words of this kind.

" 'Liberty' in the economic sphere may legitimately be used in different senses. One man may say that economic liberty means that a man may sell his labour for what he can get for it and work for as long as he can; another will say that, in the world, as it is, many men will be unable to sell their labour at all unless some restrictions are placed

"Every worker through his delegates may participate in collective bargaining to determine working conditions, as well as in the management of business

"All property and all enterprises that now have or subsequently shall have the character of a national public service or a monopoly in fact must become the property of the community

"*The nation ensures to the individual and the family the conditions necessary to their* development.

"It guarantees to all, and notably to the child, the mother, and the aged worker, health protection, material security, rest, and leisure Every human being who, because of his age, his physical and mental condition, or because of the economic situation, finds himself unable to work, has the right to obtain from the community the means to lead a decent existence

"The nation proclaims the solidarity and equality of all Frenchmen with regard to the burdens resulting from national disasters

"The nation guarantees equal access of children and adults to education, professional training, and culture The establishment of free, secular, public education on all levels is a duty of the State

"The French Republic, faithful to its traditions, abides by the rules of international law It will not undertake wars of conquest and will never use its arms against the freedom of any people

"On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace

"France forms with the people of its overseas territories a union based upon equality of rights and duties without distinction of race or religion

"The French Union is composed of nations and peoples who wish to place in common or co ordinate their resources and their efforts in order to develop their civilization, increase their well being, and ensure their security

"Faithful to her traditional mission, France proposes to guide the peoples for whom she has assumed responsibility toward freedom to govern themselves and democratically to manage their own affairs, putting aside any system of colonization based upon arbitrary power, she guarantees to all equal access to public office and the individual or collective exercise of the rights and liberties proclaimed or confirmed above"

Thus by enunciating these principles the makers of the French Constitution provided *a frame of reference* within which to appraise the ethics of political behaviour of the Government and Legislature in regard to the determination of questions concerning the transgression of the executive and the legislative authority But they did not go beyond administering pious admonition to the principal organs of sovereign power they set out to establish· the final Court of Appeal, here as elsewhere, in any democratic state, is the coercive apparatus of public opinion, and the enforcement of these principles has therefore been left to its exclusive care and control

Our Constitution and Directive Principles of State Policy

In our Constitution, as even in that of India, we have several Articles that are in the nature of Directive Principles of State Policy, and it is provided specifically in relation to these principles "The State shall be guided in the formulation of its policies by the provisions of this Part, but such provisions shall not be enforceable in any court" (See ARTs 23 to 31 of our Constitution and Arts 36 to 51 of the Indian Constitution) These provisions then constitute the manifesto of the policies and programmes of the two States as they are adumbrated and visualised by the Founding Fathers and are required to be kept in view by subsequent generations so as to secure continuity in the maintenance of a homogeneous and consistent policy in the matter of handling the affairs of the State.

upon maximum hours of labour and minimum rates of wages The first view we associate with laissez faire, the second with the age of collectivism The Supreme Court of the United States has not been unaffected by the changes in opinion in that country during the first half of the twentieth century In 1905 (in the case of *Lochner v New York* 198 U S 45), the Court declared that a statute of New York State, which had fixed a maximum of sixty hours per week and ten hours per day for bakers, was invalid, on the ground that it violated the liberty of the citizen to work as long as he liked The right to sell or purchase labour, the Court said, was part of the liberty which the Constitution guaranteed But it is interesting to notice that this view prevailed by a majority of five to four—the Court was far from unanimous In 1908, however, the Court unanimously sustained an act of the State of Oregon fixing a maximum of ten hours a day for women workers in certain employments, (*Muller v Oregon* 208 U S 412), and in 1917, by a majority of five to three, it sustained an act of the same State extending the maximum of ten hours to men (*Bunting v Oregon* 243 U S 426) "

120. Theoretical Basis of the 'Fundamental Rights'

The basis of the fundamental rights, as we have noticed before, is grounded on a philosophy which maintains that there is a higher transcendental law which cannot be undone by legislative will From this it follows that there is, in existence, a graded scale of values which it is the function of the Court to invoke and apply when giving effect to the statute law

If this view is correct, we are in a position to understand the difficulties that must be

of fundamental rights or, as a matter of fact, of any other constitutional limitation upon the State power is bound to vary with different Judges, if only because the different judges who are called upon to interpret those provisions, consciously or unconsciously, are influenced by the type of the prevailing economic and social philosophy The ruling ideas of the age become a fact in issue every time an attempt is made to interpret those constitutional provisions that cannot be understood without making a reference to them For instance, when the balance between the interest of national security and the right to individual freedom has to be struck line can only be drawn between these contending values in terms of some social philosophy to which a particular judge might owe his allegiance This is so because existing economic and political conditions are to be viewed in the light of the scale of values which a judge places before himself as representing the norms against the background of which in his opinion, judicial process must work It is for this reason that *Professor Friedmann in his book 'Legal Theory'* says

Professor Friedmann's view

"Natural law thinking in the U S undoubtedly inspired the fathers of the Constitution, and it has dominated the Supreme Court more than any other law court in the world Such thinking has not prevented the court from vacillating, from the unconditional condemnation of legislative regulation of social and economic conditions to its almost unrestricted recognition from the recognition of almost unrestricted freedom of speech and assembly to the virtual outlawing of a political party, and, on the other hand, from the toleration of the most blatant discrimination against negroes to the strong protection given in recent judgments Yet the American Constitution gives as near an approach to the unconditional embodiment of 'natural' rights as can be imagined It is not the weakness or the vacillations of the court which in the face of such provisions

freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Even during the days of our national struggle for independence, the leaders of Indian thought and opinion had frequently, both from the political platform and press, demanded recognition and enforcement of the fundamental rights, and as far back as 1928, in a report which is known as the Nehru Committee Report, it was stated that,—

"Our first care should be to have our fundamental rights guaranteed *in a manner* which will not permit their withdrawal under *any circumstances*."

At the Round Table Conference also, this demand was pressed by the Indian leaders. The demand, however, was not accepted for the reason given by the Statutory Commission in its Report, although it recommended a limited number of rights to be placed beyond the reach of the Indian Legislature. Some of the reasons that prompted the authors of the Report to reject the demand for the incorporation of fundamental rights are understandable, for they are the reasons that commend, naturally, themselves to the Englishman.

"We are aware", said the authors of the Report, "that such provisions have been inserted in many Constitutions notably in those of the European States founded after the war. Experience, however, does not show them to be of any practical value. Abstract declarations are useless unless there exist the will and means to make it effective". The Joint Parliamentary Committee, commenting on the extract in the Report cited above, remarked:

"With these observations we entirely agree; and a cynic might indeed find plausible arguments, in the history during the last ten years or more of more than one country, for asserting that *the most effective method of ensuring the destruction of a Fundamental Right is to include a declaration of its existence in a constitutional instrument.* But there are also strong practical arguments against the proposal, which may be put in the form of dilemma; for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of inconsistency with one or other of the rights so declared".

Ss. 298, 299 and 300 of the Government of India Act, 1935

The Government of India Act, 1935, did, however, contain constitutional guarantees in its sections 298, 299 and 300:—

"Section 298.—(1) *No subject of His Majesty domiciled in India* shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be *prohibited* on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(b) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special respon-

It is precisely because of the peculiar role of the American Supreme Court, regarded as a political institution (and the truth of this observation would be apparent to anyone who cares to study the specific modes in which the judges of that court have allowed themselves to be influenced by the prevailing philosophy of the time, by the nature of the political and economic situation with which the country has been confronted), that Mr Justice Frankfurter in his "*Some Reflections on the Reading of Statutes*", gives expression to the attitude which must, in his opinion, characterise the approach of those who are charged with the duty of settling questions relating to constitutional and statutory interpretation

"There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history In short, judges are not unfettered glossators They are under a special duty not to overemphasise the episodic aspect of life and not to under value its organic processes—its continuities and relationships For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty

"There are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes They may point to cases where even our three justices apparently supplied an omission or engrafted a limitation Such an accusation cannot be rebutted or judged in the abstract In some ways as Holmes once remarked, every statute is unique Whether a judge does violence to language in its total context is not always free from doubt Statutes come out of the past and aim at the future They may carry implicit residues or mere hints of purpose Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints Even for a judge most sensitive to the tradition al limitation of his function, this is a matter for judgment not always easy of answer But a line does exist between omission and what Holmes called 'misprison or abbreviation that does not conceal the purpose ' Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so "

[illegible]

with w[illegible]
legal th[illegible]
tory or [illegible]
adjudication (But of this more would be said in the Section of the Chapter on 'Structure, Nature and Reach of Judicial Power' which specifically deal with '*The Principles of Constitutional Interpretation*')

But the one important reason which inclined the framers of our Constitution to [illegible] Constitution is that in a country where we have religious [illegible]y side with the majority community professing the re- [illegible] provide in the Constitution some guarantees against which the legislative and executive rule by the majority party may not prevail There is no better guarantee against executive and legislative tyranny, particularly where the democratic tradition is not well settled in the body politic of a country, than the incorporation of fundamental rights in the Constitution

Reasons why the B[illegible] of Rights [illegible] included in our Constitution

"The very purpose of a Bill of Rights", says Mr Justice Jackson in West Virginia State *Board of Education v Barnette* (1943) 319 *U S* 624, at p. 638, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts One's right to life, liberty, and property, to free speech and a free press,

Art. 13(1), which provides for the continuance in force of existing laws, subject to the [illegible] Art. 13(1), the result that the extent to which [illegible] the provisions of Part III of our Constitution would be [illegible] portion of the existing law [illegible] Part III, as being unconstitutional, for the [illegible] for doing anything [illegible]

[illegible] Armed Forces, [illegible] for the purpose of ensuring the [illegible]

[illegible] Indian Law [illegible]

[illegible] with the ex- [illegible] the Constitution [illegible] the existing law [illegible] with [illegible] it provides [illegible] fundamental rights [illegible] fundamental rights [illegible] existent laws, [illegible] will be to give them [illegible] Such laws exist for all [illegible] before the date of the Constitution."

[illegible] the above extract has been [illegible] laws becoming void for future purposes on the one hand and those laws being alive for the purpose of giving effect to past transactions, on the other. He [illegible] the word 'repeal' with all its implications under S. 6 of the General Clauses Act for the word 'void'. The current effect of 'repeal' is, that as from the date on which repeal of a law becomes effective, the law so repealed ceases to exist, except as to the past transactions which are all saved and in relation to them the law is supposed to be alive: this principle has received statutory expression in S. 38 of the English Interpretation Act, 1889, and S. 6 of the General Clauses Act. It is pointed out, with respect, that when a law is repealed, as opposed to a case when a law lapses, the resulting

sibility of the Governor General or of a Governor for the safeguarding of the legitimate interests of minorities

"Section 299 —(1) No person shall be deprived of his property in British India save by authority of law

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act

(5) In this section land includes immovable property of every kind and any rights in or over such property, and 'undertaking includes part of an undertaking

"Section 300 —(1) The executive authority of the Federation of a Province shall not be exercised, save on an order of the Governor General or Governor, as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land, or of or to any right or privilege in respect of land or land revenue, being a grant or confirmation made before the first day of January, one thousand eight hundred and seventy, or made on or after that date for services rendered

(2) No pension granted or customarily payable before the commencement of Part III of this Act by the Governor General in Council or any Local Government on political considerations or compassionate grounds shall be discontinued or reduced, otherwise than in accordance with any grant or order regulating the payment thereof, save on an order of the Governor General in the exercise of his individual judgment or, as the case may be, of the Governor in the exercise of his individual judgment and any sum required for the payment of any such pension shall be charged on the revenues of the Federation or as the case may be, the Province

(3) Nothing in this section affects any remedy for a breach of any condition on which a grant was made "

It would be noticed that these constitutionally guaranteed rights were prospective in their operation and did not affect any existing law which may have been in conflict with them Nor, again, were any constitutional remedies for the enforcement of these rights provided for in the Government of India Act they were left to be enforced by resort to ordinary remedies

121. A Comment on ART. 4

ART 4, clause (1) of our Constitution declares that "Any existing law, or any custom or usage having the force of law, in so far as it is inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void " Existing law has been defined in ART 218 as meaning any Act, Ordinance, order, bye-law, rule, regulation or notification, which immediately before the Constitution Day had the force of law in the whole or any part of Pakistan Thus, in effect, the entire *corpus juris* of Pakistan existing immediately before the Constitution Day, and any custom or usage having the force of law, survives under

ART 4 — Effect of Laws inconsistent with Fundamental Rights in Part II

"repeal of an Act or its expiry in due course of time. In my opinion, the strong sense in which the word 'void' is normally used and the context in which it has been used are not to be completely ignored. Evidently, the framers of the Constitution did not approve of the laws which are in conflict with the fundamental rights, and in my judgment, it would not be giving full effect to their intention to hold that even after the Constitution has come into force, the laws which are inconsistent with the fundamental rights will continue to be treated as good and effectual laws in regard to certain matters, as if the Constitution had never been passed. How such a meaning can be read into the words used in Art. 13(1), it is difficult for me to understand. There can be no doubt that Art. 13(1) will have no retrospective operation, and transactions which are past and closed and rights which have already vested will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to this question would appear to me to be that the law having ceased to be effectual can no longer be applied. In *R. v. Mawgan (Inhabitants)* (1838) 8 *Ad. & E.* 496: (112 *E. R.* 927), a presentment as to the non-repair of a highway had been made under 13 Geo. III, C. 78, S. 24, but before the case came on to be tried, the Act was repealed. In that case, Lord Denman C. J. said :

> 'If the question had related merely to the presentment, that no doubt is complete. But *dum loquimur*, we have lost the power of giving effect to anything that takes place under that proceeding."

And Littledale J. added: 'I do not say that what is already done has become bad, but that no more can be done.' In my opinion, this is precisely the way in which we should deal with the present case.

"It was argued at the Bar that the logical outcome of such a view would be to hold that all the convictions already recorded and all the transactions which are closed, should be reopened, but in my opinion, to argue on these lines is to overlook what has been the accepted law for centuries, namely, that when a law is treated as dead, transactions which are past and closed cannot be revived and actions which were commenced, prosecuted and concluded whilst the law was operative cannot be reopened.

"In the course of the arguments, a doubt was also raised as to what would be the effect in the case of an appeal pending when the Constitution came into force, from a conviction already recorded before 26-1-1950. The law applicable to such a situation is well-known and has been correctly summed up by Crawford in these words:

> 'Pending judicial proceedings based upon a Statute cannot proceed after its repeal. The rule holds true until the proceedings have reached a final judgment in the court of *last resort*, for that court when it comes to announce its decision conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, *if it appears that pending the appeal a Statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal.*"

"I think I should at this stage deal briefly with two points which were raised in the course of the arguments in support of the opposite view. It was urged in the first place that without there being a saving clause to govern Art. 13(1), it can be so construed as to permit offences committed prior to 26-1-1950, to be punished. The argument has been put forward more or less in the following form. The law which is said to be in conflict

consequences in each of those two cases are different In relation to past transactions a statute having become void on the day on which past transactions are sought to be enforced by appeal to the law as it existed before the day on which it became void the legal position is not the same as it would be in the case of the same law having been repealed Ordinarily, for a right to be acknowledged, or liability to be imposed or an obligation to be enforced, the date on which this can take place must be the date on which the law creating the right, liability, or obligation, as the case may be is alive But if in the meanwhile the law has become void then prior transactions cannot possibly be enforced When a law is repealed it is only by the device of artificiality of statutory construction that it is supposed to be preserved in relation to past transactions and so can be validly invoked for the purpose of justifying enforceability of rights and obligations that result from those transactions The argument of Das J , it is submitted with respect confuses the issue by not discriminating between the posthumous effect of a law which has been declared void, and the effect of a law which has been *repealed* On this point it is submitted with respect the dissenting judgment of Fazal Ali J , states the correct principle The whole history of the law relating to the interpretation of the effect of void and repealed statutes has been summed up by the learned Judge with a great deal of forensic ability and skill After reviewing the case law in England, Mr Fazl Ali states his view on the question posed by the case before him as follows (at p 132)

D c t g Judgment of Fazal Ali J Supported

I shall now proceed to consider what would be the correct legal position when a provision of an existing law is held to be void under Article 13 (1) of the Constitution From the earlier proceedings before Constitutent Assembly it appears that in the original draft of the Constitution the words shall stand abrogated were used instead of shall be void , in Art 13(1) and one of the questions directly before the Assembly was what would be the effect of the use of those words upon pending proceedings and anything duly done or suffered under the existing law Ultimately the Article emerged in the form in which it stands at present and the words shall stand abrogatetd were replaced by the words shall be void If the words stand abrogated had been there it would have been possible to argue that those words would have the same effect as repeal and would attract S 6 General Clauses Act but those words have been abandoned and a very strong expression indeed the strongest expression which could be used has been used in their place The meaning of the word *void* is stated in *Black s Law Dictionary* (3rd Edn) to be as follows

> 'null and void, ineffectual nugatory having no legal force or binding effect unable in law to support the purpose for which it was intended nugatory and ineffectual so that nothing can cure it not valid

' A reference to the Constitution will show that the framers thereof have used the word repeal wherever necessary (see Arts 252 254 357 372 and 395) They have also used such words as invalid (see Arts 245 255 and 276) cease to have effect' (see Arts 358 and 372) shall be inoperative etc They have used the word void only in two Articles these being Art 13(1) and Art 154 and both these Articles deal with cases where a certain law is repugnant to another law to which greater sanctity is attached It further appears that where they wanted to save things done or omitted to be done under the existing law they have used apt language for the purpose see for example Arts 249, 250 357 358 and 369 The thoroughness and precision which the framers of the Constitution have observed in the matters to which reference has been made disinclines me to read into Art 13(1) a saving provision of the kind which we are asked to read into it Nor can I be persuaded to hold that treating an Act as void under Art 13(1) should have a milder effect upon transactions not past and closed than the

122. Meaning of term "Void" in American constitutional law

The meaning of term "void" in American Constitutional Law can be stated as follows: When there is a judicial declaration that a given statute is unconstitutional, in the theory of American constitutional jurisprudence, it is not the same thing as a nullification or abrogation of the statute so as, in effect, to efface, it from the Statute Book. In

Shephard v. Wheeling

the case of *Shephard v. Wheeling* (30 *W. Va.* 479) it was observed:

"(The court) does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no application. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, *and there is no judgment against the statute.* The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does not repeal. . . the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision cannot be pleaded as an *estoppel,* but can be relied on only as a *precedent.* This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitituonality of a statute unless it is absolutely necessary to do so in order to decide the case before it."

Willoughby quoted

In the words of Willoughby:

"Thus, when any particular so-called law is declared unconstitutional by a competent court of last resort, the measure in question is not 'annulled', but simply declared never to have been law at all, never to have been, in fact, anything more than a futile attempt at legislation on the part of the legislature enacting it. This is a very important point, for did the decision of the court operate as a nullification the effect would be simply to hold that the law should cease to be valid from and after the time such decision was rendered, whereas, in fact, the effect is to declare that the law, never having had any legal force, no legal rights or liabilities can be founded upon it." (See p. 10 of his 'Constitution of the United States', Vol. I).

It is the view of the American jurists that when a court declare s a statute unconstitutional with reference to the facts of particular a case, it does so with an implied reservation that it is invalid, "*as construed and applied*", so that a statute unconstitutional at the time of its enactment may, because of the change of circumstances, become, in its application to those supervening circumstances, constitutional and *vice versa.*

United States v. Realty Co.

Although an unconstitutional statute does not create any rights or impose any obligations, if an individual in good faith should have acted to his detriment under a statute believed to be valid and moral, an equitable obligation on the part of the State may be created, sufficient to support an appropriation of public moneys for their indemnification. [See the case of *United States v. Realty Co.* (1896) 163 *U.S.* 427].

The constitutionality of law in serveral cases depends upon *special facts of a particular case.* In other words, a statute may not be void on its face, but may be open to the objection, that in its application to the facts of a particular case it violates some constitutional rights and safeguards. In such instances, the declaration that the statute is unconstitutional merely means it is unconstitutional as "construed and as applied".

123. Meaning of "State" in ART 3 of our Constitution

In our Constitution the word 'State' has been extensively defined to include, for the purpose of its application to Part II, "The Federal Government, Parliament, Provincial Governments, the Provincial Legislatures and all local or other authorities in Pakistan." (Art.3)

"with the fundamental rights was a good law until the 25th January, and, since Art 13(1) is to be construed prospectively and not retrospectively, every act constituting an offence under the old law remains an offence and can be punished even after the 26th January It seems to me that the same argument could be urged with reference to matters which constituted offences under a repealed Act or temporary Act which has expired But such an argument has never succeeded The real question is whether a person who has not been convicted before the Act has ceased to exist or ceased to be effectual can still be prosecuted under such an Act The answer to this question has always been in the negative, and I do not see why a different answer should be given in the case of an Act which has become void, *i e*, which has become so ineffectual that it cannot be cured

"The second argument which also has failed to impress me is that if S 6 General Clauses Act, does not in terms apply, the principle underlying that section should be applied The answer to this argument is that the Legislature in its wisdom has confined that section to a very definite situation, and though it was open to it to make the section more comprehensive and general, it has not done so It is well known that situation similar to those which arise by reason of the repeal of an Act have arisen in regard to Acts which have expired or Acts which have been declared to be void and though such situations must have been well known to the Legislature, they have not been provided for In these circumstances I do not see how the very clear and definite provision can be enlarged in the manner in which it is attempted to be enlarged Besides I have not come across any case in which the principle underlying S 38(2) Interpretation Act or S 6, General Clauses Act, has been invoked or applied "

The view of the law given in the above extract was concurred in by Mukherjea J and it is submitted that it represents the correct statement of law on the subject The majority decision, it is submitted with respect to the four Judges who were party to it, is not good law When a law is rendered void, it cannot have the same effect as though it had been repealed And S 6 of the General Clauses Act does not in terms apply

The Indian courts have however, drawn a distinction between enforceability of an inconsistent law, which is void on the ground mentioned in Art 13(1) and the enforcement of such a law by means of an unconstitutional procedure laid down by a statute passed before the coming into force of their Constitution Thus though in India the rights and liabilities, incurred under those pre Constitution laws that by reason of their inconsistency with the fundamental rights guaranteed under Part III of the Constitution have become void, can be enforced, *they must be enforced only by resort to a constitutional procedure, and where in a pre Constitution statute the procedure prescribed is in conflict with any of the provisions in the Constitution, then it is the procedure prescribed in the Constitution which will prevail* It is not a valid objection to the maintainability of any proceedings or the result of the proceedings, which are justifiable under a pre Constitution statute to say that they be interfered with merely because the statute in question has become void after the Constitution (See *Qasim Rizvi v State of Hyderabad, AIR* (1953) *S C* 156, *Abdul Khader v State of Mysore, AIR* (1953) *S C* 355) The Indian courts have consistently held that the Constitution has no *retrospective effect* (See (1) *Keshavan Madhava Menon v State of Bombay AIR* (1951) *S C* 128, (2) *Lachmandas Kewalram v State of Bombay, AIR* (1952) *S C* 235; (3) *Qasim Rizvi v State of Hyderabad, AIR* (1953) *S C* 156, (4) *Habeeb Mohamed v State of Hyderabad, AIR* (1953) *S C* 287 See also *Shree Meenakshi Mills Ltd v Visvanatha Sastri and others, AIR* (1955) *S C* 13)

Constitution not retrospective

"........ the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the Ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the 14th Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and adminsitered by a public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

University of Madras v. Shanta Bai.

In the case of *University of Madras v. Shanta Bai, AIR* (1954) *Madras* 67, the words, "local or other authority" appearing in Art. 12 of the Indian Constitution were construed *ejusdem generis* with Government or Legislature, and it was held that when so construed, the expression "can only mean authorities exercising governmental functions. They do not include persons natural or juristic who cannot be regarded as instrumentalities of the Government". Madras University, although a body corporate created by Madras Act VII of 1923, and a State-aided institution was nevertheless held to be not one "maintained by the State", and therefore, was declared to be one not within the prohibition enacted by Art. 15 (1) of the Indian Constitution. The judgment in the above case also states the legal position as it obtains in America in regard to the distinction between "action by the State authority" and "individual action".

Following extract from the judgment will help comprehension of the legal position (P. 68):

"What is action by the State authority as distinguished from individual action has, in America, come for consideration frequently in connection with the interpretation of the 14th Amendment which prohibits States from enacting certain (specified) classes of legislation. In the Civil Rights Cases,—(1883) 27 Law Ed. 835, the question arose whether bye-laws and rules framed by Railway companies and by proprietors of public restaurants and hotels excluding the coloured races or limiting their rights to get accommodation were within the prohibition enacted in the Fourteenth Amendment. In holding that they were outside the purview of the Amendment, Bradley J. observed :

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment."

"It may be possible to hold different opinions as to whether in a particular case the Act complained against is that of the State or of its instrumentalities or not (as to which see—*United States of America v. Classic*, (1941) 85 Law Ed. 1368 ; the comment thereon of a learned writer M. Pekelis in 'Law and Social Action' at pages 106 and 107 and the later decision of the Supreme Court in — *Screws v. United States*, (1945) 89 Law Ed. 1495). But the principle that the Fourteenth Amendment prohibits only State action is itself not open to argument. That is State action as distinguished from individual action was thus stated by Strong J. in Ex parte; Commonwealth of Virgina (1880) 25 Law Ed. 676 at p. 679 :

'We have said the prohibitions of the 14th Amendment are addressed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to

It follows from this extensive scope for the application of the term 'State' that not only

the ins

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Part II

In the case of *Yick Wo v Hopkins* (1886) 118 *U S* 356 30 *Lawyer's Edition* 220 the question before the Supreme Court of the United States was, whether a certain Ordinance (which in its 68th Section had provided as follows) was against the federal guarantee of the due process clause as also the equal protection of law contained in the 14th Amendment

Yick Wo v Hopkins

"Sec 68 It shall be unlawful, from and after the passage of this order for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone "

The contentions on behalf of the petitioner, who was a Chinese subject doing laundry business in the city of San Francisco, were stated by Matthews J as follows (at p 365)

(a) "that the Ordinances for the violation of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the 14th Amendment, and,

(b) that, "in the alternative, if not so, they are void by reason of their administration operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances, an unjust and illegal discrimination, it is claimed, which, though not made expressly, by the Ordinances is made possible by them "

Mr Justice Matthews, first of all stated some general observations with respect to the constitutional principles involved in the determination of the case

"When we consider the nature and the theory of our institutions of government the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power Sovereignty itself is of course, not subject to law for it is the author and source of law, but in our system while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts And the law is the definition and limitation of power It is, indeed, quite true, that there must

Fundamental principles of American Jurisprudence

and the pursuit of happiness considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself "

The impugned Ordinance was adjudged void because the facts of the cases before the Court presented Ordinances in actual operation and the Court remarked that (p 373)

call for an *ejusdem generis* interpretation? In which case, of course, it is bound to exclude judicial authorities. But in any other case the term 'other authority' is sufficiently wide to cover the case of courts and other judicial authorities.

If judiciary is to be the guardian of the Constitution, and constitutes the final authority that determines what the law, constitutional or otherwise, is on a given subject, it is difficult to conceive of a case in which the determination by judiciary can *itself be subject to any supervision by any agency* other than by judiciary itself. In America, the operation of the 'due process' clause is, for instance, sufficiently sweeping to cover those cases where proper judicial procedure has not been followed by subordinate courts. But even there, once the final court, i.e., the United States Supreme Court, declares what the law is, the matter cannot be re-agitated in any other forum upon the footing of an argument that the decision of the Supreme Court is contrary to any of the constitutional guarantees given to the American subjects. To take an extreme case: suppose the decision of the Supreme Court of the United States is plainly opposed to one of the rights mentioned in the Bill of Rights, that is Amendments I to IX; would it be possible in such a case by any other court or authority to declare the determination of a question finally made by the Supreme Court, to be unconstitutional? The answer is obviously in the negative: *it is true that the matter can be taken up by review before* the Supreme Court, but if the Supreme Court itself chooses to be obdurate, and refuses to give any effect to the submission that its decision is contrary to the Constitution, it would not be possible to have the matter agitated any where else. This is another way of saying that the judicial pronouncements of the Supreme Court are final even though the judgments given by it be in ignorance or defiance of the provisions of the Constitution.

When a decision of the subordinate court is attacked before a higher or the final court on the ground that the decision is contrary to some fundamental right, such a contention would be based on the ground that the Constitution having been ignored the decision should not be allowed to stand. But it would be seen that this contention would prevail not only in relation to violation of the provisions of Part II of the Constitution but in respect of the entire set of the provisions of the Constitution, except of course, in those cases *where jurisdiction of courts has been expressly excluded in respect of* challenges based on the violation of the Constitution.

Judiciary under the scheme of our constitution

Judiciary *in our Constitution is not, having regard to the scheme* and arrangements of its various provisions, made a part of the Government machinery, but has been treated in a separate part (see Part IX). (Chapter I of Part IV of our Constitution talks of Federal Government, and Chapter I of Part V of Provincial Government;: similarly Chapter II of Part IV talks of Parliament of Pakistan, and Chapter II of Part V talks of the legislature of the Provinces. The framers of the Constitution could very well have included the provisions relating to judiciary in these Parts (just as the framers of Indian Constitution have done (See the Indian Constitution Parts V and VI which deal with the Federal and Provincial Governments and compare them with Parts IV and V of our Constitution).

The entire Constitution (and not only the chapter relating to fundamental rights) has to be interpreted by the judiciary even as its provisions have to be obeyed by the legislature, executive and judiciary—but *it is the judiciary which being the final judge of its own jurisdiction is the final authority upon matters affecting* judicial determination of the scope of constitutional provisions. Our Supreme Court is the highest judicial authority and an its pronouncements are constitutionally declared binding on all organs and authorities set up under the Constitution, and these cannot be challenged by them on any ground whatsoever—the only way to do this is to commence Review Proceedings before the Sup-

any person within its jurisdiction the equal protection of the laws Whoever, by virtue of public position under a State Government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power his act is that of the State '

"The question has also been considered in America with special reference to Universities Where the University is maintained by the State any regulation or law made by the University which is repugnant to the 14th Amendment has been held to be un constitutional and appropriate writs have been issued Such for example are the decisions in —*Missouri Ex rel Gaines v Canada*, (1939) 83 Law Ed 208 — *Sipuel v University of Oklahoma*, (1948) 92 Law Ed 247,—*Sweatt v Painter* (1950) 94 Law Ed 1114—*Mclaurin v Oklahoma S Regents* (1950) 94 Law Ed 1149 But where the University is not one maintained by the State, their regulations are not open to attack under the 14th Amendment because such a University cannot be considered to be a State A case of this kind arose in—*People Ex Rel Tinkoff v North Western University*, (1948) 93 Law Ed 383 The North Western University was incorporated by an Act of the Legislature of the State of Illinois in January 1851 It was not maintained by the State, though it received aid from the State Vide the decision in—*North Western University v People*, (1879) 25 Law Ed 387, where the constitution of the University is set out The University reserved the right to reject any application for admission to it for any reason which it considered adequate An applicant who had been denied admission to the college filed a suit against the University to compel it to admit him In dismissing this action Judge Kiley observed

'Under its Charter the University had the power to adopt whatever rules it deemed necessary to the proper attainment of the University purpose

An application to the Supreme Court for the issue of a writ of *certiorari* against this decision was dismissed *Vide—People Ex Rel Tinkoff v North Western University* (1948) 93 Law Ed 383 Commenting on this decision a learned American writer Mr Chambers, observes

'The outcome no doubt, will be regarded as a strengthening of the ramparts defending the right of a privately controlled educational institution to select it own students free from State compulsion The way is open for the State to provide facilities for higher education for all qualified applicants at its own State universities and colleges '

"The distinction between State maintained universities and State aided universities has also been adopted in several decisions pronounced by the State Courts in America Thus in—*Norris v Marjor and City Council of Baltimore*, 78 F Supp 451 (D Md 1948), a rule prohibiting admission of Negroes in a private school which received aid from the State, but was not maintained by it, was held not to violate the 14th Amendment, whereas a similar provision in —*Kerr v Enoch Pratt Free Library*, 149 F 2d 212 (4th Cir 1945), was held to be void as the school was maintained by the Local authorities (vide 62 *Harvard* Law Review, pp 126 to 128) "

124. Does the term "State" as defined in ART. 3 include "Judicial Authorities"

The question that arises in regard to the interpretation of ART 3 is, whether the definition of the term 'State', (which term is, as has been remarked earlier, indeed, very widely defined to include the executive and legislatures, both of the Federations and the Provinces, and "all local and other authorities in Pakistan") includes also the 'Judicial authorities' Does the expression 'all local and other authorities' mentioned in ATR 3,

right and disobedience to the mandate commanding a certain course of conduct is *wrong*. Rightness or wrongness have no other content in law.

How then is it possible for courts to say in the case of any act or omission defined by law to be a crime, that it is, in fact, not a crime but an innocent act ?

126. Difference between "Law Ex-facia being bad" and "The unjust administration of a Law valid on its face, being bad".

When any Act of the Legislature is challenged as being inconsistent with any of the rights and guarantees preserved by Part II of our Constitution, care must be taken to distinguish between the impugned law as such offending against the provisions of Part II from merely the objectionable manner in which some individual officers, who are charged with the duty of administering the law, happen to conduct themselves in the matter of issuing orders or notifications etc. under that law,—a manner of proceeding which violates the fundamental rights of the citizens. If the law *ex facia* is one which comes in conflict with any of the fundamental rights, these rights must prevail and the law must be declared as unconstitutional. But there may be a case in which what the real complaint is, relates not to the law as such offending against the Constitution but only to the *manner* in which it has been administered. In the latter category of cases, the court can declare the action of the executive officer as being one which invades the fundamental rights guaranteed by Part II. Such a declaration will not have the effect of nullifying the law but only of annulling the State-action taken under the guise of that law.

Dhanraj Mills v. B.K. Kocher

These considerations have been set forth in the case of *Dhanraj Mills v. B. K. Kocher AIR* (1951) *Bombay* 132, a case wherein their Lordships of the Bombay High Court were considering the question whether a challenge directed against administrative action, and not the law as such, which offends against the right to equality guaranteed by Art. 14, could be regarded as giving rise to a cause of action to enforce a fundamental right under Art. 14. It would be profitable if we could study the facts and the reasoning underlying the decision of that case somewhat closely.

The law under challenge was the Cotton Control Order, and during the course of arguments the grievance that was made on behalf of the petitioner was not that the impugned law directly denied *equal protection of law by unfairly discriminating between one section of the public and another*, or one class of subjects and another, but the complaint, in substance, was based on the allegation that in the *administration* of that law, allocations had been made by the authorities charged with the duty of working the law in a manner which showed that there was an unfair discrimination against the petitioner. Chief Justice Chagla then proceeded to consider, what he regarded was, an important question, namely, whether Art. 14, as it is enacted, applies to administrative orders (p. 134):

> "There can be no doubt", the Chief Justice observed, "that if a law is so passed as to make discrimination or deny its application equally to all subjects, such a law can be challenged under Art. 226 as offending against Art. 14 of the Constitution. But the matter is not free from doubt when we come to executive or administrative orders. Can a subject say that although the law is perfectly valid, it does not offend against Art. 14 of the Constitution, but an officer in administering the law is acting contrary to the provisions or the principles underlying Art. 14 ?"

The learned C.J. then remarked (at p. 135) :

> "Now a clear distinction must be borne in mind between the *law* and the *administration of the law*. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere and say we are more concerned with how the law actually works rather than how it appears in black and white in the statute book. One may even have a case where in exercising the discretion

reme Court itself If this line of reasoning is correct the definition of the word 'State' in ART 3 would not be so construed as to include 'Supreme Court', within the scope of its application That view would appear to be in line with the view taken of this matter in some Indian decisions (See *Ratilal v State of Bombay AIR* (1953) *Bombay* 242 and observations of S R Das J in *State of Punjab v Ajaib Singh AIR* (1953) *S C* 10)

125. Fundamental Rights are exhaustively stated in Part II of our Constitution—The American Constitution contrasted.

It is important to notice that the fundamental rights guaranteed by Part II are exhaustively stated, and since there is no Article, corresponding to the United States Amendment No 9, in our Constitution, (that amendment says "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people") they are the *only* rights that are fundamental Thus although the American courts are not necessarily confined to recognizing rights that are expressly stated in the Constitution as being 'fundamental', our courts are The American view of the law on the subject herein advanced is supported in the case of *Calder v Bull* (1798) 1 *Law Ed* 648 The United States Government is one based on the theory of limited powers, that is powers that have been delegated to it by the nation or the people who have expressly retained other rights with themselves The constitutional principle was stated as follows (at p 649) Calder v Bull

"The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power, on which it is founded A few instances will suffice to explain what I mean A law that punished a citizen for an innocent action or, in other words, for an act, which, when done was in violation of no existing law, a law that destroys, or impairs, the lawful private contracts of citizens, a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B It is against all reason and justice for a people to entrust a Legislature with such powers, and, therefore, it cannot be presumed that they have done it The genius, the nature, and the spirit, of our state governments, amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them The Legislature may enjoin, permit, forbid, and punish, they may declare new crimes, and establish rules of conduct for all its citizens in future cases, they may command what is right, and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property To maintain that our federal, or state, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our *free republican governments* "

It would be noticed that in the foregoing passage a curious species of reasoning is offered If an act by its very definition is crime merely because it is declared by the law of the State to be one, the question of changing "innocence" into "guilt" by the lagislature or by any one else becomes meaningless—unless of course we read into every crime the violation of some supra sensuous moral mandate It is notorious that moral casuistry is not capable of being objectively described, and ethical judgments are admittedly often subjective or of relative validity and are invariably contradictory This then is the paradox of all legal institutions if the rightness or wrongness of conduct is to be judged merely from the declarations made in that behalf by the legislature in respect of certain acts and omissions, then the inherent moral implications of those acts and omissions do not so much as arise for judicial consideration A thing that is directed to be done by law is

on a *petition for a writ* that the aggrieved party went to the Supreme Court. The aggrieved party went to the Supreme Court in appeal against a conviction alleging that he did not get a fair trial because his right to have a jury in which negroes were represented was denied to him, and even here the judgment of the Supreme Court suggests that before the appellant could succeed the Court would have to be satisfied that it was the *policy* of the State of Florida to prevent negroes from acting on the jury."

It is submitted that the view in the foregoing extract reproduced from the judgment of the Bombay High Court does not give *full* effect to the definition of the word 'State' in Art. 13 of the Indian Constitution, which includes administrative action by the Executive. The action complained was certainly not *against* the law but since it was in violation of the guarantee given by the Constitution, it could have validly been agitated upon a writ petition. The guarantee of equal protection of law, also contains the guarantee that the law, which on the face of it is fair and impartial, will nevertheless be administered impartially. The reasoning of the Bombay case does not do justice to this aspect of the guarantee of equal protection of laws. The mandate is not only addressed to the legislature to pass just and impartial laws — it is also addressed to those charged in that Act with the duty of administering it that they must not apply an Act which is not *ex facia* discriminatory, with an unequal hand or an evil eye. Unjust and discriminate administration of legislation is thus within the mischief of the prohibition against unconstitutional discrimination given by the guarantee of equal protection of law.

Art. 14 of the Indian Constitution prohibits the *State* from denying to any person equality before law or the equal protection of the laws within the territory of India. This gives rise to the fundamental rights of the citizens and other persons not to be subjected to discriminatory laws. An executive officer who discriminates unfairly pursuant to the purported performance of his duties under a law which on the face of it does not show any legislative intent to discriminate is nevertheless denying to the aggrieved person equality before law or equal protection of the law. To that extent, then, the executive officer would be guilty of violating the fundamental right of the subject. Besides, the word 'law' has been given a statutory definition in the Indian Constitution and includes even the *orders* and *notifications* "having the force of law" (see Art. 13 (3)). Consequently an order of an administrative agency would be 'law' and if it is discriminatory it is one which offends against the fundamental right guaranteed by Art. 14. It must however be pointed out that the view of the Bombay High Court under criticism has been followed in some other cases in India e.g.

(a) *Dineshcharan v. State of Madhya Bharat, AIR* (1953) *M.B.* 165;

(b) *Kanti Cotton Mills v. State of Saurashtra, AIR* (1953) *Saurashtra* 46;

(c) *Krishna Khandewal & another v. Director of Land Hiring and Disposal Eastern Command & others, AIR* (1952) *Calcutta* 16.

But it is submitted that these cases do not lay down a correct statement of the law even in India in view of the decisions of the Supreme Court in *Kathi Raning v. State of Saurashtra AIR*, (1952) *S.C.* 123; *Kedar Nath v. State of West Bengal, AIR* (1953) *S.C.* 404; *State of West Bengal v. Anwar Ali, AIR* (1952) *S.C.* 75; decisions which clearly say that the guarantee of Art. 14 includes in its purview both executive as well as legislative acts.

Nevertheless, the distinction betwen law being *ex facia* bad because *it is inconsistent with rights guaranteed by Part II of our Constitution* as opposed to the mere *administration* of that law in a manner which violates those rights is fundamental; for in the former case it is the law that is bad, and in the latter it is *only* the action complained of that will be rendered, by means of a judicial declaration, void and thus deprived of its legal force,

vested in officers under the statute the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally We can imagine that even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the State of discrimination But to our mind the position is different when a subject comes to the Court and challenges a *specific act of an individual officer* as being in contravention of Art 14 The officer in acting contrary to Art 14 is really acting contrary to the law and not in conformity with or in consonance with the law When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion *bona fide* and not dishonestly, arbitrarily or capriciously, and if he exercises the discretion dishonestly, arbitrarily or capriciously, he is really going contrary to the law In such a case the subject comes to Court not for protection under Art 14 but for protection against the dishonest, arbitrary or capricious act of the officer The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art 14 or under Art 226 We are only concerned in this case with the question as to whether the petitioner has *a right to maintain a petition against, what he chooses to call, a dishonest excercise of his discretion by an officer* There is no suggestion here that the State as a policy has laid down that licenses should be issued or quotas should be allotted not in a fair manner but in order to benefit a particular class of citizens As we said and as we repeat, the only charge, and even that is not properly or fully laid, is against respondent I, that he in exercising the discretion to allot has been swayed by certain unfair considerations

"The authorities on which Mr Pritt has relied do not support his contention that a specific *mala fide* act of an officer can be challenged by a petition in support of the

14 He has relied on two or three

has laid considerable emphasis

56, 30 *Law* Ed 220

"When we look at that case we find that what was challenged in that case was not any administrative or executive order, but an ordinance passed by the City of San Francisco which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials, and it was found that in giving consent the municipal officials had acted unfairly and that the policy of the administration was directed exclusively against a particular class of persons, viz the Chinese On those facts the Supreme Court held that though a law be fair on its face and impartial in appearance yet, if it is administered by public authority with an evil eye and unequal hand so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution Therefore, here we have a case where although the law superficially seemed to be fair and equal *in its actual administration it was found to be unfair and unequal* The other case is the case of *Tarrance v State of Florida*, (1902) 188 *U S* 572 That was

The case of Yick Wo v Hopkins reviewed

Tarrance v state of Florida

established the negroes would have been denied the protection of equality of law under the provision of the American Constitution corresponding to Art 14 It is true that in a sense what was challenged here was not any *law* but the administrative action on the part of the County Commissioners in the State of Florida who prevented negroes from being empannelled as jurors But the case is clearly distinguishable because it was not

Chotey Lal v. The State of U.P.

In support of this view reference could uselfully be made to the case of *Chotey Lal v. The State of U.P. AIR* (1951) *Allahabad* 228, where it was observed (at p.231):

"It is necessary to understand exactly how and in what circumstances courts declare laws invalid or unconstitutional. Until a bill has become law, the legislative process not being complete, courts do not come into the picture at all. It is not the function of any court or Judge to declare void or directly annul a law the moment it has been promulgated. Courts are not a supervisory body over the Legislature. Their approval or disapproval is not needed for an Act passed by the Legislature to have the force of law.

"Their function is interpretative. In other words, upon any particular case coming before them in which the right of any party is involved they decide whether the Act or any part of it is to be disregarded on the ground of its incompatibility with the Constitution."

128. Acts Void only to the extent of inconsistency—Doctrine of Severability

If any Act enacted by the legislation comes in conflict with any of the fundamental rights, it becomes void but *only to the extent of its inconsistency*. The doctrine of 'severability' expounded earlier (see p. 264-6) in connection with the study of legislative competence of the rival legislatures in Pakistan would then apply. When an Act is only partly invalid it cannot be declared *entirely invalid* if the remaining portion of the Act which is not invalid can stand by itself and is deemed sufficient to carry out the purposes of the Act. (See *Gopalan v. State of Madras, AIR* (1950) *S.C.* 27, where it was held that the declaration as to the invalidity of S. 14 of the Preventive Detention Act, 1950, did not deprive the rest of the Act or its claim to stay on the statute book. See also *State of Bihar v. Kameshwar Singh, AIR* (1952) *S.C.* 252; *Attorney-General for Alberta v. Attorney-General for Canada* (1947) *A.C.* 503 at p. 518:

"The real question" said the Privy Council in the last mentioned case, "is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all".

129. The issue whether an Act is void must be decided by reference to the provisions of the impugned Act.

A statute cannot be declared void on the ground that taken along with another statute it creates an effect which is violative of a fundamental right—unless, of course, the two statutes in their combination appear to be designed in substance to be parts of one law (*State of Madhya Pradesh v. G. C. Mandawar, AIR* (1954) *S.C.* 493). The Indian Supreme Court has observed that the power of the court to declare a law void under Art. 13 (which corresponds to our ART. 4) has to be exercised with reference to the specific legislation which is impugned. The Constitution does not allow the courts to strike down the Act of a Provincial Legislature as void on the ground that in contrast with the provisions of another statute it appears to be discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with a similar subject being held unconstitutional by making a comparative study of the provisions of the two Acts.

130. Some Fundamental Rights are for all and others only for citizens

While studing the rights that have been guaranteed under Part II of the Constitution, care must be taken to note whether the right in question *is available to a citizen* or *to a person* or *to a group of persons*, such as a community or religious sect or denomination.

and the law would continue to stay on the statute book as a valid piece of legislation This view has found favour with the Supreme Court of our country in the case of *Jibendra Kishore and others v The Province of East Pakistan PLD* (1957) S C 9 where after considering several American cases including *Yick Wo v Hopkins* (1886) 118 *US* 356, their Lordships of the Supreme Court, while dealing with the constitutionality of S 3 of the East Bengal Abolition of Zamindari Act, 1950, which had conferred unguided discretion upon the Provincial Government to acquire estates of the Zamindars observed (at p 33)

Jibendra Kishore v Province of East Pakistan

'The Act challenged in these cases is not discriminatory on the face of it because it does no more than empower the Provincial Government to acquire the interests of such rent receivers as may be specified in the notification in any district part of a district or local area and the Provincial Government could, as it has actually done so far as the present appellants are concerned, acquire the interests of all rent receivers throughout the Province at one and the same time, and if the law be as I think it is that in cases where a statute is not *ex facie* discriminatory, but is capable of being administered in a discriminatory manner, the party challenging the constitutionality of the statute must show that it has actually been administered to the detriment of a particular class and in a partial, unjust and oppressive manner the appellants case must fail because the acquisition challenged is not piecemeal but wholesale and nobody can have any occasion to complain that he or the class to which he belongs has been singled out for a discriminatory treatment " (per Munir, C J)

127 Prohibition of ART 4 cannot be enforced by means of a Writ of Mandamus to be issued to Legislature.

ART 4 also prohibits the State from enacting any law, which takes away or abridges rights conferred by this Part and declares that "any law in contravention of this clause shall, to the extent of such contravention, be void (See ART 4 clause (2)) Despite the fact that the Constitution contains an express prohibition directed against the legislative organs thereby preventing them from making any law which takes away or abridges the rights conferred by this Part, there is no known method whereby the legislature can be *prevented* from enacting laws, which are inconsistent with the fundamental rights guaranteed under the Constitution No *mandamus* can lie to compel the legislature to do or refrain from doing any act (For an unsuccessful attempt to obtain prohibition against a legislative body see *Rex v Legislative Committee of the Church Assembly Ex Parte Haynes Smith* (1928) 1 *K B* 411) Besides, when the Bill is introduced in the House it does not become an Act of the Legislature until it has actually been taken through the various stages of law making and has received the assent of the Governor if it is a Provincial law, and of the President if it is a Federal law It is thus only the completed Act of the Legislature which can be prohibited, and when the Act is actually passed it is no use prohibiting it as it can be declared void by courts Thus it is not the mere projected adventure by the Legislative Assembly which is calculated to result in the consummation of a law which purports to take away fundamental rights of the citizens that can be prohibited by courts Every Bill that is moved in the State Legislature can be opposed by any one of its members, and even if its principle is accepted it can be amended and drastically modified It would thus be worse than useless for any court, *assuming* it had the jurisdiction to issue *mandamus* to legislative bodies, to interfere with legislative process when the act of the Legislature is not complete If the Act, as it finally emerges is in conflict with the fundamental rights, it would *ipso facto* be void and can be declared as such by our courts

Rex v Legislative Committee of the Church Assembly

Chotey Lal v. The State of U.P.

In support of this view reference could usefully be made to the case of *Chotey Lal v. The State of U.P. AIR* (1951) *Allahabad* 228, where it was observed (at p.231):

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130. Some Fundamental Rights are for all and others only for citizens

While studing the rights that have been guaranteed under Part II of the Constitution, care must be taken to note whether the right in *question is available to a citizen* or *to a person* or *to a group of persons*, such as a community or religious sect or denomination.

131. Definition of "Citizen"

The word 'citizen' has been defined in ART 218 as meaning a person who i citizen of Pakistan according to the law relating to citizenship Unlike the Indian Cor tution in our Constitution the law relating to citizenship has not a constitutional status even under the Indian Constitution, in Art 11, power has been given to the Parlim to regulate the right of citizenship by law and this power includes the power to make provision with respect to the acquisition and termination of citizenship and all ot matters relating to citizenship The Indian Parliament has also the power to legis with respect to naturalization and aliens It would seem to follow from this that even definition of word 'citizen' given in ARTs 5 to 8 can be interfered with by way of ame ment at the instance of the Indian Parliament in the exercise of its ordinary law mal functions The position thus in effect in India and Pakistan with regard to the comp ence of the Federal Parliament to amend, alter and modify the law with respect to c zenship is practically the same

The Pakistan Citizenship Act, 1951, (Act II of 1951) was passed on 13th of A 1951 and contains a comprehensive statement of law on the subject of citizenship Appendix to this book) In S 3 of that Act are stated the tests by which the ques whether any person at the date of the commencement of the Pakistan Citizenship would be deemed to be a citizen of Pakistan is to be answered and S 4 ment acquisition of Pakistan citizenship by birth S 5 mentions conditions under wl citizenship by descent can be acquired and S 6 provides for cases in which citizen by migration can be acquired Power is given to the Central Government to registe 'a citizen of Pakistan by *migration*' any person who after the 13th of April 1951, before the first day of January 1952, has migrated to the territories now include Pakistan from any territory in the Indo Pakistan sub continent, out of those territo with the intention of residing permanently in those territories The Central Governm is also empowered under S 8 upon an application made to it in that behalf, to reg as a citizen of Pakistan any person who or whose father or whose father's father was l in Indo Pakistan sub continent and was ordinarily residing in a country outside Pakist the commencement of Pakistan Citizenship Act if such a *person*, unless he has l exempted, has obtained certificate of domicile Under S 9 the Central Governm is empowered *to grant* a certificate of naturalization and register him as a citize Pakistan by naturalization S 10 makes provision *with regard to the* status of mar women The Central Government has the power to deprive any person of citizen under the conditions *mentioned in* S 16 The Central Government has framed r under S 23 of the Pakistan Citizenship Act (Pakistan *Citizenship* Rules, 1952)

A citizen of Pakistan retains his *citizenship of the* Commonwealth despite the that with the coming into force of the Constitution, Pakistan becomes a Republic view of the fact that Pakistan accepts the Queen of England as the head of Commonwe of which family of nations Pakistan has elected *to remain* a member (see the declaratio the Pakistan Prime Minister) the provisions *of the* Pakistan (Consequential Provisi Act, 1956, read with S 1 of the British Nationality Act of 1948, would continue to r the citizen of Pakistan a *citizen of the* British *Commonwealth* of the Nations link with the Commonwealth has no *constitutional* basis—but has been forged by statement of the Pakistan Prime Minister referred to above (see Constituent Ass debates, 1956)

The word 'person' as used in our Constitution will have the same meaning a been given to that term in S 3 (*sub section 39*) *of the* General Clauses Act: it in l any company or association or body *of* individuals whether incorporated *or not* All

definitions under the General Clauses Act are subject to the limitation provided in S. 3 of that Act itself, namely, that the definitions in the Act are to prevail unless there is anything repugnant in the subject or context. It is obvious that a 'corporation' cannot at any rate, in a vast majority of cases, be regarded as a citizen although it is a person and whether it is or is not a person will depend upon "the intent to be gathered from the context and general purpose" of the statute in which that term has been used. In the case of *The Jupiter General Insurance Co., Ltd. v. Rajagopalan, AIR (1952) Punjab 9*, the question was whether the term 'citizen' used in Art. 19 of the Constitution of India includes a corporation and the court answered the problem by examining the language of Art. 19 and ruled that a corporation was not a citizen within the meaning of Art. 19. Similarly, the term 'person' appearing in those Articles that guarantee right to life and liberty can only have reference to natural person. Terms and expressions like "Religious Community" or "Religious denomination"; (Art. 13 (2)), "Community" (Art. 13(4)); "Religious denomination or sect thereof" (18)(b)), "*Any section of citizens having a distinct language or culture*" ; (Art. 19) will be interpreted by courts and any rights that have been conferred upon them will have to be claimed, only after evidence is led before a court that is called upon to enforce them, that such entities, in relation to the right claimed, exist and their rights or liberties have been abridged or taken away.

Jupiter-General Insurance Co. v. Rajagopalan

The foundation of a cause for the enforcement of the relevant fundamental right must be laid in a petition to the court having jurisdiction, and care must be taken to assert not only that the right in question is invaded, that is abridged or taken away, but that the person in acting or moving for the enforcement of the fundamental right is doing so because he is aggrieved by such invasion. The courts will not entertain petitions addressed to them unless all those constituent elements that go to make up the cause of action of a given petitioner in respect of the enforcement of his fundamental rights are shown to exist. And the burden to do this lies on the petitioner.

132. Analysis of Part II "Fundamental Rights"

Part II of our Constitution in its ARTS. 5 to 22 mentions the fundamental rights which are, under ART. 4, made justiciable. The enumeration of the fundamental rights in the Constitution has not been done in a scientific manner and this was obviously not possible in view of the fact that the rights guaranteed are in some cases qualified and cover a ground which cannot be demarcated with precision in an attempt to avoid overlapping. It would be helpful if, for the purpose of the present study, we follow the following plan :

Section (1) Right to Equality

Some rights may well be regarded as more appropriately covered by the caption "Prohibition against discrimination". In this category fall the following :—

Right of Equality

(a) All citizens are equal before law and are entitled to equal protection of law. (ART. 5 (1).)

The formulation of this right is the equivalent of the prohibition, namely, that there is no *discrimination between citizens and citizens* who are all equal before law; nor can discrimination be made in the matter of making law, for, "all are entitled to the equal protection of law".

(b) The citizen's right not to be discriminated against on the ground only of race, religion, caste, sex or place of birth in respect of obtaining access to places of public entertainment and resort not intended for religious purposes only. This right is subject to any special provision which is made for women. (See ART, 14).

31. Definition of "Citizen"

The word 'citizen has been defined in ART 218 as meaning a person who is a tizen of Pakistan according to the law relating to citizenship Unlike the Indian Consti tion, in our Constitution the law relating to citizenship has not a constitutional status But en under the Indian Constitution in Art 11 power has been given to the Parliament regulate the right of citizenship by law and this power includes the power to make any ovision with respect to the acquisition and termination of citizenship and all other atters relating to citizenship The Indian Parliament has also the power to legislate ith respect to naturalization and aliens It would seem to follow from this that even the finition of word 'citizen given in ARTs 5 to 8 can be interfered with by way of amend ent at the instance of the Indian Parliament in the exercise of its ordinary law making nctions The position thus in effect in India and Pakistan with regard to the compet nce of the Federal Parliament to amend alter and modify the law with respect to citi nship is practically the same

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Pakistan Citizenship Act 1951

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Definition of Person

dispose of property

(b) to any reasonable restrictions imposed by law in the public interest. This right is also available only to citizens. (See ART. 11 (b)).

Freedom to Trade or Practise a Profession

(f) Every citizen, duly qualified, has a right to enter upon any lawful profession or occupation subject to such qualifications as may be prescribed by law in relation to that profession or occupation, and every citizen has a right to conduct any lawful trade or business. These rights are guaranteed subject to:

(i) the regulation of any trade or profession by licencing system, or,

(ii) the carrying of by the Federal or Provincial Government or by a corporation controlled by any such Government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons. (See ART. 12).

Freedom of Religious Belief and Practice

(g) (i) Right of *a person* attending any educational institution to refuse receiving religious instructions or to take part in any religious ceremony or attend religious worship other than one's own religion. (See ART. 13(1)).

(ii) Right of citizen to profess, practise and propagate any religion subject to law, public order and morality. (See ART. 18 (a)).

(iii) Right of the members of a religious community or denomination to provide religious instructions to the pupils of that community or denomination in the religious institutions maintained wholly by them. (See ART. 13 (2)).

(iv) The right of every religious denomination and every sect thereof is guaranteed *subject to law, public order, morality* to establish, maintain and manage its religious institutions. [See Arr. 18 (b)].

Right to Status as a Free Citizen

(h) No person shall be held in slavery [(See ART. 16 (1)].

Prohibition against Forced Labour

(i) Subject to the State requiring compulsory service for public purposes, all forms of forced labour are prohibited by the Constitution [See ART. 16(2)].

Right to maintain distinct culture etc.

(j) The right to maintain their distinct culture, language, script is guaranteed to "any section of citizens having distinct language, script or culture". [See ART .19)].

Section (iii) Constitutional Limitation on the State Action in regard to deprivation of Life and Liberty and Property of Persons in Pakistan

Right to the Rule of Law

(1) Right of persons (both resident citizens and non-resident citizens) not to be deprived of *life, liberty* or *property* save in accordance with law. (See ARTs. 15 (1) add 5 (2)).

Limitation on the State action and the making of Law relating to Compulsory Acquisition or taking of Property (ART. 15)

(2) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given. [See Art. 15 (2)]

Nothing in this Article (Art. 15) shall affect the validity of—

(a) any existing law, or

(b) any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health, or

(c) any law relating to the administration or acquisition of any property which is or is deemed to be evacuee property under any law, or

(d) any law providing for the taking over by the State for a limited period of the management of any property for the benefit of its owner.

(c) Citizen's right not to be discriminated against in the matter of securing admission to any educational institution receiving aid from public revenue on the ground only of *race*, religion, caste or place of birth [See ART 13(3)] This right is available subject to any provision that may be made by any public authority for the advancement of any socially or educationally backward class of citizens

(d) No community (consisting of citizens or non citizen residents) can be discriminated against in respect of the grant of tax exemption or concession to any religious institution [See ART 13(4)]

(e) Right of a resident in Pakistan not to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own (se ART 21)

(f) The State is not to discriminate in the matter of extending recognition to religious institutions established by religious communities or denominations on the ground that the management of such institution vests in that community or denomination *This right is not restricted to citizens only This is equivalent* to saying that every religious community has a right to establish and maintain religious institutions of its own choice and the State is prohibited from refusing recognition to them on the ground that such institutions are being maintained by a certain religious community or denomination [See ART 13(5)]

(g) Right of residents in Pakistan not to be discriminated against on the ground of religious prejudice relating to any one being considered as unworthy of social intercourse merely because he is low born This right flows from the mandate relating to the abolition of untouchability and a direction to the legislature to declare its practice an offence (See ART 20)

(h)

Day, posts may be reserved for persons belonging to a class or area to secure their adequate representation in the service of Pakistan and further that in the interest of the said Service specified positions in the Service may be reserved for members of either sex (See ART 17)

Section (ii) Liberties, (Rights Guaranteeing Freedom to Citizens)

(a) — Freedom of Speech

(b) Citizen's right to assemble peacefully and without arms is guaranteed subject to any reasonable restrictions imposed by law in the interest of public order (ART 9) — Freedom of Assembly

(c) Citizen's right to form associations or unions, subject to reasonable restrictions imposed by law in the interests of morality or public order (ART 10) — Freedom of Association

(d) *Pakistan and to reside and settle in any part* sonable restrictions imposed by law in — Freedom of Movement

(e) Freedom to acquire, hold and dispose of property is available subject (a) to the right of State to acquire property in the manner provided for in ART 15,—and — Freedom to acquire and hold and

Right to Equality in favour of citizens

Confining our attention to the first clause of ART. 5, we notice that the right to equality is affirmed only in favour of the citizens. The non-citizen resident within the territory of Pakistan cannot claim benefit of this right. In India, however, in Art. 14, it is provided, "The State shall not deny to any *person* equality before the law or the equal protection of the laws within the territory of India." The right to equality in India is available to citizens and non-citizens alike and the right has been so worded as to impose a clear prohibition on the *State* "not to deny to any person equality before law or the equal protection of laws" If judicial authorities are covered by the definition of the term 'State' in India, even the judicial procedure must conform to the concept of equality—the right to which has been constitutionally guaranteed—that is to say, the courts must regard all persons being subject to the ordinary law of the land and they should not regard any person or class of persons as being exempt from obedience to law.

The term "State" does not occur in ART. 5

But under our Constitution we need not speculate about the conduct of judiciary being subject to the exercise of the constitutional right of equality, affirmed in favour of citizens, that is of their equality before law and their entitlement to equal protection of law; and this, for the simple reason that the word 'State' is no part of the clause relating to equality in the Article in question.

What are the juristic implications of the expression "All citizens are equal before law" and in what essential particulars do they differ from the ideas underlying the expression "All citizens are entitled to the equal protection of law"?

V. G. Row v. State of Madras

In the case of *V. G. Row v. State of Madras AIR* (1951) *Madras* 147, this question was posed before the Full Bench that decided the case, and Mr. Justice Satyanarayana Rao, while dealing with the interpretation of the Indian Art. 14, stated (at p. 158):

"This Article, in my opinion, relates to two different concepts. One is 'equality before the law' and the second 'equal protection of the laws'. Two obligations are cast upon the State, that is, to secure to a person equality before the law and also to give equal protection of the laws to the person. The expression 'equality before the law' is not used in the American Constitution, though 'equal protection of the laws' occurs in the 14th Amendment. The expression 'due process of law' is used in a more elastic sense as to include equality before the law and also equal protection of the laws. Though in the 5th Amendment of the American Constitution, equal protection of the laws is not specifically mentioned it is specifically stated, however, in the 14th Amendment as it was thought that there should be an implication in that direction so far as the State legislation was concerned. Prof. Dicey in his Law of the Constitution treats 'equality before the law' as one of the three meanings of the expression 'rule of law' which formed the fundamental principle of the English Constitution. He defines it at p. 202, 9th Edn. as meaning :

'The equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts; the rule 'of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (droit administratif) or the 'administrative tribunals' (tribunaux administratifs) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England and indeed is fundamentally inconsistent with our traditions and customs.'

"In other words, this expression implies in my opinion that the Legislature should

In clauses (2) and (3), of Art 15, "property" shall mean immovable property, or any commercial or industrial undertaking, or any interest in any such undertaking "

(3) (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice

Limitation on State Action on the making of Law relating to Arrest and Detention (ART 7)

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply to any person—

(a) who for the time being is an enemy alien, or

(b) who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a *representation against the order* "

(4) No person shall be punished for an act "which was not punishable by law when the act was done, nor shall any person be subjected to a punishment greater than that prescribed by law for an offence when the offence was committed "

Limitation on State-act on on the making of Penal Laws (ART 6)

on (iv) *Enforcement of Fundamental Right—Constitutional Remedies*

Right to constitutional remedies for the enforcement of fundamental rights (See Ts 22 and 170)

(Sections 1 to 3 are dealt with in this Chapter and as the problems presented by study of "Constitutional remedies" fall into a class by themselves, the 4th Section of analysis, has been separately dealt with in Chapter VI)

Section (1)—Right to equality

. A Comment on ART. 5. Right to Equality

ART 5 of our Constitution consists of two clauses, the first of which enjoins "All zens are equal before law and are entitled to equal protection of law", and the second ch is completely unconnected with the first is, "No person shall be deprived of life or rty save in accordance with law " Similarly, in ART 15(1) we have, "No person l be deprived of his *property* save in accordance with law " The combined effect of T 5(2) and ART 15(1) is to establish that right to life, liberty and property can only taken away under the sanction of a constitutionally valid law But of this aspect of rule law we will deal with a little later (See Section III of our anaylsis at p 393 seq)

for discriminatory treatment they would be acting counter to the ideal of equality before law which has been proclaimed by the framers of the Constitution in the first part of the clause of ART. 5—an Article which declares that all citizens are equal before law.

Right to equality available only to citizens.

Why this right of equality was made available only to citizens appears to be incomprehensible, for all individuals who are to be found within the territories of Pakistan, (quite apart from recognising the well-known exceptions laid down by International Law in favour of diplomatic and consular representatives from foreign sovereign States), should be considered equal before law. Law is no respecter of persons. This idea is fundamental to the life of a republican polity and is the corner-stone on which the superstructure of law and order of all the civilised States in the modern world has been reared across the course of the last four hundred years or so.

What, however, complicates the question relating to the interpretation of the first clause of ART. 5 is the juxtaposition in which this right to being considered equal before law is asserted: in the first place, is entitlement to equal protection of law a species of a wider legal injunction which says that all citizens are equal before law? How can citizens be considered equal before law if they are not to receive equal protection from the law? On this point the Irish Constitution offers a more explicit statement of the concept of equality which is relevant for the purpose of jurisprudence. It says in Article 40 as follows:

"All citizens shall, as human persons, be held equal before the law.

"This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

In this statement the Irish Constitution affirms the notion of equality before law but also proceeds to limit the operation of that guarantee in the field of law-making activity by expressly enjoining upon the legislature to have due regard to differences of capacity, physical and moral, and of social function.

The interpretation of the Article is likely to be influenced by American concepts

We have no such limiting provision in our Constitution and the expression 'equal protection of laws' is likely to be interpreted in the light of American constitutional provisions contained in its 14th Amendment. The American decisions that have a bearing on the interpretation of the 'due process' clause of the 5th Amendment and 'equal protection of law' in the 14th Amendment have frequently been referred to in India and there is no denying the fact that they appear to have influenced, to a considerable extent, the interpretation of Art. 14 of the Indian Constitution. The argument in support of taking guidance from the American decisions in India has been that the framers of the Indian Constitution were influenced by the enunciation of the American principle of 'equal protection of laws' and they must be presumed to have intended that the interpretation bestowed on that clause by the American courts was the one which was to be followed in India.

Distinction between Language of 14th Amendment and our Articles

There is, however, an important distinction between the two American Amendments referred to above and the formulation of the Indian Art 14 as even of Article 5 of our Constitution relating to 'equality before law' and 'equal protection of laws.' The point of this distinction, it is submitted with respect, ought to be borne in view for it might be of some relevance in the matter of securing correct interpretation of the relevant Articles.

134. The 14th and the 5th Amendments of the U.S. Constitution

The 'due process' clause of the 5th Amendment was specifically confined to limiting the exercise of federal power: in fact, it was a prohibition directed against the exercise of federal authority: in this Amendment it was ordained that no one shall be deprived of life, liberty or property without due process of law, nor "shall private property be taken for public use without just compensation". The 14th Amendment imposes a prohibition on the State power: "Nor shall any State . . . deny to any person within its jurisdiction equal protection of laws." *The assertion that all men are equal before law does not find a place in the*

not make a distinction between the rich and the poor, official and non officials, and make discrimination on any other basis between one subject and the other"

In yet another Madras case, *In re B N Ramakrishna AIR (1955) Madras 100*, it was observed (at p 104) — In re B N Ramakrishna

"Equality before law means that among equals the law should be equal and should be equally administered and that the like should be treated alike Hence, equality before the law does not mean that things which are different shall be treated as though they were the same What it does mean is the denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land"

It is important to remember that under our Constitution the two ideas 'equality before law', and 'equal protection of law' have been put in one and the same clause of ART 5 If 'eqality before law' is to be the ideal for legislature to attain, it may come in conflict with the notion of 'equal protection of law'—for in a society which is riddled with inequalities of all kinds to insist upon rigid adherence to 'equal protection of law' might, in effect, mean perpetuation of just the sort of inequality which the framers of our Constitution set out to eradicate 'Equality before law' therefore can have no content other than the one which is compatible with the due maintenance of the guarantee of 'equal protection of law' — Equality before Law and Equal Protection of Law—The whole ART must be read so as to reconcile the two

There are, let us note, various kinds of inequalities, inequality emanating for example — Notion of inequality

given country and thus inevitably involves the deprivation of the right of the people to participate in the political life of the State The ideal of political equality can only be realised by universal suffrage and free participation in the representative institutions by recourse to which modern democratic states are functioning Similarly there is such a thing as social inequality the growth of humanism has brought about the liberation of people from the thraldom of slavery and the evil of untouchability and such other social abominable practices which deprive people of an honourable place as free citizens in a democratic society To this list of inequalities might be added the inequality which results from racial pride this, again, finds its culmination in the dogma that only those who have blue blood in their veins are capable of taking part in the political, civic and economic activities of the State

Now, it is submitted that the expression 'equality before law' does not directly involve anything more than the idea that there will be within the State *equal administration of justice* This principle does not necessarily assume that men are, in any tangible way alike, but it insists that in the administration of justice between man and man law should not discriminate That all citizens are equal before law, is an injunction which taken by itself appears to be addressed, not so much to the legislature as to those who are charged with the duty of administering the law and represents more of an ideal than a realistic appraisal of the existing inequality which is discoverable in the economic, social and political condition of our national life

Historically considered, the notion of human equality has arisen as a protest against the practice of magnifying artificial distinctions between man and man based on considerations like wealth, purity of blood and religious superstition and making these as *criteria* for determining the status of each individual in the total legal order If the judicial administrative organs of the State while applying the law were to discriminate between man and man and exercise what may be characterised as arbitrary authority in singling out some persons

whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law',—are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment (i.e. 14th Amendment) were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process . . . ."

In his dissenting Judgment Mr. Justice Holmes voiced his protest against the view taken by the majority, observing that (p. 342) :

"The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . Delusive exactness is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value, and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct; and, like other conduct, is subject to substantial modification according to time and circumstances, both in itself and in regard to what shall justify doing it a harm. . . .

"I think, further, that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by this Court. And especially I think that, without legalizing the conduct complained of, the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere, I can feel no doubt of the power of the legislature to deny it in such cases . . . .

"I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. I agree with the more elaborate expositions of my brothers Pitney and Brandeis, and in their conclusion that the judgment should be affirmed."

Equal Protection of Laws-and the question of classification Lindsley v. Natural Carbonic Gas Co.

The principles bearing on the question of constitutionally permissible legislative classification have been summarised in the case of *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 *U.S.*61 *at* 78: 55 *Law Ed.* 369 *at p.* 377 :—

"1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend againt that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the

American Constitution, although it is only too true to say that the whole system of the American Constitution and the law is based upon it, and what is more the fundamental generalisation as to the equality of all men is contained in the Declaration of Independence

The course of the judicial interpretation of these two Amendments has not been a consistent one and the emphasis which came to be placed upon the due process clause is admittedly a belated phenomenon in the development of American constitutional interpretation.

Justice Miller in the case of *Davidson v Board of Administrators of New Orleans*, (1878) 96 *U S* 97 24 Law Ed 616, complained about the undesirable manner in which the guarantee of the 14th Amendment, which was designed to protect the negro, was being stretched to cover cases of the abstract opinions of every unsuccessful litigant Said he (p 103)

> "It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion But while it has been a part of the Constitution as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment In fact, it would seem from the character of many of the cases before us, and the arguments made in them that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded '

In the case of *Smyth v A*
the requirement as to due proc
the equal protection of laws
two ideas, that is, the one relating to due process clause and the other concerning equal protection of laws clause but there is no unanimity as yet upon the point, as to precisely what is the ruling judicial opinion on this much vexed question Justice Taft in his opinion in *Truax v Corrigan* (1921) 257 *U S* 312 66 Law Ed 254 observed (at p 332)

> "It may be that they (two prohibitions) overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not con terminus The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative and judical powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment, and so does not apply to congressional legislation The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold Our

known. They put forward their own attorneys as candidates for office; they donated funds to political parties; they backed this or that faction in the state legislature. Sometimes less scrupulous industrial leaders resorted to bribery. The eighties and nineties saw a new low in the moral level of the American state legislature. That the seats of assemblymen in Harrisburg or Albany were often for sale was a matter of common knowledge. From the point of view of business these tactics, whether or not they remained within the scope of orthodox political morality, were a matter of practical necessity. State interference with industry might be dangerous. Therefore the state government must be kept out of hostile hands...The judiciary could hardly be expected to remain immune to the 'big business' conception of the role of government in society. Judges, then as now, usually reached their positions through the legal profession. The philosophy of the legal profession, as always, was generally colored by the interests and attitudes of the men it most often represented—that is, industrialists, bankers, and railroad men. The path of corporation lawyers to the bench in the two generations after the Civil War was made easier by the fact that the Republican Party controlled the presidency for all but two administrations between 1868 and 1912. The Republican Party was for the most part a party of big business, and the men its Presidents appointed to the bench were most often corporation lawyers by training. Thus, it is not surprising that the attitude of the Supreme Court, as well as that of the Federal and state judiciaries in general, began to reflect the economic and social attitudes of big business. Judges of this background might be expected to interpret the Constitution in the light of the laissez-faire economic philosophy and to regard the Constitution and the judiciary as bulwarks of property. They did not disappoint these expectations."

The moral of the foregoing reflections on the course of American interpretation of 5th and 14th Amendments may be summed up as follows :

(1) There is no clear-cut distinction between the scope of the 'due process' clause and the 'equal protection of law' clause and that the one has influenced the other and in main it would appear that 'equal protection of laws' clause has been construed as containing a guarantee which was implicit in the due process clause but had to be specifically affirmed due to the desire to accord to the newly liberated Negro citizens some protection against arbitrary action.

(2) That the content of these two clauses appears to have received diverse interpretations from the Supreme Court less as a result of realization by that court of the constitutional significance of these clauses but more out of its deference to the prevailing economic, political and social ideas of the time.

The Indian interpretation has been unduly influenced by the American decisions.

If we now turn to some of the observations contained in the Indian decisions by the learned Judges who have attempted to construe and apply the provisions of Art. 14, it is interesting to discover that they have taken American decisions as though they were infallible guides, nay invincible oracles—and not as mere transient notes in the grand symphony of the case-law that has been produced by the last 180 years of judicial interpretation under the stress and impact of factors and forces that could not be said to have been within the prevision of those who were the authors of American Constitution. It is for this reason that Shearer J, for instance in the case of *Kameshwar Singh v. State of Bihar AIR* (1951) *Patna* 91, finds it difficult to understand why Art. 14 was at all put in the Indian Constitution. Said he (p. 99):

Kameshwar Singh v. State of Bihar

"I must confess that I have found it difficult to understand and have been unable to discover, why Article 14 was inserted in the Constitution. So far as I am aware, there was, in 1950, no class of persons anywhere in India who were subjected to such discrimination before the law, as, in 1867, the victorious Northern States apprehended

time the law was enacted must be assumed 4 One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary"

Fourteenth amendment—its History and purpose

From the foregoing account it would appear that the interpretation of the 14th Amendment has a history to it and it is wise never to forget the reasons that prompted its incorporation in the Constitution The idea was to protect the newly acquired political and legal rights of Negroes against arbitrary State action ' There is little evidence", say *Kelly and Harbinson* in their famous '*American Constitution*—its Origin and Development,' (1955) Edition,

"that the statesmen who wrote the amendment were interested in bringing about the intervention of the Federal Government in the protection of vested rights Certainly there was nothing to indicate in their time that the due process clause of the *14th Amendment was destined to become one of the most important* corner stone of modern Constitutional Law"

Before 1868 when the 14th Amendment became a part of the American Constitution, by and large, at least till 1850 the due process clause of the 5th Amendment was interpreted as a clog of a qualifid character upon the Federal power It was construed by the Supreme Court as guaranteeing certain protected rights to persons before they could be deprived of life, liberty and property An examination of the case law on this point would amply show that the 'due process of law' clause upto that time at least was of significance primarily in criminal cases and the substantive conception of due process, although it appears to have influenced the minds of some of the Judges of the Supreme

in the way it did subsequent to 1870

nstitutional historians to account for the way

es began steadily to lend its support to the substantive conception of the due process clause It is important to bear these outstanding facts of American constitutional history in mind while the case law of that country is being appreciated by our Courts in an endeavour to derive the benefit of the wisdom which has flowed from the Supreme Court in the several decisions which it has given on the construction of the due process and equality clauses of the 5th and 14th Amendments In the background of these decisions lie 170 years of the economic and political forces that have shaped the course of judicial interpretation of these two Amendments and the considerations that have ultimately prevailed are now frankly being acknowledged by the apologists of the decisions of the Supreme Court on this count to be due less to the logic of strict adherance to judicial interpretation and more due to the pressure of political and economic conditions of the American Social History The growth of the conception of substantive due process has been explained by appeal to several factors And some of these, according to Kelly and Harbinson, are (p 509)

"First, the whole spirit of the times was against extensive state regulation of the new economic life in America American industry seemed to be doing very well indeed for itself without the necessity for any governmental interference Most of America was profiting in one way or another by the tremendous rise in industrial wealth and productive power True, a few industries and a few men associated with them were amassing fortunes beyond the comprehension of the average person, but the great

ment The modern idea of the service state had not yet arisen

"American industry had always been in politics to some degree After 1880, however, industry and the railroads went into state politics to an extent hitherto un

known. They put forward their own attorneys as candidates for office; they donated funds to political parties; they backed this or that faction in the state legislature. Sometimes less scrupulous industrial leaders resorted to bribery. The eighties and nineties saw a new low in the moral level of the American state legislature. That the seats of assemblymen in Harrisburg or Albany were often for sale was a matter of common knowledge. From the point of view of business these tactics, whether or not they remained within the scope of orthodox political morality, were a matter of practical necessity. State interference with industry might be dangerous. Therefore the state government must be kept out of hostile hands...The judiciary could hardly be expected to remain immune to the 'big business' conception of the role of government in society. Judges, then as now, usually reached their positions through the legal profession. The philosophy of the legal profession, as always, was generally colored by the interests and attitudes of the men it most often represented—that is, industrialists, bankers, and railroad men. The path of corporation lawyers to the bench in the two generations after the Civil War was made easier by the fact that the Republican Party controlled the presidency for all but two administrations between 1868 and 1912. The Republican Party was for the most part a party of big business, and the men its Presidents appointed to the bench were most often corporation lawyers by training. Thus, it is not surprising that the attitude of the Supreme Court, as well as that of the Federal and state judiciaries in general, began to reflect the economic and social attitudes of big business. Judges of this background might be expected to interpret the Constitution in the light of the *laissez-faire economic philosophy and to regard the Constitution and the judiciary* as bulwarks of property. They did not disappoint these expectations."

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the negro population · rticle 14 occurs at the beginning of heading 'Right to Equality' and, havi been disposed myself to think that what the makers of the Constitution had in mind were potential evils of the mind which the American people aimed at when they adopted the fourteenth amendment There are a number of articles in the Constitution which rather express the ideals of the makers than aim at existing evils or evils which are likely to arise The Supreme Court has, however, given to the article the extended interpretation which has been put on the fourteenth amendment in modern times in America I am bound by that decision and am constrained to hold that the impugned Act is unconstitutional as it transgresses Article 14 ''

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But before we deal with the Indian cases in an attempt to illustrate the point of the guarantee of ilosopher Judge, *e of West Bengal v Anwar Ali*, *AIR* (1952) S C 75, Says the learned Judge (at 101)

Views of Bose J of the indian Supreme Court

''We are concerned here with Art 14 of the Constitution and in particular with the words 'equality before the law' and 'equal protection of the laws' Now I yield to none in my insistence that plain unambiguous words in a Statute, or in the Constitution, must having regard to the context, be interpreted according to their ordinary meaning and be given full effect But that predicates a position where the words are plain and unambiguous I am clear that that is not the case here

''Take first the words 'equality before the law' It is to be observed that equality in the abstract is not guaranteed but only equality before the law That at once leads to the question, what is the law, and whether 'the law' does not draw distinctions between man and man and make for inequalities in the sense of differentiation? One has only to look to the differing personal laws which are applied daily to see that it does to trusts and foundations from which only one particular race or community may benefit, to places of worship from which all but members of a particular faith are excluded, to cemeteries and towers of silence which none but the faithful may use, to the laws of property, marriage and divorce All that is part and parcel of the law of the land and equality before it in any literal sense is impossible unless these laws are swept away but that is not what the Constitution says, for, these very laws are preserved and along with equality before the law is also guranteed the right to the practice of one's faith

''Then, again, what does 'equality' mean? All men are not alike Some are rich and some are poor Some by the mere accident of birth inherit riches, others are born to poverty There are differences in social standing and economic status High sounding phrases cannot alter such fundamental facts It is, therefore, impossible to apply rules of abstract equality to conditions which predicate inequality from the start, and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of a constitution are not mathematical formulae which have their essence in mere form They constitute a frame work of Government written for men of fundamentally differing opinions and written as much for the future as the present They

are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready made generalisations like classification. I have no doubt those tests serve as a rough and ready guide in some cases but they are not the only tests, nor are they the true tests on a final analysis."

The learned Judge thereafter considers the question relating to classification, class legislation, discrimination and comes to theconclusion that the good faith of the legislature in the matter of legislation is not relevant if the Statute is discriminatory.

"I have no doubt", says the learned Judge, "that the motive, except in rare cases, is beyond reproach and were it not for the fact that the Constitution demands equality of treatment these laws would, in my opinion, be valid. But that apart. What material have we for delving into the mind of a legislature?" (p. 102)

The learned Judge then proceeds to observe that there may be cases where there is utmost good faith and classification, scientific and rational and yet the law be invalid.

"Let us take an imaginary case", says he, "in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their substandard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like Art. 14 into a concrete concept. Even in England, where Parliament is supreme, that is inevitable, for, as Dicey tells us in his Law of the Constitution:

> 'Parliament is the supreme legislator, but from the moment Parliament has uttered its will as law-giver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the House of Parliament, if the Houses were called upon to interpret their own enactments.'

"This, however, does not mean that judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a narrow margin within which judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks

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Turning now to the decisions of the Supreme Court of India, one finds that there oo, a well marked shift in the emphasis on the scope of Art 14, as originally defined by it s observable The Supreme … his Article in the determinati … aken a somewhat rigorous a … espect, a more *tough* attitude to this Article

A study of the ind an deci s on shows a marked change in the interpretation of Art 14

But before we deal with the Indian cases in an attempt to illustrate the point of the foregoing remarks, let us note a somewhat novel mode of applying the guarantee of equal protection of law that has been suggested by that erudite and philosopher Judge, Bose J, in a dissenting judgment delivered by him in the case of *State of West Bengal v Anwar Ali, AIR* (1952) S C 75, Says the learned Judge (at 101)

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"We are concerned here with Art 14 of the Constitution and in particular with the words 'equality before the law' and 'equal protection of the laws Now I yield to none in my insistence that plain unambiguous words in a Statute, or in the Constitution, must having regard to the context, be interpreted according to their ordinary meaning and be given full effect But that predicates a position where the words are plain and unambiguous I am clear that that is not the case here

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"Then, again, what does 'equality' mean? All men are not alike Some are rich and some are poor Some by the mere accident of birth inherit riches, others are born to poverty There are differences in social standing and economic status High sounding phrases cannot alter such fundamental facts It is, therefore, impossible to apply rules of abstract equality to conditions which predicate inequality from the start, and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of a constitution are not mathematical formulae which have their essence in mere form They constitute a frame work of Government written for men of fundamentally differing opinions and written as much for the future as the present They

can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the 'legal precepts which are actually recognised and applied in the tribunals of a given time and place' but 'the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise them.' (Dean Pound in 34 Harvard Law Review 449 at 452).

"I grant that this means that the same things will be viewed differently at different times. What is considered right and proper in a given set of circumstances will be considered improper in another age and *vice versa*. But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.

"This is no new or startling doctrine. It is just what happened in the cases of blasphemy and sedition in England. Lord Summer has explained this in *Bowman v. Secular Society* (1917) *A.C.* 406 *at pp* 454, 466, 467 *and the Federal Court in Niharendu Dutt v. Emperor,* 1942 *F.C.R.* 38 *at p.* 42 *and so did Puranik J. and I in the Nagpur High Caurt in Bhagwati Charan v. Provincial Govt. C.P. and Berar, I.L.R.* (1946) *Nag.* 865 *at pp.* 878 *and* 879."

This virtually means that judges must act as jurors and give not a legal decision but a verdict on the question wether the guarantee of the equal protection of law has been violated.

What then is to be the attitude of our Courts in the matter of construing ART. 5? What is to happen if in the judgment of the Court the concept of equality before law as an ideal to be attained gets frustrated, if the guarantee of the equal protection of law clause is to be rigidly adhered to? Even if we were to say, following the long line of decisions in America that, what this Article is calculated to forbid is discrimination or "class legislation" but that it does not forbid reasonable classification, we cannot lose sight of the observations of Brewer J. in the case of *Atchison, Topeka and Santa Fe. Railroad Co., v. Matthews* (1899) 174 *U.S.* 96 at p. 106 : 43 Law. Ed. 909 at 913 :—

Atchison, Topeka and Santa Fe Railroad Co v. Matthews

"It is the essence of a classification", says the learned Judge, "that upon the class are cast duties and burdens different from those resting upon the general public . . . Indeed, *the very idea of classification is that of inequality* so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.".

Connolly v. Union Sewer Pipe Co.

So also McKenna J. in his dissenting opinion in *Connolly v. Union Sewer Pipe Co.* (1902) 184 *U.S.* 540 at pp. 566-568 : 46 Law. Ed. 679 at 692 observed:

"It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradition disappears; . . . Government is not a simple thing. It encounters and must deal with the prolems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. . . . . classification based on those relations need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore it has been repeatedly declared that classification is justified, if it is not palpably arbitrary."

A test for judging an Act being [dis]criminatory

The test for adjudging a given law as being discriminatory was formed by Patanjali Sastri, Chief Justice of Supreme Court of India, in a minority judgment delievered in the case of *State of West Bengal v. Anwar Ali AIR* (1952) *S.C.* 75, at p. 79 as follows:

the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it

"I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way It was gradually added to as each concrete case arose and a decision was given *ad hoc* on the facts of that particular case It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what was the law applicable to that particular case But though they did not purport to make the law and merely applied what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision, nor indeed is it necessary to travel as far afield Much of the existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision They cannot, in my judgment, be enunciated in static form by hide bound rules and arbitrarily applied standards or tests

"I find it impossible to read these portions of the Constitution without regard to the background out of which they arose I cannot blot out their history and omit from consideration the brooding spirit of the times They are not just dull lifeless words static and hide bound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs I feel therefore that in each case judge must look straight into the heart of things and regard the facts of each case concretely much as a jury would do, and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact Do these 'laws' which have been called in question offend a still greater law before which even they must bow?

"Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of the sovereign democratic republic as seen through Indian eyes There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinance promulgated in haste because of what was then felt to be the urgent necessities of the moment With out casting the slightest reflection on the judges and the Courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary Courts, many were acquitted, many who had been sentenced to death were absolved That was not the fault of the judges but of the imperfect tools with which they were compelled to work The whole proceedings were repugnant to the peoples of this land and, to my mind Article 14 is but a reflex of this mood

"What I am concerned to see is not whether there is absolute equality in any acade-

tion of the laws has been invoked upon more occasions than any other constitutional guarantee, with the possible exception of the due process of law guarantee, also contained in the Fourteenth Amendment, no rule has yet been formulated by the Supreme Court as to what may be regarded as a denial of the 'equal protection of the laws' that will embrace every case and the application of the principle has always depended on the facts of each case as it came before the Court. But notwithstanding the disinclination of the Court to give an all-inclusive definition of the expression, some broad propositions as to its meaning have been enunciated. One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization more frequently stated is that the guarantee of equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification of persons or things is in no way repugnant to the equality doctrine provided the classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation. It is not for the Courts in such cases, it is said, to demand from the legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant considerations, such as differences in race, colour or religion will certainly be rejected by the Courts. Applying these tests to the present case, it cannot but be held that if in consequence of abolishing the system of private rent for agricultural land, it also became necessary to make some provision for the outgoing landlords, the classification of the landlords on the basis of their net incomes at the time of their expropriation was a necessary and not an unreasonable classification."

The principle laid down was explained in a later case by the Lordships of the Supreme Court. This was the case (*Waris Meah v. The State*, *PLD* (1957) *S.C.* 157) in which the question of the validity of Foreign Exchange Regulation (Amendment) Act XXXII of 1956 was considered: the argument against its validity was that inasmuch as three tribunals were brought into existence by the impugned legislation, (namely (1) the ordinary criminal courts functioning under the Code of Criminal Procedure, (2) the Tribunal, and (3) the Adjudication Officer), and that law had not provided *any guidance* to any authority as to the basis upon which offenders could be tried in any one of these three forums, the impugned law contravened the guarantee of equal protection of laws given by ART. 5 of the Constitution. The Court found the impuged Act *ex facie* discriminatory because (at p. 167):

"Three tribunals with different powers and procedures have been set up. The Act creating them contains no indication as to which class or classes of cases are to go before a Court and which before the Tribunal and the Adjudication Officer, and it does not impose upon the Central Government the obligation, or expressly confer on it the power, of making rules with a view to classifying the cases to be tried by each of these tribunals. Nor does it define the principle or policy on which such classification may be made by the Central Government or the State Bank.

"The Central Government has not exercised its power of issuing any directions to the State Bank or of making any rules under section 27 for carrying into effect the provisions of the Act. The result, therefore, is that in the present state of the law no person who is alleged to have contravened any provision of the Act can know by which Court he is to be tried, and the question whether on conviction he shall be punished with imprisonment

"First, it has to be seen whether it observes equality between all the persons on whom it is to operate An affirmative finding on the point may not, however, be decisive of the issue If the impugned legislation is a special law applicable only to a certain class of persons, the Court must further enquire whether the classification is founded on a reasonable basis having regard to the object to be attained or is arbitrary Thus, the reasonableness of classification comes into question only in those cases where special *legislation affecting a class of persons is challenged as discriminatory* But *there are* other types of legislation, such as, for instance the Land Acquisition Act, which do not rest on classification, and no question of reassonable classification could fairly arise in respect of such enactments Nor obviously could it arise when executive orders or notifications directed against individual citizens are assailed as discriminatory "

The learned Chief Justice of India felt that the view of the law taken by him was in accord with the trend of decisions in America which has had to lean strongly towards sustaining state action both in the legislative and in the administrative spheres based on hostile discrimination

Jibendra K shore v Province of East Pakistan

Our Supreme Court in the case of *Jibendra Kishore and others v The Province of East Pakistan, PLD* (1957) *S C* 9 has interpreted the provisions of ART 5 of our Constitution The full facts of the case appear in a comment on ART 15 in this book at page 418 but it would be sufficient for the purpose of presenting the view of the Supreme Court upon this point merely to say that the argument at the bar with reference to which the application of ART 5 was invoked was the following S 37 of the East Bengal State Acquisition Act of 1950 had classified rent receivers according to the quantum of net annual income received by them and had proceeded to award compensation to them in an inverse ascending *scale* The contention was that S *37 offended against the guarantee of 'equal protection of* law' in that it provided different rates of compensation for rent receivers with different amounts of net income After reviewing the law, as it is stated in some of the well known American decisions, the Chief Justice proceeded to deal with the objection (at p 37)

" I have little doubt in holding that the classification of rent receivers adopted by the Act is justified I do not base this opinion on Article 29 of the Constitution which states one of the directive principles of State policy to be

'(2) to secure the well being of the people, irrespective of caste, creed, or race, by raising the standard of living of the common man, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of the interest of the common man, and by ensuring equitable adjustment of rights between employers and employees, landlords and tenants',

' because the Act we are concerned with is a pre Constitution enactment and was not passed in furtherance of the policy outlined in Article 29, but on the general ground that if the legislature once decides to abolish the system of private landlordism in agricultural land and the resources of the State are not sufficient to compensate the outgoing landlords, some means for the rehabilitation of the expropriated landlords have to be devised, and if *in its anxiety to rehabilitate such landlords the legislature takes into* consideration the net incomes of the persons whom it is intended to set on their feet, [illegible] d to be a necessary [illegible] Whatever else the [illegible] ot mean equality of operation of legislation upon all citizens of the State The expression has been borrowed from the Fourteenth Amendment to the Constitution of the United States which was intended to secure to the emancipated negroes equal rights to the enjoyment of life, liberty and property Though in the United States the guarantee of equal protec-

ableness of those differences, and the basis on which the classes are defined is relevant only so far as it bears thereon. There is, accordingly, no basis of classification that is invariably sustained. There are, however, certain principles almost universally applied in this field. The equal protection clause is not violated merely because a State makes an exception which it is required to make by some other provision of the federal Constitution. This has been specifically held in a case involving an ex-exercise of a State's taxing power for reasons that are equally applicable to its police powers (*Union Bank and Trust Co. v. Phelps*), (1932) 53 S. Ct. 321 : 77 Law. Ed. 687.) It has also been held that an objection that legislation violated the clause because not including certain other persons would not be sustained in the absence of showing that there actually were such others engaged in the business to which the legislation applied:—*Pullman Co. v. Knott*, (1914) 35 S. Ct. 2 : 59 Law. Ed. 105. The fact that those excepted from a statute regulating carriers by motor vehicle were subject to comparable regulations by local authorities was held a sufficient basis for sustaining the reasonableness of the classification (*Continental Banking Co. v. Woodring*, (1931) 52 S. Ct. 595 : 76 Law. Ed. 1155.)

"A classification justifiable by its tendency to promote a legitimate Governmental policy is valid. This is the basis for sustaining the exception from a statute regulating motor vehicles using the public highways of such vehicles as are used by their owner in transporting his own livestock, and of buses employed in carrying children to and from school (See also—*Sproles v. Binford*, (1931) 52 S. Ct. 581 : 76 Law. Ed. 1167.) No violation of the equal protection clause results from a classification whose effect is to relieve a municipality owned utility from regulation of its rates by a state board actually regulating the rates of a competing privately owned company, —(*Springfield Gas & Electric Co. v. Springfield*, (1921) 42 S. Ct. 24 : 66 Law. Ed. 131), nor from one that accorded the marketing contracts of co-operatives a degree of protection denied to other contracts (*Liberty Warehouse Co., v. Burley Tobacco Growers' Co-operative Marketing Association*, (1927) 48 S. Ct. 291 : 72 Law. Ed. 473.)

"The legislature may in adopting a policy recognize an existing situation and adapt its legislation thereto. It is on this basis that the exemption of existing structures from zoning ordinances has been held valid, and that the grant of a preferred position to prior applicants for certificates of convenience and necessity to operate motor vehicles over a given route has been sustained (*Bradley v. Public Utilities Commission*, (1932) 53 S. Ct. 577 : 77 Law. Ed. 1053.) The validity or invalidity of classification cannot be determined without taking into account all the factors that have a natural and obvious relation to the purposes of the regulation in connection with which they are made and to the differences in treatment made in connection with realizing those purposes. The possible bases of classification are almost unlimited."

American view of the scope of "Equal Protection of Laws" Professor Willis quoted

(b) The American attitude to the guarantee of 'equal protection of the laws' may further be seen in the following extract from *Constitutional Law by Professor H.E. Willis:* (1936 Edition pp. 579-580.)

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred

or whether he should be punished with imprisonment and fine which may extend to any amount, or whether he should be let off with a mere penalty of three times the value of the amount involved rests entirely on the action that the Central Government or the State Bank may choose to take

The Court further found that in the state of the law embodied in the Foreign Exchange Regulation, 1947 the duty of giving effect to the guarantee of equal protection of law could not be performed by the Courts and it was not possible for them to ensure that

> a law operates equally in relation to all persons within its mischief if the law itself provides for differential operation in relation to such persons not in accordance with any principle expressed or implicit in the law not on the basis of any classification made by or under the law but according to the unfettered discretion of one or more statutory authorities (p 168)
>
> The scope of the unguided discretion allowed by the law was according to their *Lordships (at p 168)* too
> is not infringed by the mere
> exercise For in the absence
> from among the thre provided by the law the choice must always be in the judicial viewpoint arbitrary t a greater or less degree

135 Difficulty of applying the guarantee of equality

The principles on which the Courts in our country would apply the provisions of ART 5 have yet to be fully worked out and even when they are worked out they are bound to be so vague and nebulous that they are least likely to furnish any practical gui

judges and lawyers for that is the only course that is left open to a rational mind to assist in the interpretation and application of legislative provisions to the facts of a given case But in the matter of applying ART 5 abstract principles are really not of much pragmatic value, and this for the simple reason that the judgment of the Courts upon the question, namely whether or not a given statute offends against equality clause, largely depends on the view they take of economic and political conditions of the country in relation to which the constitutionality of the impugned law has to be determined by it We will first state these principles and then review some of the decided cases in order to illustrate the point of these remarks

(a) *Lord Rottschaefer* in his treatise on *Constitution Law* sums up the principles as they apply in America for determining whether legislation is discriminatory, as follows — Lord Rottschaefer's views

> The validity of a classification thus depends on whether the legislature had reasonable grounds for its restriction of the class upon which burdens are imposed or benefits conferred The usual objections to a classification made in connection with a regulation that imposes a burden is that it is invalid to limit the burden to the defined class and that if a regulation of the given character is to be put into effect it should be extended to others as well The usual objection to such a classification in connection with a regulation that confers upon some persons benefits that are denied to others is that it is invalid to thus limit those benefits The grant of benefits is frequently part of a larger plan of regulation in which the benefit conferred consists of immunity from the burden The second objection is in such case merely a different form of stating the first
>
> ' The crucial point in any case involving the validity of a classification is the existence of differences in treatment between groups The issue is as to the reason

A study of the course of Indian decisions shows that there is no disagreement on the principles upon which the guarantee of equal protection of laws is to be applied. The difficulties do however arise in the matter of answering the one important question which comes up for judicial determination whenever any law is impeached as being discriminatory: that question is, has the impugned legislation the effect in it of discriminating between persons and persons, or classes and classes, in such a way that there is no rational relationship as between the differentiation in the treatment which that law accords to the individuals and classes, and the objects of its legislation? It is the difficulty of answering this crucial question that is attested by almost all decisions of the Indian Courts. One notices a great deal of elasticity of approach in the judgments of one and the same Court in India. A comparative study of the case of (1) *State of West Bengal v. Anwar Ali, AIR* (1952) *S.C.* 75; (2) *Kathi Raning v. State of Suarashtra, AIR* (1952) *S.C.* 123; and (3) *Kedar Nath v. State of West Bengal, AIR* (1953) *S.C.* 404, would illustrate this difficulty. All the three cases were decided by the Supreme Court of India in 1952- 53, and although there is a close adherence to the abstract principle in terms of which all the three cases have been decided, a close scrutiny of the reasoning of the learned Judges in relation to the application of that principle would tend to show that the same test has been applied with different results by different Judges in all the three cases. All these three cases deal with the contention regarding laws being discriminatory in that they had provided for a system of separate special tribunals side by side with the ordinary tribunals without their containing any provision from which any guidance as to the choice of the forum in which the person accused of a crime is to be tried. It has been suggested in almost every case that has been decided in India that where the legislature does not lay down or indicate any test or standard, by appeal to which the executive could be guided in the matter of administering the law, the law which confers such an absolute, naked and unguided arbitrary power as to the choice of forum where the accused is to be prosecuted, the statute must be deemed to be invalid as offending against Art. 14. This was the principle on the basis of which, the case of *State of West Bengal v. Anwar Ali, AIR* (1952) *S.C.* 75. was decided and West Bengal Special Courts Act was declared as *ultra vires* (see AIR, (1952) S.C. 75.) Practically the same question arose in the case of *Kathi Raning v. State of Saurashtra, AIR* (1952) *S.C.* 123, but a contrary result was reached by the majority of the Judges that composed the Supreme Court Bench. The authority of the *State of West Bengal v. Anwar Ali, AIR* (1952) *S.C.* 75, was pressed by the Counsel who appeared in the case as having concluded that matter and at least three of the Judges who decided the Kathi Raning case found it impossible not to apply the principle upon which that case was decided to the facts of Kathi Raning case and they held that the Saurashtra State Public Safety Act (3rd Amendment) Ordinance 49 was invalid as offending against Art. 14. Mr Justice Chandrasekhara Aiyar held that in his view the decision in Anwar Ali's case governed the present case also and that opinion was shared by Bose J. Mahajan J. too shared that opinion.

Some Indian Cases Reviewed

Ambalal v. Jawarlal

(i) Under Order 37 of the Code of Civil Procedure, a special summary procedure for the trial of suits on promissory notes before the High Court has been provided. Before the Calcutta High Court, in the case of *Ambalal Purusottamdas & Co. v. Jawarlal, AIR* (1953) *Calcutta*, 758, this summary procedure was challenged *inter alia* on the ground that it was discriminatory in that there was no rational classification involved in the different procedures being prescribed by it in the determination of suits relating to Promissory Notes. Why the procedure in the Mufassil Court, as opposed to the one that was to prevail within the Original Jurisdiction of the High Court of Calcutta,

and in the liabilities imposed The inhibition of the Amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation It does not take from the state the power to classify either in the adoption of police laws or tax laws or eminent domain laws but permits to them the exercise of a wide scope of discretion and nullifies what they do *only when it is without any reasonable basis* Mathematical nicety and perfect equality are not required Similarity not identity of treatment is enough If any *state of facts can reasonably be conceived to sustain a classification the* existence of that state of facts must be assumed One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis Many different classifications of persons have been upheld as constitutional A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it

(Following cases decided by the U S Supreme Court have more or less adopted the same approach

(i) *Louisville Gas and Electric Co v Coleman*, (1928) 277 *U S* 32 72 *Law Ed* 770

(ii) *Barbier v Connolly* (1885) 113 *U S* 27 28 *Law Ed* 923)

Equal Pro t on of La and spec a treatment g en to a class—The Ind an v e

(c) *The expression equal protection of law in India has been interpreted to mean* that if a law discriminates for or against a person or a class without evidencing the fact that such a *differentiation in* the treatment as it has meted out to individuals and classes has some rational relation to the objects of impugned legislation it would be deemed to have offended against Art 14 This seems to be in sum and substance the point of the several decisions pronounced by the Indian High Courts and the Supreme Court The Indian view on the subject of discriminatory legislation may be taken as it is summarised by Fazl Ali J in the case of the *State of Bombay v F N Balsara AIR* (1951) *S C* 318

State of Bombay v F N Bals

1 The presumption is always in favour of the constitutionality of an enactment since it must be assumed that the legislature understands and correctly appreciates the needs of its own people that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds

2 The presumption may be rebutted in certain cases by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class

3 The principle of equality does not mean that every law must have universal application for all persons who are not by nature attainment or circumstances in the same position and the varying needs of different classes of persons often require separate treatment

4 *The principle does not take away from the State the power of classifying* persons for legitimate purposes

5 Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough

6 If a law deals eqally with members of a well defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons

7 While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis

United Motors Ltd.

taxes would be relatively more onerous than the probable estimated proceeds from taxation, is not void on the ground of discrimination for the simple reason that the differentiation in the treatment accorded to several classes has a rational relationship to the objects of the taxing law (*State of Bombay v. United Motors Ltd. AIR* (1953) *S.C.* 252).

Charanjit Lal v. Union of India

(iii) Even a law applying to one person or one class of persons is constitutional if there is satisfactory basis or reason for treating that person or class as a representative type. There may be an individual or class about which legislation may become essential because that individual or class might afford rational basis for being treated as a type. In the case of *Charanjit Lal Chowdhury v. Union of India, AIR* (1951) S.C. 41, the question whether a law applying to one person could be treated as being repugnant to Art. 14 of the Indian Constitution, came up for adjudication. The Government of India had passed, on 9-1-1950, an Ordinance called the Sholapur Spinning and Weaving Company (Emergency Provision) Ordinance, thereby empowering the Central Government to take over the control and management of that Company and its properties and effects by appointing their own Directors etc. Later on this Ordinance was repealed and was replaced by an Act of Parliament (being Act XXVIII of 1950) which contained similar provisions. The question that arose for adjudication was whether a legislation which was specifically confined to one concern was competent.

The preamble to the repealed Ordinance, it may be noted, had said,

> "On account of mismanagement and neglect a situation has arisen in the affairs of the Sholapur Spinning and Weaving Company, Limited, which has prejudicially affected the production of an essential commodity and has caused serious unemployment amongst a certain section of the community and that an emergency has arisen which renders it necessary to make special provision for the proper management and administration of the aforesaid Company".

It was contended that the legislation was directed solely against a particular Company and shareholders and not against any class or category of companies and no question therefore of reasonable legislative classification arose in the case. Patanjali Sastri, who made a minority Judgment accepted the contention on the ground that:

> "Legislation based upon mismanagement or other misconduct as the differentia and made applicable to a specified individual or corporate body is not far removed from the notorious parliamentary procedure formerly employed in Britain of punishing individual delinquents by passing bills of attainder, and should not, I think, receive judicial encouragement."

He held that:

> "The impugned Act which selects this particular Company and imposes upon it and its shareholders burdens and disabilities on the ground of mismanagement and neglect of duty on the part of those charged with the conduct of its undertaking, is plainly discriminatory in character and is, in my judgment, within the constitutional inhibition of Article 14."

The majority Judgment, however, took a contrary view of the matter. Fazl Ali J. was of the view, that burden lay on the person impugning the Act to show that that Act was unconstitutional and held that in that case the petitioner had made no attempt to discharge the burden of proof. He referred to the back ground against which legislation had been passed and observed.

> "It was against this background that the Act was passed, and it was evident that the facts which were placed before the Legislature with regard to the Sholapur

different? The Court repelling the contention held the classification reasonable and erved

"Universal application of the same procedure to all courts is not an unfailing equirement of the Constitutional principle of equality before the law or of equal protection of laws The fact that Order 37, Civil Procedure Code does not apply o all Courts in the land does not *ipso facto* make it unconstitutional on that ground To my mind the basic reason for holding this provision to be constitutional is that t is, in my opinion, still founded on a reasonable and substantial classification which annot be said to infringe this Constitutional principle of equality before the law The courts in India are necessarily graded and with varying jurisdictions powers and procedures Not all procedures for trial and appeal are common to all the Courts"

(ii) In another Indian case *Dhirendra v Superintendent and Remembrancer of Legal Fairs to the Government of West Bengal* [AIR (1954) S C 424] where the question is whether a State notification issued under S 269(1) of the Code of Criminal Procedure directing that the trial of certain offences before any court of Sessions shall be Jury could be validly revoked in a case in which the accused persons have actually en committed to a court of Sessions, the Court observed — Dhirendra v Superintendent & R L, West Bengal

"It appears to us that the section does not empower the State Government to direct that the trial of a particular case or of a particular accused person shall be by jury while the trial of other persons accused of the same offence shall not be by jury The Section does not take notice of individual accused or of individual cases It only speaks of offences or of a particular class of offences and does not direct its attention to particular cases or classes of cases and it does not envisage that persons accused of the same offence but involved in different cases can be tried by the Court of Sessions by a different procedure, namely some of them by jury and some of them with the help of assessors"

It was also held that the power of revocation alteration being co extensive with the power conferred by the opening words of S 269(1) the State Government could not pick out a particular case or set of cases and revoke notifications *qua* those cases only and leave cases of other persons charged with the same offence tried by the Court of Sessions To that extent the notification was bad in law and void The notification was in conflict not only with the power visualised by S 269(1) of the Code of Criminal Procedure but also void being repugnant to Art 14 The Court observed

Now it is well settled that though Article 14 is designed to prevent any person or class of persons for being singled out as a special subject for discriminatory legislation it is not implied that every law must have universal application to all persons who are not by nature, attainment and circumstance in the same position and that by process of classification the State has power of determining which should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification however must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis"

This was thus a case in which not the statute but a notification issued under that statute was repugnant to Art 14 of the Constitution

In respect of a Taxing Act that exempts certain classes of persons whom the Legislature does not consider it proper to tax because the cost involved in collecting such — State of Bombay v

of proving that the law did not unfairly discriminate is on him who wants the Court to give a judgment to that effect.

136. Presumption in favour of the Constitutionality of the impugned law

Where the presumption of constitutionality can be validly drawn, of course a heavy burden is cast upon the party attacking it to produce evidence to dis-establish that presumption. As to the nature of this burden of proof see the following cases decided in United States:

(1) *Lindsley v. Natural Carbonic Co.* (1910) 220 *U.S.* 61 (78): 55 *Law Ed.* 369

(2) *Louisville Gas & Electric Co. v. Coleman* (1928) 277 *U.S.* 32: 72 *Law Ed.* 770

(3) *Bayside Fish Flour Co. v. Gentry* (1936) 297 *U.S.* 422 (430) : 80 *Law Ed.* 722

(4) *Bain Peanut Co. v. Pinson* (1930) 282 *U.S.* 499 (502) : 75 *Law Ed.* 482

(5) *Charleston Federal Savings & Loan Association v. Alderson* (1945) 324 *U.S.* 182: 89 *Law Ed.* 857

(6) *Weaver v. Palmer Bros. Co.* (1926) 270 *U.S.* 402: 70 *Law Ed.* 654 ; *Borden's Farm Products Co. v. Baldwin* (1934) 293 *U.S.* 194: 79 *Law Ed.* 281

(7) *State Board of Tax Commrs. v. Jackson* (1931) 283 *U.S.* 527: 75 *Law Ed.* 1248

(8) *Pacific States Box & Basket Co. v. White* (1935) 296 *U.S.* 176 : 80 *Law Ed.* 138

It was observed in the case of *Gulf Colorado & Santa Fe Railway Co. v. Ellis* (1897) 165 *U.S.* 150 at p. 154 : 41 *Law Ed.* 666 at p. 668 that

"to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protection clause . . . . a mere rope of sand."

137. ART. 5 and the Citizen's Right of access to Tribunals of the country

The equal protection of law to which citizens of Pakistan are entitled would include a right of the citizen in the absence of an express constitutionally valid provision taking away such right, to have access to the tribunals and courts of the country where law is administered and to insist that his rights should not be frustrated, nor undue obstacles placed in the way of his getting justice from the courts and tribunals of the country. This necessarily involves the consideration of the questions relating to the conduct of litigation in our courts with particular reference to situations where parties to the proceedings are impecunious and are not able to afford either the payment of court fee required by law or the professional charges of Advocates. If there is a right to sue it should not be encumbered by the kind of limitations necessarily inherent in a sort of society in which we live, a society where some are extremely rich and others are extremely poor.

Observations of Justice Mr. Maule in a Bigamy case

It is the existence of this discord between the *idea* of legal equality and the actual state of economic inequality that precludes the possibility of the realisation of that ideal of justice the disregard of which drew a cynical although a solemn protest of *Justice Mr. Maule* in a bigamy case—decided before the passing of *Court of Matrimonial Causes Act of* 1857.

"Prisoner at the bar, you have been convicted of the offence of bigamy, that is to say, of marrying a woman while you have a wife still alive, though it is true she has deserted you, and is still living in adultery with another man. You have, therefore, committed a crime against the laws of your country and you have also acted under a very serious misapprehension of the course which you ought to have pursued. You should have gone to the ecclesiastical court and there obtained against your wife

Mill were of an extraordinary character and fully justified the Company being treated as a class by itself There were undoubtedly other mills which were open to the charge of mismanagement, but the criteria adopted by the Government which in my opinion, cannot be said to be arbitrary or unreasonable is not applicable to any of them As we have seen one of the criteria was that a mere allegation of mis management should not be enough and no drastic step such as is envisaged in the Act should be taken without there being a complete enquiry In the case of the Sholapur Mill, a complete enquiry had been made and the revelations which were made as a result of such enquiry were startling The Honourable Judge further remarked Article 14 of the Constitution lays down an important fundamental right which should be closely and vigilantly guarded but in construing it we should not adopt a doctrinaire approach which might choke all beneficial legislation

This view was shared by Mukherjea J who too held that the burden of proof cast upon the petitioner of showing that the legislation was discriminatory had not been *discharged*

It is submitted with respect that the view of the two Judges (Patanjali and Das) who made the minority Judgment is sound and is not such as can be controverted by appeal to considerations that formed the basis of majority Judgment The presumption of the con stitutionality of a statute stood rebutted in this case for the simple reason that in the Act the *name* of the Company was mentioned if there had been a general power conferred by the Act on the Government in pursuance whereof the Government could have taken over one mill as opposed to several other mills, the burden of leading evidence to demons trate the discriminatory character of the Government notification could have well been laid on the party impeaching the Act But once the legislation is directed to one person natural or juristic by name there is a *prima facie* case that the legislation being *ex facia* discriminatory is unconstitutional and it would be putting an unnecessary burden on a person who was agitating the question of its unconstitutionality to prove by some extrinsic evidence that there were other concerns in existence that fell in the same category as his and that the Government by having taken over the management of only one of them was guilty of discrimination Observations of Das J who also wrote a separate minority Judgment on this point are instructive

Cr t m the ajor view in the case of Charanj Lal

I am not saying said the learned Judge that this particular company and its share holders may not be guilty of mismanagement and negligence which has brought about serious fall in production of an essential commodity and also considerable un employment But if mismanagement affecting production and resulting in unem ployment is to be the basis of a classification for making a law for preventing mis management and securing production and employment the law must embrace within its ambit all companies which now are or may hereafter become subject to the vice This basis of classification, by its very nature, cannot be exclusively applicable to any particular company and its shareholders but is capable of wider application and there fore, the law founded on that basis must also be wide enough so as to be capable of being applicable to whoever may happen at any time to fall within that classification "

The legislation which deals with a named person without disclosing the reason why that named person has been treated as a class by himself or itself is *ex facia* bad and the question of the presumption of constitutionality cannot at all be raised in such a case The law by its nature must lay down *general* rules of public conduct and deal with human situations generally in order to sustain the attribute of impartiality If the Legis lature singles out a particular person for a certain type of prejudicial treatment the burden

made, that is, grounds other than those mentioned in ART. 14, then the case is taken out of ART. 14 and no court will be able to give effect to this species of prohibition against discrimination. What is prohibited by the Article is discrimination no doubt but it should be discrimination based solely on all or any of the grounds mentioned in that Article. In *Anjali Roy v. State of West Bengal*, *AIR* (1952) *Calcutta* 825, the provisions of Art. 15 of the Indian Constitution were interpreted, and since ART. 14 of our Constitution more or less is worded in the same way as Art. 15 of the Indian Constitution, the observations made by the Court with regard to the interpretation of that Article may be of some assistance.

Anjali Roy v. State of West Bengal

This was a case in which a student applied for admission to a college and her application having been finally refused she moved the High Court for the issue of certain writs in order to enforce what she claimed to be her fundamental right. Art. 15 (1) on which she relied is in the following terms:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

In regard to the interpretation of that Article the High Court observed at p. 829:

"Of paramount importance in clause (1) are the words 'discrimination' and 'only'. What the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article. All differentiation is not discrimination, but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural difference between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article."

The difference between this ART. 14 and the general ART. 5, which recognizes right of equality, is not to be lost sight of: under ART. 14 if discrimination is shown to have taken place upon any or all of the grounds mentioned in ART. 14, the discriminatory legislative or executive action would be straight away hit by the prohibition contained therein. The equal protection of law given by ART. 5 is, however, examined with an initial presumption in favour of the constitutionality of legislation, namely that the State action is a *bona fide* exercise of the power of classification (see observations of Patanjali Sastri in the case of *Kathi Raning v. State of Suarashtra AIR* (1952) *S.C.* 123).

It would be further noticed that this right is subject to any special provision which is made for women. This proviso is in terms the same as clause (3) of Art. 15. 'Special provision for women' has in India been interpreted to mean 'special provision in favour of women.' The idea underlying the proviso is that if any special provision which amounts to showing discrimination in favour of women as a class has been made it cannot be brought within the general prohibition against the kind of discrimination which has been mentioned in ART. 14. In the case of *Anjali Roy v. State of West Bengal*, *AIR* (1952) *Calcutta* 825, referred to earlier, the Court observed with regard to the true meaning of Art. 15 (3) that the proviso—

"really contemplates provision in favour of women, although grammatically and etymologically, 'for' may mean 'concerning' and although, theoretically, it is possible

a decree a *mensa et thoro* You should then have brought an action in the courts of common law and recovered, as no doubt you would have recovered, damages against your wife's paramour Armed with these decrees you should have approached the legislature, and obtained an Act of Parliament, which would have rendered you free, and legally competent to marry the person whom you have taken on yourself to marry *with no such sanction It is quite true that these proceedings would have cost* you many hundreds of pounds, whereas you probably have not as many pence But the law knows no distinction between rich and poor The sentence of the court upon you therefore is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the assizes" *(Holdsworth, 'A History of English Law' Vol I, 5th Ed p 623 and Fay's Dinco in the Statute Book* 1939 See also Tudor Ree s 'Judgement Reserved p 216)

The person who can pay for the services of a competent Counsel is certainly in a better position to have his point of view accepted in a legal contest where the other party is so poor that he cannot secure the services of competent Advocates But it is doubtful if it is within the scope of ART 5 of our Constitution for any one to insist that the "equal protection of law to which he is entitled must be so construed as to mean that the State should make available to him the necessary financial resources with which to effectively enter upon a contest involved in the vindication or enforcement of his rights or in the establishment of the plea of "not guilty" if he is charged with criminal liability — No right Professio assistance

In America, the right to have access to the ordinary courts is said to be substantiated by appeal to the *due process clause* which, as has been argued earlier, having regard to the interpretation it has received from the American courts, appears to be sufficiently wide in its scope to embrace the concept of equal protection of laws' — Pos tion America

It is true that in our country under the Civil Procedure Code a person can sue in *forma pauperis* provided he is able to satisfy the court as to the existence of conditions mentioned in Order 33, Civil Procedure Code, namely that he is not possessed of sufficient means to enable him to pay the fee prescribed by the law for the plaint in such suit, or, where no such fee is prescribed, that he is not entitled to property worth Rs 100 other than his necessary wearing apparel and the subject matter of the suit (For procedure governing appeals, see Order 44 C P C) Similarly if a person is charged with a crime punishable with *death* the Government engages for him what is called a Pauper Advocate to conduct his defence not only in trial court but also in confirmation proceedings before the High Court under S 471 of the Criminal Procedure Code But such a professional assistance is not available to a person who is charged with an offence which is punishable with transportation for life or for imprisonment for a lesser term It is doubtful if a *mandamus* can lie at the instance of an impecunious person either to the Provincial or Federal Government commanding them to afford 'equal protection of the law to a person who is not able to arrange for sufficient pecuniary resources to vindicate his fundamental rights or to establish the plea of 'not guilty' in cases involving criminal prosecution

138. Comment on some specified aspects of the Right of Equality

Having considered the right to equality, in general, it becomes now necessary to make a few observations in respect of some other Articles falling in Section (I) of our analysis and note a few essential characteristics of these rights

ART 14 limits itself to prohibiting any discrimination being made against any citizen in respect of his right to have access to places of public entertainment or resort (places not intended for religious purposes only) on the ground only of "race, religion, caste, sex or place of birth" If there are other grounds on which discrimination has been — ART 14

the individuals within the State. This can only be achieved by limiting individual liberty. This doctrine has been universally acknowledged.

"Political liberty", said Montesquieu in his Esprit des Lois published as far back as 1748, "does not consist in an unlimited freedom . . . We must have continually present to our minds the difference between independence and liberty. Liberty is the right of doing whatever the laws permit and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."

In a case decided by the Supreme Court of India, [illegible] v. The State of [illegible], [illegible] which may be regarded as being the Indian counterpart of our [illegible] in his dissenting judgment, at p. [illegible], observed:

"The court is to see the rights which are fundamental, not the limitations, and it is the duty of this Court and of all Courts in the land to guard and defend these rights jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restriction or limitation on these freedoms, and in the case of the Executive to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the people of India the freedoms which have now been guaranteed to them and which they have earned through the years of struggle, to the fullest extent of the guarantee, and to ensure that they are not whittled away or brought to naught either by Parliamentary legislation or by executive action."

It is submitted, with respect, that the distinction between the rights being fundamental and not the limitations being fundamental is an artificial one, and, having regard to the language employed in the Indian Constitution, it is clear that the nature of the right which is conferred by the text relating to fundamental rights is that of the right subject to the limits imposed by the relevant provisions of the Constitution in which that right has been embodied. In other words, there are not the fundamental rights and incidental limitations imposed on these rights. A fundamental right in relation to the freedom of speech, subject to restrictions imposed by law in the interest of security of the State, does not mean that there is a right to freedom which is fundamental, whereas the restrictions imposed by law are merely its incidental appendages. There is no warrant for looking at the content of the fundamental rights in this manner. What is guaranteed is freedom subject to reasonable restrictions and it is this indivisible idea which lies behind these words, that the courts will seek to enforce. The Constitution affirms both the right to freedom and its limitations—and it is the combined effect of these ideas which is the right guaranteed by the part relating to fundamental rights.

These considerations are important not only because they bring out prominently the full effect of the language used in the several articles that guarantee qualified freedoms but also because they throw considerable light on the question relating to the burden of proof. If the distinction drawn between rights being fundamental and limitations being incidental were to be pushed to its logical conclusion, it would follow that the burden of substantiating in a given case the plea that restrictions imposed on the enjoyment of citizens' freedom of speech, or movement, etc., are reasonable would lie on those who wish to defend those limitations as being reasonable. In such a case, therefore, the citizen would not have any onus cast upon him of demonstrating to the court that the limitations imposed on

to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen But the ordinary meaning of 'provision for' is certainly 'provision in favour of' Besides the command in Art 15(1), to quote only the material portion, is that the State shall not discriminate against any citizen on the ground only of sex That means that no discrimination shall be made against any citizen solely on the ground that such citizen is a man or a woman Then comes clause (3) which provides that nothing in the Article shall prevent the State from making any special provision for women and children That clause is obviously an exception to clauses (1) and (2) and since its effect is to authorise what the Article otherwise forbids, its meaning seems to me to be that notwithstanding that clauses (1) and (2) forbid discrimination against any citizen on the grounds of sex the State may discriminate against males by making a special provision in favour of females"

This observation on the construction of ART 14 would apply to other Articles that are similarly worded, as for instance, ART 13(3), and ART 17

Comment ART 18

As to the scope of ART 18, the student may usefully turn to the case of *Jibendra Kishore and others v The Province of East Pakistan, PLD* (1957) *S C* 9, decided by our Supreme Court where observations on the meaning of the expression subject to law public order and morality' have been made (See also p 386 infra)

SECTION (II) Concept of Qualified Liberties

139. Introductory Statement

Introductory statement the dogma Reasonable Restrictions

ARTs 8, 9, 10, 11 and 12, relate to the freedom of citizens but in each case the freedom guaranteed is subject to limits ART 8 guarantees freedom of speech and expression subject to any reasonable restrictions of the kind mentioned in that Article , similarly ART 9 guarantees freedom of assembly subject to reasonable restrictions This is also true about the freedom of association, freedom of movement and the right to acquire, hold and dispose of property mentioned in ARTs 10 and 11 These freedoms too are subject to reasonable restrictions of the kind mentioned in these Artilces The scheme of these Articles and of several others in Section II of our analysis seems to be to determine the legitimate province of the freedom reserved to the citizens and, at the same time, to define this sphere by expressly stating the limits under which it is available There are two contending interests at stake which are sought to be reconciled by means of two co ordinates one asserting *affirmatively* the right to freedom of the specified kind in favour of the citizens, and another limiting the same, negatively, by setting forth the restrictions within which such a freedom is available An attempt is made to strike a balance between individual rights and the overall collective interests which are involved in the maintenance of those rights The collective interests of the society at large are comprehensively indicated in terms like 'security of the State,' 'public order,' 'morality', 'public interest' etc A citizen has the freedom of speech and expression, of assembly without arms, of forming associations or unions, of residing or settling in any part of Pakistan, of acquiring, holding or disposing of property, but these are all qualified freedoms and are available within the limits prescribed by ARTs 8 to 12 And in each case it will be for the court, before which the enforcement of any of these fundamental rights comes up for consideration, to say whether or not the restrictions imposed on the enjoyment of these freedoms are reasonable Individual liberty n be accommodated within the wider social framework so that it may be available t

the individuals within the State. This can only be achieved by limiting individual liberty. This doctrine has been universally acknowledged.

"Political liberty", said *Montesquieu* in his '*Spirit of Laws*' published as far back as 1748, "does not consist in an unlimited freedom . . . . we must have continually present to our minds the difference between independence and liberty. Liberty is the right of doing whatever the laws permit and if a citizen would do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."

Are the Rights Fundamental and limitations incidental? Ram Singh v. The State of Delhi

In a case decided by the Supreme Court of India, (*Ram Singh v. The State of Delhi, AIR* (1951) *S.C.* 270), *Bose* J., while commenting on the Indian Art. 19, which may be regarded as being the Indian counterpart of our ARTs. 8 to 12, in his dissenting Judgment, at p. 276, observed:

> "In every case it is the rights which are fundamental, not the limitations; and it is the duty of this Court and of all Courts in the land to guard and defend these rights, jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms, and in the case of the Executive, to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the people of India the freedoms which have now been guaranteed to them and which they have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by Parliamentary legislation or by executive action."

It is submitted, with respect, that the distinction between the rights being fundamental and not the limitations being fundamental, is an artificial one; and, having regard to the language employed by the Indian Art. 19, it is clear that the nature of the right which is conferred by the part relating to fundamental rights is left to be spelt out by appeal to the totality of the several provisions in the constitution in which that right has been reflected. In other words, there are not the fundamental rights and incidental limitations imposed on those rights. A fundamental right in relation to the freedom of speech, subject to restrictions imposed by law in the interest of security of the State etc., does not mean that there is right to freedom which is fundamental, whereas the restrictions imposed by law are merely its incidental appendages. There is no warrant for looking at the concept of the fundamental rights in this manner. What is guaranteed is freedom subject to reasonable restrictions and it is this one indivisible idea which lies behind these words, that the courts will seek to enforce. The Constitution affirms both the right to freedom and its limitations—and it is the combined effect of these ideas which is tne right guaranteed by the part relating to fundamental rights.

The question of 'Burden of Proof'

These considerations are pertinent not only because they bring out prominently the full effect of the language used in the several Articles that guarantee qualified freedoms but also because they throw considerable light on the question relating to the burden of proof. If the distinction drawn between rights being fundamental and limitations being incidental were to be pushed to its logical conclusion, it would follow that the burden of substantiating in a given case the plea that restrictions imposed on the enjoyment of citizens' freedom of speech, of movement, etc., are reasonable would lie on those who wish to defend those limitations as being reasonable. In such a case, therefore, the citizen would not have any onus cast upon him of demonstrating to the court that the limitations imposed on

civil liberties are unreasonable If it is once assumed *that there is a fundamental right* vested in a citizen to enjoy these liberties, the burden of showing that the restrictions imposed on such a right are reasonable would lie on any side that claims that the restrictions are reasonable This was in fact the view of the burden of proof taken by Meredith C J of the Patna High Court in *Brajnandan Sharma v State of Bihar, AIR* (1950) *Patna* 322, where he said

"There has been a *prima facie* infringement of that right, and *prima facie* no law can infringe that right Therefore, the burden is, in my opinion, on the State to bring that law within the exception contained in Art 19 cl (5) which alone can save it

It is submitted that the above view as to the burden of proof is not correct The entire burden rests with the citizen *to show that the restrictions imposed on his* liberties are unreasonable and are not within the scope of the relevant Article It is he who must show that the impugned legislation or the executive act complained of by him is in conflict with the provisions of the Part relating to fundamental rights

Individual liberty guaranteed by law

Without the liberty of the individual being constitutionally guaranteed it is not possible to hope *for any progress*, and it is the individual who gives the benefit of his thought and action in order that society may be able to adjust itself to the changing needs of the times But the liberty of the individual must not be allowed to go so far as to stultify itself the individual must not be allowed to make a nuisance of himself to his fellow men In a civilised society a line has to be drawn somewhere in order to confine, by means of regulation and control, the actions of individuals in such a way that they do not come in conflict with the pursuit of an overall interest of the society as a whole

Defin tion o Liberty

In Art 4 of the Declaration of the Rights of Man and of the Citizen of 26th August, 1789, the French Assembly gave the following definition of liberty

> "Liberty consists in the power of doing whatever does not injure another Accordingly, the exercise of the natural rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights, and these limits are determinable only by the law "

It is submitted that this definition of liberty could be accepted as a valid one for the purpose of interpreting the scope of the expression employed by our Constitution "Reasonable restrictions imposed by law "

The common good thus can only be realised by imposing *limits* on individual liberty

How and where this line is to be drawn just to be able to confine the conflicting individual interests and desires to the sphere of their legitimate expression, is a matter of practical politics, and the trouble with our Constitution is that this duty has now been transferred to the judiciary of the country to discharge

140. Individual liberty and social control—in the United States

In the United States, the constitutionally guaranteed rights like that of life, liberty and property have no express *limitations imposed on them by the Constitution but the* American Courts have evolved the doctrine of 'police power', 'eminent domain', and 'taxation power' as limiting the application of 'due process clause The two important aspects of the interpretation of the 'due process' clause are (1) that it operates as a limitation upon the legislature as also upon the Executive branch of the Government, and (2) that it is applicable to substantive as well as to the procedural rights (See *Willoughby's Constitutional Law of the United States, Second Edition p* 726) 'Police power', power of 'eminent domain', 'taxation power' are those powers the

the individuals within the State. This can only be achieved by limiting individual liberty. This doctrine has been universally acknowledged.

"Political liberty", said *Montesquieu* in his '*Spirit of Laws*' published as far back as 1748, "does not consist in an unlimited freedom . . . . we must have continually present to our minds the difference between independence and liberty. Liberty is the right of doing whatever the laws permit and if a citizen would do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."

Are the Rights Fundamental and limitations incidental? Ram Singh v. The State of Delhi

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> "In every case it is the rights which are fundamental, not the limitations; and it is the duty of this Court and of all Courts in the land to guard and defend these rights, jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms, and in the case of the Executive, to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the people of India the freedoms which have now been guaranteed to them and which they have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by Parliamentary legislation or by executive action."

It is submitted, with respect, that the distinction between the rights being fundamental and not the limitations being fundamental, is an artificial one; and, having regard to the language employed by the Indian Art. 19, it is clear that the nature of the right which is conferred by the part relating to fundamental rights is left to be spelt out by appeal to the totality of the several provisions in the constitution in which that right has been reflected. In other words, there are not the fundamental rights and incidental limitations imposed on those rights. A fundamental right in relation to the freedom of speech, subject to restrictions imposed by law in the interest of security of the State etc., does not mean that there is right to freedom which is fundamental, whereas the restrictions imposed by law are merely its incidental appendages. There is no warrant for looking at the concept of the fundamental rights in this manner. What is guaranteed is freedom subject to reasonable restrictions and it is this one indivisible idea which lies behind these words, that the courts will seek to enforce. The Constitution affirms both the right to freedom and its limitations—and it is the combined effect of these ideas which is tne right guaranteed by the part relating to fundamental rights.

The question of 'Burden of Proof'

These considerations are pertinent not only because they bring out prominently the full effect of the language used in the several Articles that guarantee qualified freedoms but also because they throw considerable light on the question relating to the burden of proof. If the distinction drawn between rights being fundamental and limitations being incidental were to be pushed to its logical conclusion, it would follow that the burden of substantiating in a given case the plea that restrictions imposed on the enjoyment of citizens' freedom of speech, of movement, etc., are reasonable would lie on those who wish to defend those limitations as being reasonable. In such a case, therefore, the citizen would not have any onus cast upon him of demonstrating to the court that the limitations imposed on

civil liberties are unreasonable. If it is once assumed that there is a fundamental right vested in a citizen to enjoy these liberties, the burden of showing that the restrictions imposed on such a right are reasonable would lie on any side that claims that the restrictions are reasonable. This was in fact the view of the burden of proof taken by Meredith C. J of the Patna High Court in *Brajnandan Sharma v. State of Bihar, AIR* (1950) *Patna* 322, where he said.

"There has been a *prima facie* infringement of that right, and *prima facie* no law can infringe that right. Therefore, the burden is, in my opinion, on the State to bring that law within the exception contained in Art. 19 cl. (5) which alone can save it."

It is submitted that the above view as to the burden of proof is not correct. The entire burden rests with the citizen to show that the restrictions imposed on his liberties are unreasonable and are not within the scope of the relevant Article. It is he who must show that the impugned legislation or the executive act complained of by him is in conflict with the *provisions of the Part relating to fundamental rights*.

Individual liberty guaranteed by law

Without the liberty of the individual being constitutionally guaranteed it is not possible to hope for any progress, and it is the individual who gives the benefit of his thought and action in order that society may be able to adjust itself to the changing needs of the times. But the liberty of the individual must not be allowed to go so far as to stultify itself. the individual must not be allowed to make a nuisance of himself to his fellow-men. In a civilised society a line has to be drawn somewhere in order to confine, by means of regulation and control, the actions of individuals in such a way that they do not come in conflict with the pursuit of an overall interest of the society as a whole.

Definition of Liberty

In Art. 4 of the Declaration of the Rights of Man and *of the Citizen of 26th* August, 1789, the French Assembly gave the following definition of liberty

"Liberty consists in the power of doing whatever does not injure another. *Accordingly, the exercise of the natural rights of every man has no other limits than* those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law."

It is submitted that this definition of liberty could be accepted as a valid one for the purpose of interpreting the scope of the expression employed by our Constitution "Reasonable restrictions imposed by law."

The common good thus can only be realised by imposing *limits* on individual liberty.

How and where this line is to be drawn just to be able to confine the conflicting individual interests and desires to the sphere of their legitimate expression, is a matter of practical politics, and the trouble with our Constitution is that this duty *has now* been transferred to the judiciary of the country to discharge.

140. Individual liberty and social control—in the United States

In the United States, the constitutionally guaranteed rights like that of life, liberty and property have no express limitations imposed on them by the Constitution, but the American Courts have evolved the doctrine of 'police power', 'eminent domain', and 'taxation power' as limiting the application of 'due process' clause. The two important aspects of the interpretation of the 'due process' clause are (1) that it operates as a limitation upon the legislature as also upon the Executive branch of the Government, and (2) that *it is applicable to substantive as well as to the procedural* rights. (See *Willoughby's Constitutional Law of the United States, Second Edition p. 726.*) 'Police power', power of 'eminent domain', 'taxation power' are those powers the

the individuals within the State. This can only be achieved by limiting individual liberty. This doctrine has been universally acknowledged.

"Political liberty", said *Montesquieu* in his '*Spirit of Laws*' published as far back as 1748, "does not consist in an unlimited freedom . . . . we must have continually present to our minds the difference between independence and liberty. Liberty is the right of doing whatever the laws permit and if a citizen would do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."

Are the Rights Fundamental and limitations incidental? Ram Singh v. The State of Delhi

In a case decided by the Supreme Court of India, (*Ram Singh v. The State of Delhi, AIR* (1951) *S.C.* 270), *Bose* J., while commenting on the Indian Art. 19, which may be regarded as being the Indian counterpart of our ARTs. 8 to 12, in his dissenting Judgment, at p. 276, observed:

"In every case it is the rights which are fundamental, not the limitations; and it is the duty of this Court and of all Courts in the land to guard and defend these rights, jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms, and in the case of the Executive, to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the people of India the freedoms which have now been guaranteed to them and which they have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by Parliamentary legislation or by executive action."

It is submitted, with respect, that the distinction between the rights being fundamental and not the limitations being fundamental, is an artificial one; and, having regard to the language employed by the Indian Art. 19, it is clear that the nature of the right which is conferred by the part relating to fundamental rights is left to be spelt out by appeal to the totality of the several provisions in the constitution in which that right has been reflected. In other words, there are not the fundamental rights and incidental limitations imposed on those rights. A fundamental right in relation to the freedom of speech, subject to restrictions imposed by law in the interest of security of the State etc., does not mean that there is right to freedom which is fundamental, whereas the restrictions imposed by law are merely its incidental appendages. There is no warrant for looking at the concept of the fundamental rights in this manner. What is guaranteed is freedom subject to reasonable restrictions and it is this one indivisible idea which lies behind these words, that the courts will seek to enforce. The Constitution affirms both the right to freedom and its limitations—and it is the combined effect of these ideas which is the right guaranteed by the part relating to fundamental rights.

The question of 'Burden of Proof'

These considerations are pertinent not only because they bring out prominently the full effect of the language used in the several Articles that guarantee qualified freedoms but also because they throw considerable light on the question relating to the burden of proof. If the distinction drawn between rights being fundamental and limitations being incidental were to be pushed to its logical conclusion, it would follow that the burden of substantiating in a given case the plea that restrictions imposed on the enjoyment of citizens' freedom of speech, of movement, etc., are reasonable would lie on those who wish to defend those limitations as being reasonable. In such a case, therefore, the citizen would not have any onus cast upon him of demonstrating to the court that the limitations imposed on

civil liberties are unreasonable If it is once assumed that there is a fundamental right vested in a citizen to enjoy these liberties, the burden of showing that the restrictions imposed on such a right are reasonable would lie on any side that claims that the restrictions are reasonable This was in fact the view of the burden of proof taken by Meredith C J of the Patna High Court in *Brajnandan Sharma v State of Bihar, AIR* (1950) *Patna* 322, where he said

"There has been a *prima facie* infringement of that right, and *prima facie* no law can *infringe that right Therefore, the burden is, in my opinion, on the State to bring that* law within the exception contained in Art 19 cl (5) which alone can save it "

It is submitted that the above view as to the burden of proof is not correct The entire burden rests with the citizen to show that the restrictions imposed on his liberties are unreasonable and are not within the scope of the relevant Article It is he who must show that the impugned legislation or the executive act complained of by him is in conflict with the provisions of the Part relating to fundamental rights

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Without the liberty of the individual being constitutionally guaranteed it is not possible to hope for any progress, and it is the individual who gives the benefit of his thought and action in order that society may be able to adjust itself to the changing needs of the times But the liberty of the individual must not be allowed to go so far as to stultify itself the individual must not be allowed to make a nuisance of himself to his fellow-men In a civilised society a line has to be drawn somewhere in order to confine, by means of regulation and control, the actions of individuals in such a way that they do not come in conflict with the pursuit of an overall interest of the society as a whole

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In Art 4 of the Declaration of the Rights of Man and of the Citizen of 26th August, 1789, the French Assembly gave the following definition of liberty

"Liberty consists in the power of doing whatever does not injure another Accordingly, the exercise of the natural rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights, and these limits are determinable only by the law "

It is submitted that this definition of liberty could be accepted as a valid one for *the purpose of interpreting the scope of the expression employed by our Constitution* "Reasonable restrictions imposed by law "

The common good thus can only be realised by imposing *limits* on individual *liberty*

How and where this line is to be drawn just to be able to confine the conflicting individual interests and desires to the sphere of their legitimate expression, is a matter of *practical politics*, and *the trouble with our Constitution is that this duty* has now been transferred to the judiciary of the country to discharge

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In the United States, the constitutionally guaranteed rights like that of life, liberty and property have no express limitations imposed on them by the Constitution, but the *American* Courts have *evolved the doctrine of 'police power'*, '*eminent* domain', and 'taxation power' as limiting the application of 'due process' clause The two important aspects of the interpretation of the 'due process' clause are (1) that it operates *as a limitation upon the legislature as also upon the* Executive branch of the Government, and (2) that it is applicable to substantive as well as to the procedural rights (See *Willoughby's Constitutional Law of the United States, Second Edition p* 726) 'Police *power*', power *of 'eminent domain'*, 'taxation *power*' are those powers the

exercise of which whether by the Government of the Federation or the states is not held to be in conflict with the due maintenance of the protection of the 'due process of law' which is given to the individual by the United States Constitution in its 5th and 14th Amendments.

Due Process clause.

The 5th and the 14th Amendments of the U.S. Constitution guarantee that right to life, liberty, and property will not be interfered with except by recourse to the *due process* of the law. It is the interpretation of the 'due process of law' clause given by the Supreme Court which has served the purpose of bringing into the forefront practically the same limitation on the rights guaranteed by the U.S. Constitution as are involved in the expression, 'reasonable restrictions' employed by our Constitution.

In itself, the phrase 'due process of law' does not convey anything specific and for that reason it has been denounced by Fred Rodell as that "lovely limpid legalism" (See his Woe unto you, lawyers—New York, Reynal and Hitchlock 1939—p 77). And Justice Frankfurter has had no hesitation in saying of it that it has been cast in words so undefined, either by their intrinsic meaning, or by history, or by tradition that they leave the individual justice free; if indeed they do not actually compel him to fill in the vacuum with his own controlling notions of economic, social and industrial facts with reference to which they are invoked.

It is the requirement of the 'due process' clause that the fundamental ideas of justice should be respected, and it has been ruled by the United States Supreme Court that fundamental regulations for public welfare which trench upon these rights, that is rights affecting life, liberty and property, are not prohibited by the 'due process' clause. The essential thing is not that any one of these fundamental rights is abridged or taken away by process of law, but whether the process of law by which this is sought to be achieved is such as can validly be called the '*due*' process of law.

Police Power

All regulations that are reasonably necessary to secure the health, safety, public order, comfort or general welfare of the community can be made by the States in pursuance of its *police power*. 'Police power' of a State in America is not susceptible of any precise definition but speaking very generally, all activities of the State which are calculated to promote 'public safety, health, morals, or to the suppression of what is evidently disorderly and unruly conduct, (in short, all steps necessary to secure the greatest welfare of the State) come within its fold. (See the case of *Bacon v. Walker*, (1907) 204 *U.S.* 311 : 51 *Law Ed.* 499; and *Noble State Bank v. Haskell*, (1911) 219 *U.S.* 104 : 55 Law Ed. 112).

In the exercise of its police power the State cannot resort to arbitrary or oppressive means to pursue its ends or objectives but anything that it may do should be shown to bear a real and substantial relation to the pursuit of general welfare. (See *Erie R. Co. v. Williams* (1914) 233 *U.S.* 685: 58 Law Ed. 1155.)

Eminent domain and Taxation Power

We may next consider the American doctrine of 'eminent domain' and 'taxation power'. 'Eminent domain' was first used by Grotius and denotes the power of the sovereign compulsorily to acquire the property of the subjects. As understood by him the right was limited morally, if not legally, to acquisition 'for ends of public utility' and was subject to the liability to make good the loss to the dispossessed owner. (See *R.W. Barker's Compulsory Acquisition Powers of the Commonwealth*).

"The power of taxation may be defined", says *Willis*, "as the legal capacity of Government to impose charges upon persons or their property to raise revenue for governmental purposes. Police power is the legal capacity of the Government to control the personal liberty of the individuals for the protection of social interests (or common good) of the people who establish such government.

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(b) in the second place, . . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals . . . There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of the English Institutions. We may say that—

(c) the Constitution is pervaded by the rule of law on the ground that the general principles of the Constitution, (as for example, the right of personal liberty or the right to public meeting) are with us the result of judicial decisions determining the rights of private person in particular cases brought before the courts; whereas under many foreign Constitutions the security (such as it is) given to the rights of individual results, or appears to result, from the general principles of the Constitution." (See p. 187 of his Law of Constitution, IX Ed.)

In the third and the last sense of the rule of law stated by Dicey, is to be found a clue to the comprehension of the essential distinction between the English constitutional approach to the problem of personal liberties of the subject, on the one hand, and that of our Constitution, on the other.

Important liberties of English subjects

In paragraph 437 of the VI Volume of *Halsbury's Laws of England*, it is stated that the most important liberties of the English subjects are the following:

"(1) The right of personal freedom, or immunity from wrongful detention or confinement, which is ensured by the action of false imprisonment and by the writ of habeas corpus, reinforced by the Habeas Corpus Acts, under which, upon probable cause being shown by an affidavit, either of the prisoner himself, or of some other person on his behalf, a writ may be obtained directing the person having charge of the prisoner to produce his body before the King's Bench Division, in order that the reason of his detention may be inquired into.

(2) The right of property, which is protected by various proprietary and delictual actions, in particular the actions of trespass *quare clausum fregit*, and of trespass *de bonis asportatis*.

(3) The right to freedom of speech or discussion, which means that any person may write or say what he pleases, so long as he does not infringe the law relating to libel or slander, or to blasphemous, obscene, or seditious words or writings. This right is closely connected with and covers that of freedom of conscience.

(4) The right of public meeting, which means that any persons may meet together, so long as they do not thereby trespass upon private rights of property, or commit a nuisance, or infringe the law relating to public meetings or unlawful assemblies.

(5) The right of association, which arises from the fewness of the restrictions on the making of contracts and the constitution of trusts, from the ease with which companies can be formed under the Companies Act, and trade unions under the Trade Union Acts, and from the laxity of the law of conspiracy.

"It seems that there should be added to this list the following rights, which appear to have become well-established:—

(6) The right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case.

The power of the eminent domain is the legal capacity of Government *to take the private property of individuals for public use upon the* payment of just compensation Eminent domain is the superior domain of the State over all property within the State It is not an incident of tenure but an offspring of political necessity It differs from taxation in that taxation is a contribution levied on people whereas eminent domain is compulsory sale of property to Government, although both involve taking of property Eminent domain differs from police power in that police power is not a taking of any rights whether of property or a person from people, but a limitation on the exercise of such rights by people although the police power may also result in making people lose their property" (*Willis Constitutional Law*, 1936 *Ed pp* 224 225)

141. Individual liberty and Social Control—in England

It is a cardinal principle of the English Constitution that a subject may say or do what he pleases or to move about anywhere he likes and form associations and act in concert with his fellow men *provided he does not transgress the substantive law or do acts which invade the legal rights of others* Similarly, the authorities charged with the duty of maintaining public order or performing any other governmental duties cannot do anything to the prejudice of these individual rights unless they can show that they were authorised to do that act by some rule of common law or some provision made by a statute (See *Entick v Carrington* (1765) 19 *St Tr* 1030, *E R Vol* 95 *page* 807)

The Legal Position under the English Constitution

Entick v Carrington

The position under the English Constitution is often summed up by the employment of a phrase which has acquired a well known connotation there is it is said in England, 'the rule of law By that phrase is meant the idea that the existence or non existence of a justification to do anything by a public authority is a matter that can be decided solely by appeal to law it is not, negatively stated, a question of fact and it can only be determined by appeal to some statute or some judicially decided principle Even the existence of a necessity does not constitute any sufficient justification for resort to the exercise of a power or fulfilment of a duty which cannot, strictly speaking be said to flow either from a statute or precedent In the case of extreme urgency, however, when the ordinary law of the land cannot function, there is the common law right in the public authority to repel force by force and to do all acts necessary to bring back order to prevail in the country and thus secure normal functioning of government machinery We will deal with this aspect of the matter later when we consider the constitutional basis of the existence of Martial Law in England But it should be carefully borne in view that the concept of the rule of law is one of the foundations of the English Constitution *Dicey* in his '*Law of the Constitution*' stated the doctrine of the rule of law to be one of the distinguishing features of the English Constitution He described the three different senses in which that doctrine could be looked at In his words

Meaning of Rule of Law

Concept of the Rule of law—Dicey quoted

"When we say that the supremacy or the rule of law is a characteristic of the English Constitution, we generally include under one expression at least three distinct *though kindred conceptions*

(a) We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land *In this sense* the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, *or discretionary powers of* constraint we mean

ted person of average intelligence could possibly regard the provision as reasonable, then our decision would be that it is an unreasonable provision, but not otherwise. For an authority for this proposition it is sufficient to cite one Privy Council decision, *Emperor v. Vimlabai Deshpande*, 73 *I.A.* 144: *AIR* (33) 1946 *P.C.* 123: 47 Cr. L. J. 831)."

N. B. Khare v. State of Delhi

What is meant by 'standard of judgment' being an 'objective' standard and not a 'subjective' one? The courts have to be, by a notional fiction, satisfied whether or not the restriction imposed by law on the exercise of the right by citizen is one which a normal, average man would regard as reasonable. In the case of *N.B. Khare v. State of Delhi*, *AIR* (1950) *S.C.* 211, Mukherjea J. declared his inability to formulate an effective test in this behalf (at p. 217) :

> "It is not possible to formulate an effective test which would enable us to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. The question of reasonableness of the restrictions imposed by a law may arise as much from the substantive part of the law as from its procedural portion . . . . Under clause (5) of Article 19, the reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such standard which is sometimes described as an external yard-stick, the vesting of authority in particular officers to take prompt action under emergent circumstances, entirely on their own responsibility or personal satisfaction, is not necessarily unreasonable. One has to take into account the whole scheme of the legislation and the circumstances under which the restrictive orders could be made."

(On the question of 'subjective' and 'objective' standards of judgment much will be said when we deal with the question of *certiorari* jurisdiction of the Supreme court and High Courts in our country, but the student who is interested in pursuing the problem may be well advised to read carefully two Engish cases which repersent to some extent the extreme views in either direction in regard to what the requirements of subjective and objective standards of judgment are. (a) *Liversidge v. Anderson*, (1942) *A.C.* 206; (b) *Nakuda Ali v. Jayarante*, (1951) *A.C.* 66).

State o. Madras v. V. G. Row

Now, although it is no doubt true that the question, whether or not a given restriction is a reasonable restriction, should be determined, is a matter which is incapable of any precise formulation, but the following observations of Pastanjali Sastri in the case of *State of Madras v. V. G. Row*, *AIR* (1952) *S.C.* 196, are opposite in this context, and are offered as representing, in the present author's opinion, the best that has been said in India on that topic at p. 200) :

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evils sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the

(7) The right to strike, or the right of the subject to withhold his labour, so long as he commits no breach of contract, or tort, or crime '

These rights are protected in England by —

(a) the high development of the action of trespass in its various forms, by resort to higher prerogative writs,

(b) by the right of the subject to insist upon having common law action affecting his most treasured rights, as well as all accusations of serious crime, tried by gentlemen of the Jury, and

(c) by resort to a rule of construction which is invariably followed in England, namely that statutes and other legislative Acts are so far as possible, to be interpreted so as not to cause any interference with the vested rights of the subjects (See paragraph 436 of *Halsbury s Laws of England Vol VI*)

It would be noticed that the foregoing rights are not Fundamental Rights they are not constitutionally guaranteed and can be taken away by an Act of Parliament

142. The individual liberty and Social Control—Position under our Constitution.

The rights guaranteed in ARTs 8 to 12, under our Constitution represent in their totality the legal status and capacity of a free citizen, and ART 4 prevents the State from interfering in any manner with these rights save in accordance with the limitations imposed upon those rights by the Constitution itself

The court s power to adjudicate upon the reasonableness of the restriction imposed by law is practically unfettered In the case of *Jeshingbhai v Emperor, AIR* (1950) *Bombay* 363, Chief Justice Chagla of the Bombay High Court stated

What is an what is no reasonable restriction for court t decide Jeshingbhai v Emperor

' It is not for the Legislature to determine whether the restrictions are reasonable or not It is for the Court of law to consider the reasonableness of the restrictions imposed upon the rights Reasonable is an objective expression and its objectivity is to be determined judicially by the Court of law There is no limit placed upon the power of the Court to consider the nature of restrictions The Court must look upon the restrictions from every point of view It being the duty of the Court to safeguard fundamental rights, the greater is the obligation upon the Court to scrutinize the restrictions placed by the legislature as carefully as possible "

Similarly, it was observed by Meredith C J in the case of *Brajnandan Sharma v State of Bihar AIR* (1950) *Patna* 322

[illegible]

"The learned Advocate General has argued that it is not open to the Courts [illegible] consider the reasonableness or otherwise of the provision The Legislature [illegible] the sole Judge of reasonableness, and if the Legislature makes a provision, the Courts [illegible] accept it as reasonable I find it difficult to follow that argument [illegible] word 'reasonable' in cl (5) is rendered completely nugatory The C[illegible] the restrictions must be reasonable Obviously, it is for the Courts [illegible] restrictive provisions are reasonable or not But then, says the [illegible] amounts to substituting one subjective test for another, [illegible]

[illegible]

is what the Courts apply They do not ask themselves [illegible] satisfied that the restrictions are reasonable [illegible] 'the reasonable man', that is to say, the normal [illegible] able? That is a well recognised legal means of [illegible] ableness, and it is essentially an objective test [illegible]

under challenge, on the ground that the restrictions it imposes are not reasonable *having regard to the prevailing conditions*, does not necessarily involve the risk of importing any relativity in the making of judicial determinations and taken by itself is a well established mode of proceeding which is not unknown even to the practitioners of English Common Law. For instance, it was in deference to this very principle that in the case of *King v. Governor of Brixton Prison Ex Parte Sarno*, (1916) 2 *K.B.* 742, Lord Reading Chief Justice said:—

> "I can conceive that an act which in time of peace could not fairly be described as a danger to the safety of the realm might fairly be so described in time of war, as for instance if a person commits, or even if he is merely suspected of committing, a crime. Although his actual offence may be merely the commission of a crime, nevertheless in time of war, when all the activities of persons engaged in police protection and in bringing criminals to justice must necessarily be restricted because of the demand that has been made upon persons of military age, the *commission of crime may contribute* to endanger the safety of the realm, and in time of war suspicion may justify action which could not be justified in time of peace . . . . . . It is unavoidable that incidents should happen in time of war which would, in truth, shock the majority of persons in this country in time of peace."

Some suggested tests of Reasonable Restrictions

In considering whether or not restrictions imposed by law on the freedoms guaranteed by ARTs. 8 to 12 are reasonable, it is perfectly permissible to a court to enquire into the provisions of the impugned law with a view to seeing whether *principles of natural justice, like the right of audience being given to the party to whose prejudice an order is being passed etc. have been incorporated by the legislature.* (See *AIR* (1956) *Allahabad* 571, *State v. Babulal* and *others; AIR* (1951) *Calcutta* 322, *Tozammal v. Joint Secretary to Government of West Bengal; AIR* (1952) *S.C.* 196, *State of Madras v. V. G. Row; AIR* (1954) *Allahabad* 562, *Rama Shankar Tewari v. The State*). Every thing will depend on the objects of the legislation and no hard and fast rule can be laid down about the extent to which requirements of natural justice should be taken care of by the legislature at the time when it imposes restrictions on the freedoms preserved by the Constitution. Similarly, the Court is entitled to see whether or not any absolute unqualified and *unguided discretion* has been conferred by the legislature on the executive in the matter of enforcing reasonable restrictions. Thus it has been held, as for instance in India, in the case of *Raghubir Singh v. Court of Wards, Ajmer, AIR* (1953) *S.C.* 373, that omission to provide for adequate machinery for the purpose of determining, whether a certain person was habituatly infringing the rights of his tenants so as to be within the mischief of the law for being treated as incapable of managing his property, is by itself an adequate basis for declaring the law to be unreasonable. It has also been held that a provision enabling authority being delegated to an officer of a very low rank to exercise powers under the West Bengal Security Act XIX (19) of 1950 is unreasonable legislation (*Jatish Chandra v. B. K. Sinha, AIR* (1951) *Calcutta*, 404). But it has also been held that the fact that the law though reasonable in itself has not provided for adequate safeguard against the abuse of executive authority to administer the law is not by itself sufficient for denouncing that law as imposing unreasonable restriction within the meaning of Art. 19 (See the case of *N. B. Khare v. State of Delhi AIR* (1950) *S.C.* 211)

Restriction vs. Regulation

The word 'restriction' appearing in the Constitution in relation to the freedoms that have been guaranteed has been interpreted in India to mean a term that is wider than the term 'regulation'. Even a total prohibition in *Loknath Misra v.*

decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable"

In the case of *Chintamanrao v The State of Madhva Pradesh AIR (1951) S C 118*, the expression 'reasonable restriction' was interpreted by Mahajan J of the Supreme Court of India as implying— Chintamanrao v State of Madhva Pradesh

"that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public The word 'reasonable implies intelligent care and deliberation, that is the choice of a course which reason dictates (p 119)

This case has been referred to and its principle re affirmed by the Supreme Court of India in the case of *M/S Dwarka Prasad Laxmi Narain v the State of Uttar Pradesh*, A I R (1954) *S C* 224, where the constitutionality of the Uttar Pradesh Coal Control Order, 1953, was considered Under the impugned Order the licensing authority was given absolute power to grant or withhold the grant of licence, to renew or refuse to renew, suspend, cancel or modify any licence under that Order the authority competent to do any one of these things was required to give reasons in support of the action that he took The Supreme Court adjudged the order as being violative of ART 19 and remarked that these restrictions on the right to do trade were unreasonable It said

"No rules have been framed and no directions given on these matters to regulate or guide the discretion of the Licensing Officer Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same" (p 227)

As to the safeguard, namely, that the licensing authority was to record his reasons in support of the action he took, the Court remarked that the alleged safeguard was not effective,

"for there is no higher authority prescribed in the Order who could examine the propriety of these reasons and revise or review the decision of the subordinate officer The reasons, therefore, which are required to be recorded are only for the personal or subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person"

(See also *West Bengal v Subodh Gopal Bose* A I R (1954) *S C* 92 and *Raghubir Singh v the Court of Wards, Ajmer*, A I R (1953) *S C* 373)

In each case, therefore, the claims of individual rights have to be viewed in the context of an over all combined welfare of the rest of the members composing society, and the judgment of the courts to that extent would necessarily be influenced not so much by considerations of abstract justice, as by *the appreciation of the political and economic situation which at the relevant time might be confronting the society as a whole* A proper balance is expected to be struck between the claims of individual freedom and the necessity of imposing some measure of social control which may be demanded by the general public interests

The doctrine that a Court of Law should assess the constitutionality of law

although the freedom to express oneself ought to be freely granted, care has also to be taken at the same time to see that this freedom is not abused. In this modern age of ours, when the means available for dissemination of information and opinion are so widespread and effective that one can, in the course of a brief hour or so, by means of telephone, radio or telegraph contrivances transmit from one end of the country to the other any idea, opinion or information—or even publicise same on an extensive scale through the medium of the daily Press—which is prejudicial or harmful to the interests of society, the need does arise of safeguarding not only the interests of other citizens in so far as their right to reputation is concerned but also of ensuring that the freedom of speech shall not be used by scheming ruffians as a licence for the purpose of subverting the organised civil government of the day. That then is the reason why ART. 8 enables legislature to impose "reasonable restrictions" on this freedom "in the interest of the security of Pakistan, friendly relations with foreign States, public order, decency or morality or in relation to the contempt of court, defamation or incitement of offence." The framers of our Constitution have taken advantage of the Indian experience of the working of their Constitution in relation to the right of freedom of speech. They, that is the Indians, have amended the second clause of Art. 19: this change was brought in by way of amendment by the 'First Amendment Act 1951, dated 18th June 1951 [Section 3 (1)(a)]. The statement of objects and reasons, in the light of which the amendment was pressed and ultimately accepted appeared in the *Gazette of India*, 1951, *Part II*, *Section II*, *page* 357, and it was pointed out that:

"During the last fifteen months of the working of the Constitution certain difficulties have been brought to light by judicial decisions and pronouncements, especially in regard to the Chapter on Fundamental Rights. A citizen's right to freedom of speech and expression guaranteed by Article 19(1) (a) have been held by Supreme Court to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence."

Legal Position in America.

In the Constitution of the United States of America in its very First Amendment we have the following provided:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

The American Courts, while interpreting the freedom of speech and the press enjoined by the First Amendment, have evolved a doctrine which is known as the 'rule of clear and present danger.'

The Fourteenth Amendment which enjoins that no one shall be deprived of his life, liberty and property without the due process of law, has also been invoked (in cases where the express provision mentioned in the First Amendment does not apply) as furnishing a basis for the recognition of the freedom of speech and press in the States.

The Founding Fathers knew only too well the state of the common law that had a reference to the freedom of the speech and of the press. According to *Blackstone*:

"The liberty of the Press is indeed essential to the nature of a free State; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion

State of Orissa, AIR (1952) *Orissa* 42, has been considered as reasonable It has been held in that case that expression 'restriction' in Art 19(6) is not synonymous with regulation' Restriction may be complete or partial and where it is complete it would imply absolute prohibition The Court went on the dictionary meaning of the word 'restriction' which includes prohibition also (See however the case of *Municipal Corporation of City of Toronto v Virgo* (1896) *A C* 88 where it has been ruled that a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed, and the case of *Commonwealth of Australia v The Bank of New South Wales* (1949) 2 *All E R* 755 (1950) *A C* 235 where it has been held that the power of regulation in some cases would include power of prohibition although normally that would not be so In this last mentioned case the question was whether S 46 of the Commonwealth Banking Act of 1947 was invalid on account of its being inconsistent with freedom of inter State trade guaranteed by S 92 of the Australian Constitution) In *Saghir Ahmad s case* of the Supreme Court of India reported in A I R (1954) S C 728, at 737 *PLD* (1956) *S C* (*India*) 148 Mukherjea J at page 160 left the question whether or not the term restriction included the idea of total prohibition open His Lordship remarked

' Be that as it may, although in our opinion the normal use of the word restriction seems to be in the sense of 'limitation' and not extinction we would on this occasion prefer not to express any final opinion on this matter

In the case of Hughes and Vale Proprietary Ltd v State of New South Wales, the Privy Council have laid down that a regulation which reserved to the licensing authority the absolute right to refuse the grant of licence in his discretion for whatever reason he liked amounted to a *prohibition* and interfered with the freedom of inter State trade guaranteed by S 92 of the Australian Constitution [See (1954) 3 *All E R p* 607 (1955) *A C* 241 (1954) 3 *W L R* 824) Vale Proprietary Ltd v New South Wales

The argument of their Lordships was that as a simple prohibition of the trade of an individual or such a prohibition subject to a discretionary exemption was not merely regulatory of the trade (and, not being regulatory, would offend against S 92 of the Constitution within the principle stated in *Commonwealth of Australia v Bank of New South Wales*, (1949) 2 *All E R* 755) because the individual was thereby not allowed in effect to carry on his trade at all, so also the prohibition in the Transport Act of the operation of transport unless authorised by licence which might be granted or withheld at the discretion of State authority was not merely regulatory of trade, commerce and intercourse among the States, accordingly the licensing provisions of the Transport Act contravened S 92 of the Constitution and were invalid as regards the inter State transport

(See also *Motor Transport Commissioners v Antill Ranger & Co Proprietary Ltd , State of New South Wales and Edmund T Lennon Pty Ltd J C* (1956) *A C* 527, (1956) 3 *W L R p* 497 (1956) 3 All E R 106)

We may now consider the several freedoms guaranteed in ARTs 8 to 12 of our *constitution*

143 Various 'Freedoms' considered

The freedom of speech and expression is an essential pre requisite for the purpose of successfully working democratic institutions If democracy refers to a form of government which is to be conducted by means of an organised public opinion, any clog or fetter that may be imposed on the citizens' right to express themselves freely on public questions, virtually would amount to preventing effectively the formation of that very opinion which is the admitted basis for the working of a democratic government But (a) Freedom of Speech and Expression

Pre-censorship and the Freedom of Expression.

It would appear that under our Constitution all laws that permit the imposition of pre-censorship, which is not related to any of the purposes mentioned in ART. 8, may have to be regarded as being opposed to the guarantee contained in ART. 8, and therefore void and of no effect whatever. In a case decided by the Supreme Court of India (*Brij Bhushan and another v. The State of Delhi, AIR* (1950) *S.C.* 129), it has been ruled that the imposition of pre-censorship unconnected with the purposes mentioned in Art. 19 (2) of the Indian Constitution is void. Fazl Ali J., while conceding in his dissenting judgment that pre-censorship on a journal did tantamount to a *restriction* on the liberty of the press (which is included in the right to freedom of speech and expression guaranteed by Art. 19 of the Indian Constitution) proceeded to examine the further question whether the imposition of such a restriction was covered or saved by clause (2) of Art. 19, which had said,

> "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, in so far as it relates to, or prevent, the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State"

and came to the conclusion that the law which was impeached before the Court was fully saved by Art. 19(2).

Under our ART. 8, there is no saving of "the existing laws" and the only question to be considered by a Court is whether the right of freedom of speech and expression has been subjected to reasonable restrictions imposed by law in the interests of the security of State etc. It would thus appear that the principle of the decision recorded by Fazl Ali J., in his dissenting judgment would apply to the interpretation of ART. 8 also to the extent indicated earlier.

A similar argument would apply for holding that laws enabling the executive to demand security from the Press also violate guarantee contained in ART. 8, provided it be held that that restriction was not imposed in the interest of security of State etc. In the case of *Bharati Press v. The Chief Secretary of the Government of Bihar, AIR* (1951) *Patna* 12, the Special Bench of three Judges of the Patna High Court have held that:

"An order demanding security under S. 3(3), Press Act for violation of S. 4(1) (a) of that Act is void and must be quashed."

This was a case of a pamphlet entitled 'Sangram' written in Bengali, which contained a clear invocation to the readers to join a total and deadly struggle to bring about a revolution by violence resulting in complete annihilation of those whom the writer considered as 'oppressors', or who were directors of wrong and injustice, or who took part in parochial national politics or who brought into disgrace the mother tongue. Relying on the decision of the Supreme Court in *Romesh Thappar v. State of Madras, AIR* (1950) *S.C.* 124, and *Birj Bhushan and another v. State of Delhi, AIR* (1950) *S.C.* 129, their Lordships of the Patna High Court held that:

> "Clauses (a) and (b) of S. 4(1), Press Act are void being inconsistent with the fundamental right given under Art. 19(1) of the Constitution, and that these provisions are not saved under cl. (2) of the said Article. As the demand for security in the case has been made for violation of S. 4(1) (a) of the Act, the order demanding security is void and must be quashed."

It is largely as a result of these decisions that the original provision in sub-clause (2) of Art. 19 was amended in India and given its present shape—and our ART. 8 corresponds to the present Indian formulation in Art. 19(2) of that Constitution. The original provision was, as follows:

and government But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion the only solid foundations of civil liberty Thus the will of individuals is still left free, the abuse only of that free will is the object of legal punishment " (See his Commentaries Vol IV p 145)

They, that is the American people, however, wanted to ensure by means of an express constitutional guarantee that the freedom of speech and press shall not be at the mercy of ordinary legislative process

Clear and present danger rule

The 'clear and present danger doctrine, referred to earlier as evolved and applied by the Courts in America, refers to the requirement of law that before the Government can penalise any utterance it must show that it occurred in such circumstances or has been of such a nature as to create a clear and present danger and further that it constitutes "a substantive evil ', which Government is entitled to prevent Whether or not this is made out, is a question of *law* and its enforcement by the Courts has reference to the provisions of First Amendment and the Fourteenth Amendment of the American Constitution In the case of *Schenck v United States* (1919) 249 *U S* 47 63 Law Ed 470, (a case where this doctrine received its formulation,) Justice Holmes *(at p 52)* observed

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic It does not even protect a man from an injunction against uttering words that may have all the effect of force The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent It is a qestion of proximity and degree "

In a recent case *American Communications Association v Douds* (1950) 339 *U S* 382 94 Law Ed 925 at p 927 the Supreme Court of America has observed

> Freedom of speech, press and assembly are dependent upon the power of constitutional government to survive If it is to survive it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts Freedom of speech does not comprehend the right to speak on any subject at any time "

(See also the case of *Niemotko v Maryland*(1951) 340 *U S* 268 95 Law Ed 267, particularly the opinion of Justice Frankfurter for a scholarly analysis and classification of the different types of free speech cases considered by the United States Supreme Court)

Freedom of the press

Under our Constitution freedom of the press has not been separately mentioned, but it would seem that the freedom of the Press would flow logically from the citizen's right to freedom of speech and expression—for, after all freedom of the Press means nothing more than one s ability to express oneself in print Press is thus under our Constitution in much the same position as the ordinary citizen, it has no special privileges This is also true under the English Law (See *Arnold v King* (1914) 41 *I A* 149)

' Liberty of the Press", said Lord Mansfield ' consists in printing without any previous licence subject to the consequences of the law ' (*The King v Dean of Saint Asaph* (1784) 3 TR 428 at 431)

Justice Darling is exempt. There is not a journalist in Birmingham who has anything to learn from the imprudent little man in horsehair, a microcosm of conceit and empty headedness . . . One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he seated a new judge from among the larrikins of the law. One of Justice Darling's biographers states that an eccentric relative left him much money. That misguided testator spoiled a successful bus conductor."

S. 228 of Penal Code and S. 480 of Cr. P.C.

So far as the statutory provisions of law of contempt are concerned, reference may be made to Section 228 of the Penal Code, and S. 480 of the Criminal Procedure Code: the former defines the nature of the offence created by the statute, and the latter gives summary powers to a Court to punish a person guilty of contempt of its authority, "when any such offence is committed in the view or presence of any civil or criminal court . . . ."

The two High Courts of our country, as also the Supreme Court, are described by the Constitution as being Courts of record and their powers for punishing contempt are mentioned in the Constitution itself. (See ART. 176). As far as comments critical of Bench are concerned Lord Atkin stated the principle thus in *Ambard v. Attorney-General for Trinidad and Tobago*, (1936) *AC* 322 at p. 335:

"Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."..

Nature of Defence in Contempt Proceedings Israr Hussain v. Crown.

In the case of *Israr Hussain v. The Crown*, (1954) *F.C.R.* (*Pak*) p.7,: P.L.D. (1954) F.C. 313, the question relating to the contempt of the Judge of a Superior Court has been elaborately considered by the Full Bench of the Federal Court of Pakistan. This was a case in which an advocate, in his capacity as a private litigant, had in an affidavit scandalised a Judge of the former Sind Chief Court. Chief Justice Munir ruled that it was not a good defence to the proceedings for contempt that the advocate's intention was not to scandalise or that the allegation was true, because the essential question in such a case was the tendency of the allegation to lower the authority of the Judge by bringing him into disgrace and not the intention underlying the allegations or the truth thereof. In the words of the learned Chief Justice:

"The contention that the allegations were justified and the complaint that the appellant was not given an opportunity to substantiate them assume that in summary proceedings for contempt where such contempt consists in scandalising a Judge truth is a valid answer. But neither before the Chief Court nor before us was cited any authority or opinion that where proceedings in contempt are initiated against a person who has scandalised a Judge of a Superior Court, truth can be successfully set up as a defence. The whole principle of the Law of Contempt is against any such defence, and if the law were as contended for, the whole administration of justice would be brought into disrepute because in that case the honour of the Judges would be at the mercy of disgruntled litigants who might with impunity attack the judges and when proceedings in contempt were taken against them, bring them into further contempt by pleading truth and offering to prove it. Judges would thus be constantly engaged in defending their own personal honour against the onslaughts of persons who are parties to causes pending in their own Courts. And where a judge has thus been dragged into a forensic arena, public confidence in the administration of justice by him would be completely gone and a few such instances would be sufficient to expose the whole system to public ridicule." (p. 21)

Defamation

The law relating to defamation may be divided into two parts:

(a) Criminal liability for the offence of defamation which is punishable under S. 500 of the Penal Code.

"Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, in so far as it relates to, or prevent, the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State"

The law relating to contempt of Court in our country is the same as it is known to the English Law There is no precise definition given in any of our statutes, as to what constitutes contempt of court In the Contempt of Court Act (Act XII of 1926) all that was done was to define and limit the power of certain courts in the matter of punishing contempts of court In Section 2, it was laid down — Contempt of Court

"2 (1) *Subject to the provisions of sub section (3), the High Courts of Judica ture* established by Letters Patent shall have, and exercise the same jurisdic tion, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to them as they have and exercise in respect of contempts of themselves

(2) Subject to the provisions of sub section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub section (1)

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code"

There are of course various classes and kinds of contempts known to English law in the words of Lord Russell of Killowen, utered by him in the case of *Reg v Gray*, (1900) 2 QB 36 (at p 40) some of them are as follows

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower its or his authority, is a contempt of Court That is one class of contempt Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts, is a contempt of Court The former class belongs to the category which Lord Hardwicke L C characterised as scandalising a Court or a Judge (*In re Read and Huggonson* (1742) 2 *Atk* 469) That description of that class of contempt is to be taken subject to one and an important qualification Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court The law ought not to be astute in such cases to criticise adver sely what under such circumstances and with such an object is published, but it is to be remembered that in this matter the liberty of the press is no greater and no less, than the liberty of every subject of the Queen"

In this case the Editor of Birmingham Press had attacked Darling J who was hold ing the Local Assizes The offender apologised and was fined £ 100 with £ 25 as costs The language used by the offender has been reproduced in the report of the case in 69 L J Q B 502 82 L J 534 and is as follows

"If any one can imagine little titch upholding his dignity upon a point of honour in a public-house he has a very clear conception of what Mr Justice Darling looked like in warning the press against the printing of indecent evidence His Diminutive Lordship positively glowed with judicial self consciousness No newspaper can exist except upon its merits, a condition from which, the Bench, happily for Mr

minds are open to such immoral influences and into whose hands the publication of this sort may fall. (See also Lord Goddard's remarks approving this statement of law by Cockburn C. J. in a recent case *Regina v. Reiter*, (1954) 2 *Q.B.* 16 *at p.* 19, as also the case of *Sreeram Saksena v. Emperor*, *ILR* (1940) 1 *Cal.* 581 : *AIR* (1940) *Calcutta* 290. If the publication is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it may come, it will be an obscene publication which it is the intention of law to suppress. (*See Emperor v. Hari Singh* (1905) *ILR* 28 *Allahabad* 100).

Expert evidence inadmissible for determining the obscene character of publication.

It is submitted that in the determination of the question whether or not a publication charged as obscene is one which is likely to corrupt or deprave those into whose hands it is likely to fall is one for the Court to decide, and it is not a matter on which expert evidence could be allowed to be led. In an English trial relating to the offence (misdemeanour) of obscenity, presided over by Sir Chartres Biron, the conversation in court reported to have taken place between the Magistrate and Norman Birkett, (the latter appearing for the defence) is instructive on the point:

"Norman Birkett: I want to call evidence from every conceivable walk of life which bears on the test whether the tendency of this book was to deprave and corrupt. A more distinguished body of witnesses has never before been called in a court of justice.

The Magistrate : I have the greatest doubt whether the evidence is admissible.

Norman Birkett: If I am not allowed to call evidence it means that a Magistrate is virtually a censor of literature.

The Magistrate : I don't think people are entitled to express an opinion upon a matter which is for the decision of the court."

Mr. Desmond McCarthy, then Editor of 'Life and Letters', went into the box and replying to Mr. Birkett said he had read the book.

"Norman Birkett: In your view is it obscene?

The Magistrate: No I shall disallow that. It is quite clear that the evidence is not admissible. A book may be a fine piece of literature and yet obscene. Art and Obscenity are not disassociated at all. There is a room at Naples to which visitors are not admitted as a rule, which contains fine bronzes and statues, all admirable works of Art, but all grossly obscene. It does not follow that because a book is a work of art it is not obscene. I shall not admit the evidence.

Norman Birkett: I formally tender thirty-nine other witnesses. The evidence which a number of them would have given is identical with that of Mr. McCarthy. In a second category are distinguished authors and authoresses who would have said that they had read the book and in their view it was not obscene. Other witnesses include booksellers, ministers of religion, social workers, magistrates, biologists, including Professor Julian Huxley, educationalists, including the Registrar of Durham University, medical men and representatives of the London Libraries.

The Magistrate: I reject them all."

The best that has been said on the subject of obscenity is to be found in the summing up by Mr. Justice Stable in a trial, the subject-matter of the accusation being the publication of "*Philanderer*", published by Secker and Warburg in April, 1953:

"Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: 'Well, corrupt or deprave whom?' and again the test: those whose minds are open to such immoral

(b) Civil liability which is enforceable by an action in damages for compensation to the person who has been subjected to libel or slander. Here the principles of the English Common Law in regard to the tort of libel and slander would apply.

S. 499 of the Penal Code defines offence of defamation as follows: S. 499 of Penal Code

"499. *Defamation.*—Whoever by words either spoken or intended to be read, or by signs or by visible representation makes or publishes any imputation concerning any person intend to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

"*Explanation* 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to a defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

There are ten exceptions mentioned in the section which it is not necessary to reproduce for the purpose of the present statement of law relating to defamation.

Incitement to offence is itself an offence under the Penal Code. S. 107 of the Pakistan Penal Code defines what is abetment of an offence and in its very first clause in effect says that a person may abet the doing of a thing when he instigates a person to do that thing. S. 108 defines an abettor, and S. 109 prescribes punishment for abetment, "if the act abetted is committed in consequence of abetment and where no express provision is made for its punishment." Under S. 117 of the Penal Code there is a provision for the punishment of abetting the commission of an offence by the public or by more than ten persons.

The expressions 'decency' and 'morality' occuring in Art. 8 are too vague to admit of any precise juridical connotation. Obviously, the words are calculated to hit obscene and paronographic expressions in writing or in speech. Concept of Decency or morality

S. 292 of the Pakistan Penal Code penalises the sale, letting on hire, distribution, public exhibition or circulation of any obscene book, pamphlet, paper, drawing, painting, representation of figure or any other obscene object whatsoever. This Section was incorporated along with S. 293 which punishes sale of obscene books to young persons by Obscene Publication Act (Act VIII of 1925) for the purpose of giving effect to the international convention for the suppression of the circulation of, and traffic in, obscence publications, signed at Geneva on behalf of the Governor General in Council of India on September 12, 1923. S. 294 punishes any person who to the annoyance of others does any obscene act in a public place or sings, recites or utters any obscene songs, ballad or words, language or song in public place. It would be noticed that in none of these three Sections has any attempt been made to offer a statutory definition of obscenity. There have been judicial pronouncements, however, which throw a great deal of light on the legal notion of obscenity. As per Cockburn C. J. in *The Queen v. Benjamin Hicklin*, (1868) *L. R.* 3 *Q. B. D.* 360, the test of obscenity is this: whether the tendency of the matter charged as obscene is so to deprave and corrupt those whose S. 292 of the Penal Code The Queen v. Benjamin Hicklin

Meaning of Public Order, Public Interest and Public Safety.

The meaning of expressions 'public order' appearing in ARTs. 8, 9, 10 and 'public interest' appearing in ART. 11, may now be considered. The expression 'public order' has reference to the maintenance of conditions whereunder the orderly functioning of government can be carried on. It is the duty of Government to see that the lives, properties and liberties of the citizens are not thrown in jeopardy. 'Public order' is wider than 'public safety', and implies absence of internal disorder, rebellion, lack of interference with or obstruction to the supply or distribution of essential commodities or services. Security of State involves something more than maintenance of public order, the latter term having exclusive reference to the creation of internal conditions within a State which make it possible for the State to carry on its duties, and discharge its functions. Security of State implies also an external reference, such as immunity from war of external aggression, avoidance of unfriendly relations with the neighbouring States etc. It must, however , be admitted that these terms have not been precisely defined anywhere and even the judicial pronouncements in India as well as in our country which have a bearing on the interpretation of these terms do not seem to proceed on any well accepted basis or approach for the comprehension of these vague words. Security of the State could be achieved by preventing the recrudescence of all the prejudicial acts which bring about its political or economic stability. In relation to the conduct of its external affairs the security of the State can be exposed to grave risk in case friendly relations with the neighbouring States are disturbed by well calculated attempts on the part of pestiferous provocateurs to precipitate crisis etc. The Supreme Court of India in a case referred to earlier (*Romesh Thappar v. State of Madras*, *AIR* (1950) *S.C.* 124), did not give any definition of the expression 'Security of State', but indicated that it connoted something more than mere breaches of public safety or public order which do not constitute any danger to the State itself. In the words of Patanjali Sastri:

> "The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance treating for this purpose differences in degree as if they were differences in kind." (p. 128)

The meaning of 'public safety' and 'public order' was adverted to by Fazl Ali J. in his dissenting judgment in the case of *Brij Bhushan v. State of Delhi*, *AIR* (1950) *S.C.* 129. He felt that the expression 'public safety'

> "has now acquired a well-recognized meaning in relation to an Act like the impugned Act, (East Punjab Public Safety Act, 1949) as a result of a long course of legislative practice, and may be taken to denote safety or security of the State. In this sense, it was used in the Defence of the Realm (Consolidation) Act, 1914, as well as the Defence of India Act, and this is how it was judicially interpreted in *Rex. v. Governor of Wormwood Scrubbs Prison*, (1920) 2 *K.B.* 305". (p. 130)

The learned Judge further went on to remark:

> "Thus 'public order' and 'public safety' are allied matters, but in order to appreciate how they stand in relation to each other, it seems best to direct our attention to the opposite concepts which we may, for convenience of reference, respectively label as 'public disorder' and 'public unsafety'. If 'public safety' is, as we have seen, equivalent to 'security of the State', what I have designated as public unsafety may be regarded as equivalent to 'insecurity of the State'. When we approach the matter in this way, we find that while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by or affects a

influences and into whose hands a publication of this sort may fall What exactly does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen year old school girl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is Of course not A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public

"You have heard a good deal about the putting of ideas into young heads But is it really books that put ideas into young heads, or is it nature? When a child, be it boy or girl, passing from a state of blissful ignorance, reaches that most perilous part of life's journey which we call 'adolescence', and finds itself traversing an unknown country without a map, without a compass, and sometimes, I am afraid, from a bad home, without a guide, it is this natural change from childhood to maturity, that puts ideas into its young head It is the business of parents and the teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life "

"This is an American novel written by an American, published originally in New York and purporting to depict the lives of people living today in New York, to portray their speech and attitude in general towards this particular aspect of life If we are going to read novels about how things go on in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman of teenage has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage plots or under gooseberry bushes?

"You may think that this is a very crude work, but that it is not, perhaps altogether an exaggerated picture of the approach that *is being made in America* towards this great problem of sex You may think that if this does reflect the approach on that side of the Atlantic towards this great question, it is just as well that we should know it and that we must not close our eyes or our minds to the truth because it might conceivably corrupt or deprave any somewhat puerile young mind "

The Judge then gave an outline of the plot and continued

"So far as his amatory adventures are concerned, the book does, with candour or, if you prefer it, crudity, deal with the realities of human love and intercourse There is no getting away from that, and the Crown say· *'well, that is sheer filth '* Is the act of sexual passion sheer filth ? It may be an error of taste to write about it It may be a matter in which some, perhaps old fashioned, people would prefer that reticence continued to be observed as it was yesterday But is it sheer filth? That is a matter which you have to consider and ultimately to decide

"I do not suppose there is a descent man or woman in this court who does not whole heartedly believe that pornography, the filthy bawdy muck that is just filth for filth's sake, ought to be stamped out and suppressed Such books are not literature They have got no message, they have got no inspiration, they have got no thought They have got nothing They are just filth and ought to be stamped out But in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, and that the pendulum may swing too far the other way and allow to creep in things that at the moment we can exclude and keep out?"

The battle for human rights and the ultimate victory that was won in its name was fought against authoritarian order in favour of the concept of liberal rule. That is why it was in the era of individualism of the eighteenth century that mankind saw the dawn of the establishment of liberal rule. The constitutional liberties were conceived of even by those responsible for the incorporation of Bill of Rights in the United States Constitution, on the *premises of individual rights*: the First Amendment to the Constitution of the United States that guarantees "Congress shall make no law respecting any establishment of religion or prohibiting free exercise thereof; or abridging the freedom of speech or of the press: or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances" was primarily designed to consecrate the rights of the individuals and the rights of the groups which the United States Supreme Court has since protected, whether that has been done in the name of First Amendment or the Fifth or the Fourteenth Amendment, have been derived by a process of artificiality of construction. The derivation of "groups-rights" from the guarantees of individual rights, have brought about a crop of manifest anomalies in the American jurisprudence, anomalies which attest the truth of these observations. In the case of *Gitlow v. New York*, (1925) 268 *U.S.* 652 :69 Law. Ed. 1138 the United States Supreme Court has upheld the contention of the 'associations' to lay claim to free speech, press and assembly against legislation of the States. As opposed to this it has long been held that 'corporations' cannot claim the right against self-incrimination which is limited to natural persons and so the officers of the corporation must give evidence when called upon to do so regarding corporation affairs even though it implicates them personally. This rule has been extended even to the officers of unincorporated voluntary associations (see *United States v. White* (1944) 322 *U.S.* 694: 88 Law. Ed. 1542) Thus, for certain purposes, the associations are treated as individuals, for others, not. These inconsistencies arise because law of associations has been evolved under the impact of modern conditions. As Mr. Horn put it:

> "The rights of associations have been raised upon the rights of individuals to associate. Indeed, it is a rare thing to find in the judicial opinions with which we shall be concerned any overt discussion of the nature of groups or the rights of groups. The court's rhetoric is still the rhetoric of individualism, but its logic is the logic of the collectivity of our own time. The Justices focus the light of their learning upon the individual before the bar, but if one looks back at the rear wall of the court room, one can see, large and distinct, the shadow of the group for whom the individual litigant stands. But this will not seem strange to anyone familiar with the ways of the law. Novel questions are answered in familiar words, and almost unconsciously, absent-mindedly—or with the art that conceals art—the judge refashions old ideas to fit new problems. On the technical level, for example, the Court sometimes treats an association as a legal entity and sometimes not." (*See p. 16 of his "Groups and the Constitution" Stanford University Press* 1956).

The United States Constitution does not speak of the freedom of association. The student of American Constitutional Law has to do a lot of clear thinking and research before he can successfully track down the sources whence the freedom of association, guaranteed to groups like the political parties, labour and industrial classes, etc., could be said to have been derived. Is the group whose rights are constitutionally guaranteed a mere sum or collection of its individual members' liberties or is it something more than all this? The answer to this question raises many metaphysical questions of the kind with which the students of Company Law are so familiar. The rights that are guaranteed to an association cannot be claimed by an individual in his own right as an individual but only as a member of the group.

small group of persons, 'public unsafety' (or 'insecurity of the State') will usually be connected with serious internal disorders and such disturbances of public tranquillity as jeopardize the security of the State "

It would thus appear from the foregoing extract taken from the judgment of Fazl Ali J that that learned Judge regarded public safety as an all inclusive concept and 'public order' was merely represented as connoting a variegated aspect on a small scale of that very idea which was inherent in the expression public safety Thus 'public safety' would cover serious cases of public disorder

Here, as elsewhere, definitions can only serve to fix dominant ideas underlying the terms they define, but in their application to the facts of each particular case the Court will have to consider numerous attendant circumstances It is hard to expect any unanimity of approach in the application of these ill defined juristic ideas

The prejudicial activities such as attempts to overthrow the government or the making of war or precipitating border incidents with a view to provoking the hostility of neighbouring States, would necessarily fall within the mischief of the expression Prejudicial acts threatening the security of the State'

The expression public interest' is, however, wide enough to cover every and any conceivable act which has reference to 'public interest' generally Anything which tends to promote common good would be deemed to be in the public interest and would afford a justification for restrictions being imposed by law in that behalf (See the case of *Krishnamurthy v Venkateswaran AIR* (1952) *Madras* 11 *at p* 16)

144. Several Freedoms considered (Continued) (Arts: 10, 11, 18, 16).

(b) Freedom of Movement

Under ART 11 of our constitution freedom of movement is guaranteed subject to reasonable restrictions imposed by law in the public interest Every citizen of Pakistan is free to move to and settle in any part of Pakistan subject to any law providing for reasonable restrictions in the public interest Although the right has been guaranteed to every citizen to freely move about, there must emerge, as a result of every citizen exercising this right, what might be characterised as a *collective* right of a group of people to move about, or to take out a procession If, however, more persons than one manifestly get together to engage themselves in a criminal conspiracy to commit an offence or to facilitate the commission of an offence, their right of movement will come in conflict with the limitation of 'reasonable restrictions' imposed by law in public interest The actual content of this right is thus practically negligible because restrictions to any extent can be imposed by law provided they can be shown to be reasonably demanded in the public interest

But be it noted the reasonableness of restriction is to be judged by both the nature and extent of restriction as well as by the procedure prescribed relevant to the imposition of a given restriction The Division Bench of West Pakistan High Court consisting of Rahman C J and Yakub Ali J thus, in the case of *Rao Mahroz Akhtar v District Magistrate, Dera Ghazi Khan, PLD* (1957) *Lahore* 676, declared S 5 of the Punjab Safety Act (XVIII of 1949) void for the reason that the Court considered the restriction imposed by the impugned Act unreasonable in that it did not provide for an opportunity to make a representation against the order of internment (See further *Bazal Ahmad Ayyubi v West Pakistan Province, PLD* (1957) *Lahore*, 388, *Abdul Quddos Bihari v Chief Commissioner, Karachi, PLD* (1956) *Karachi* 533

Rights of Groups under the U S Constitution

In this context it is necessary to make a few general observations on the juristic implications of what are known as "group rights"—as opposed to individual rights

(1952) *Madras*, 253, it was held that any interference with the right conferred by Art. (19)(1)(c) to prohibit teachers from forming unions other than joining officially approved teachers union was unconstitutional. Their Lordships of the Madras High Court observed (at p. 254):

"It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of administrative or executive authority which can grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is (in) the nature of administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by the exercise of official discretion."

This case contains comprehensive discussion of some of the American cases and could be read with profit as its principle would apply to the interpretation of ART. 10 of our Constitution. (See *Whitney v. California* (1927) 274 *U.S.* 357: 71 *Law Ed.* 1095; *New York Ex. Rel. Byrant v. Zimmerman* (1928) 278 *U.S.* 63:73 *Law Ed.* 184; *Lovell v. Griffin* (1938) 303 *U.S.* 444 : 82 *Law Ed.* 949; *Hague v. Committee for Industrial Organization* (1939) 307 *U.S.* 496 : 83 *Law Ed.* 1423; *Schneider v. Irvington*(1939) 308 *U.S.* 147: 84 *Law Ed.* 155; *Largent v. Texas* (1943) 318 *U.S.* 418 : 87 *Law Ed.* 873, *United Public Workers v. Mitchell* (1947) 330 *U.S.* 75 : 91 *Law Ed.* 754)

(c) Comment on ART. 18. Right to Profess, Practise and Propagate Religion etc.

ART. 18 of our Constitution guarantees certain rights—(Right to profess, practise, and propagate any religion and right to establish, maintain and manage religious institutions)—subject to 'law', 'public order' and 'morality'. What is the nature of the limitation that has been imposed upon the enjoyment of this right? On the face of it, it would appear that the 'rights' guaranteed are available only against administrative action. The legislature is not precluded from taking away these rights, in other words the content of the right is contingent upon there being no law taking it away and stands on the same footing as the right to life or liberty or property which too is subject to law. This interpretation is further re-inforced by the consideration that the legislature has used, in several other Articles, the expression 'subject to reasonable restrictions imposed by law'. Why did not the Constitution-makers use the same expression in ART. 18 if the idea was to make the content of the right subject not to every and any law but only to a law of a particular kind, a law regulating the exercise of the right and not a law that abrogates the right.

Jibendra Kishore v. Province of East Pakistan

ART. 18 of the Constitution of Pakistan came up for a comment in the case of *Jibendra Kishore and others v. The Province of East Pakistan, PLD* (1957) *S.C.* 9. It was contended that the Government of East Bengal could not exterminate the *wakfs* and the debutters if they were religious institutions, and the acquisition of the properties of *wakfs* and *debutter* properties by the State virtually meant the annihilation of these religious institutions. The objection was sustained on the premises of following reasoning (at pp. 41 to 43):

"There can be no doubt that these drastic provisions of the Act (the impugned Act) strike religious institutions at their very root, and the question is whether, that being the effect of the provisions, they constitute an infringement of the fundamental right guaranteed by Article 18 of the Constitution? In the High Court, Mr. Brohi's bold and categorical assertion that the rights referred to in Article 18 are 'Subject to law' and may therefore be taken away by the law, succeeded. That assertion has been repeated before us, but I have not the slightest hesitation in rejecting it. The very conception of a fundamental

The political pluralists, for instance, strenuously argue that since a group is as real as a human being it is entitled to be treated by law as though it were an individual The development of the civil liberty of association in the United States presents peculiar complexities, and it is not the aim of the present writer to embark upon an examination of the course which that history has taken "The rights of association", says Mr Horn (at pp 14-15) "like the right of property is a bundle of rights The right to assemble and the right to communicate by speech and writing are parts of the broader right of association These the First Amendment of the Constitution specifically guarantees But what of the rights to admit, to discipline and even to expel members? What of the rights to enact constitutions, by laws and regulations of the association, to choose officers, and, more than that, to determine how they shall be chosen and what their powers shall be? What of the rights to acquire, to hold, and to expend funds, and to enter into legal relations with individuals and groups outside the association? All these rights go to make up the power of an association to govern itself and are in some degree also indispensable to effective association The exercise of many of them also involves, it is important to observe, the interests of others outside the group Whatever protection for these rights the Constitution of the United States affords must be drawn from the broad language of the due process clauses that no person shall be deprived of his liberty or property without due process of law Under the traditional interpretation of these clauses, rights are not protected by them absolutely, but if any governmental limitation upon these rights is challenged the question is whether or not the limitation is a reasonable one Such a standard requires that the interests of the group be compared with interests asserted by the law in question In short, our constitutional system recognizes that freedom to exercise these rights is the rule, and that exceptions must have a rational justification acceptable to the courts"

So far as our own Constitution is concerned, the right to form associations or unions is expressly provided, and before a comment is made on ART 10, it is necessary to reproduce the following five principles of the law of association which have been formulated by the author from whose book "*Groups and the Constitution*" the extracts just cited have been qoted *First* The rights of individuals to associate must be protected from unlawful governmental infringement *Second* Government may promote the opportunities of individuals to associate by appropriate means, and may grant appropriate privileges and powers to associations when the public interest will be fostered by doing so *Third* Government may when the public interest requires it forbid private persons to interfere with the rights of individuals to associate and may even require private persons to enter into legal relations with associations *Fourth* An association must not without adequate reason infringe [illegible] rights of other persons, and government must define the interests entitled to [illegible] protection of these other individuals and groups, whether they are members or non-members of the association *Fifth* Government may prevent the use of the [illegible] association to do serious injury to society as a whole or to the organized [illegible] institutions of the society

Position under our & Indian Constitutions

ART 10 guarantees the *right to form associations or unions* subject [illegible] restrictions imposed by law in the interest of morality or public [illegible] and Trade Union legislation are set forth the limits within which [illegible] ployees to engage themselves in collective bargaining is to be given effect [illegible] restriction of the right of employees to form unions being [illegible] constitutional In the case of *Ramakrishnaiah v President* [illegible]

Article *inter alia* guarantees the right to establish, maintain and manage religious institutions, but concedes to the legislature the power to regulate the manner in which such institutions may be established, maintained and managed. It does not, however, empower the legislature to make a law that hereafter no institutions of a religious character shall be established, maintained or managed or that an existing religious institution shall be abolished. The Article appears to me to proceed on the well-known principle that while legislature may not interfere with mere profession or belief, law may step in when professions break out in open practices inviting breaches of peace or when belief, whether in publicly practising a religion or running a religious institution, leads to overt acts against public order. In the present case no question of law and order being involved, I am constrained to differ from the view taken of this fundamental right by the High Court."

It is submitted with respect that (a) the notion that the content of fundamental right cannot be made dependent upon law taking it away is contradicted by the text of ART. 15(1) and ART. 5(2), and further that (b) to confine the interpretation of the term 'law' occurring in Art. 18 only to a law of certain type would appear to be unwarranted. The intention behind the formulation may well have been to take the right away from the range of administrative interference and thus make it the exclusive preserve of legislative action to interdict it. The plain language of the Article seems to suggest a different intention on the part of the framers of the Constitution from the one that has been imputed to them. If this view is not accepted almost every change sought to be made by the legislature in the religious institution of any given section of the people of our country would be denounced as *ultra vires* and if *wakfs* and debutters are religious institutions so is also almost every phase of the Muslim and Hindu personal law.

Analysis of the content of ART. 18 would show that in its clause (a) what is guaranteed is. a qualified right of the citizen to profess, practice and propagate any religion and in its clause (b) what is protected is the right of 'every religious denomination' and 'every sect' to establish, maintain and manage religious institutions. These guarantees roughly correspond to those mentioned in Arts. 25(1) and 26(a) (b) of the Indian Constitution. Chagla C. J. of the Bombay High Court in the case of *Ratilal v. State of Bombay, AIR* (1953) *Bombay* 242, rightly remarked at p. 244 that what Art. 25 guaranteed was right of persons to have religious freedom and what Art. 26 protected was the right of "every religious denomination and every sect thereof" to establish and maintain institutions for religious and charitable purposes "and also to manage its own affairs in matters of religion." Perception of this distinction between the right of persons and right of every religious denomination or sect as two distinct aspects of religious freedom guaranteed by the Constitution is essential to the proper understanding of the meaning of 'religious institutions' appearing in ART. 18 (b) of our Constitution as even of that term as it pre-figures in Art. 26 of the Indian Constitution. It is suggested that 'religious institution' does not mean the same thing as legal institution even though under the personal law of the Hindus and Muslims, as even under the personal laws of the Christians, Zoroastrians and Budhists, 'Law' has a religious source and sanction. 'Religious institutions' must have a public aspect about them as distinguished from the profession of religious belief which is a matter of inward realization and subjective conviction and feeling. Only that is a 'religious institution' which is capable of being established as an organisation in which a religious denomination or sect is interested as an essential part of its fundamental religious practice.

right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law I am unable to attribute any such intent to the makers of the Constitution who in their anxiety to regulate the lives of the Muslims of Pakistan in accordance with the Holy Quran and Sunnah could not possibly have intended to empower the legislature to take away from the Muslims the right to profess practise and propagate their religion and to establish, maintain and manage their religious institutions, and who in their conception of the ideal of a free tolerant and democratic society could not have denied a similar right to the non Muslim citizens of the State If the argument of Mr Brohi is sound it would follow and he admitted that it would, that the legislature may today interdict the profession of Islam by the citizens because the right to profess, practise and propagate religion is under the Article as much subject to law as the right to establish, maintain and manage religious institutions I refuse to be a party to any such pedantic technical and narrow construction of the Article in question, for I consider it to be a fundamental canon of construction that a Constitution should receive a liberal interpretation in favour of the citizen especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship Consistently with the language used, constitutional instruments should receive a broader and more liberal construction than statutes for the power dealt with in the former case is original and unlimited and in the latter case limited, and constitutional rights should not be permitted to be nullified or evaded by astute verbal criticism without regard to the fundamental aim and object of the instrument and the principles on which it is based If the language is not explicit, or admits of doubt, it should be presumed that the provision was intended to be in accordance with the acknowledged principles of justice and liberty Accordingly, in doubtful cases that particular construction should be preferred which does not violate those principles In the light of these rules of construction of constitutional instruments it seems to me that what Article 18 means is that every citizen has the right to profess, practise and propagate his religion and every sect of a religious denomination has the right to establish maintain and manage its religious institutions, though the law may regulate the manner in which religion is to be professed, practised and propagated and religious institutions are to be established, maintained and managed The words 'the right to establish subject to law, religious institutions cannot and do not mean that such institutions may be abolished altogether by the law Speaking of the right of political franchise, Chief Justice Shaw of the Supreme Judicial Court of Massachusettes remarked in *Copen* v *Foster* (12 Pick 485 —488)

'That in all cases where the Constitution has conferred a political [illegible] vilege, and where the Constitution has not particularly designated [illegible] which that right is to be exercised it is clearly within the just and [illegible] limits of the legislative power, to adopt any reasonable and [illegible] regard to the time and mode of exercising that right, which are [illegible] and facilitate the exercise of such right, in a prompt, orderly and [illegible]
Nevertheless such a construction would afford no warrant [illegible] legislative power, as under the pretence and colour of [illegible] injuriously restrain the right itself'

"This principle is, in my opinion, fully applicable [illegible] extent of religious freedom recognised by Article 18 [illegible]

It would be noticed that in the United States formulation the cases of punishment for crimes, that involve deprivation of freedom of movement and of choice not to sell one's labour, are expressly excluded from receiving recognition as constituting violation of this guarantee. The Indian Art. 23 which corresponds roughly to our ART. 16 falls in a section of the Chapter on 'Fundamental Rights' headed 'Right against Exploitation' and is couched in the following terms:

> "(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

It would be appreciated that the Indian Article does not prohibit all forms of forced labour as does our Article, but only "other similar forms of forced labour" which would be read in the context in which it occurs, *ejusdem generis* with "traffic in human beings and *begar*." It is doubtful if, on the plain interpretation of our ART. 16, it would be possible to sustain the legality of imposing compulsory labour upon convicted offenders who have been sentenced to hard labour. In America, by virtue of an express exception enacted, compulsory work as a punishment for crime is not prohibited (see *Ex Parte Karstendick* (1876) 93 *U.S.* 396: 23 *Law Ed.* 880). Compulsory military service is not prohibited by the 13th Amendment as it has been interpreted by the United States Supreme Court and, in fact, there the right of the State to compel performance of involuntary military service has been regarded as stemming from the sovereign character of the State and justifiable on the premises of historical experience (see *Robert Robertson v. Barry Baldwin* (1897). 165 *U.S.* 275: 41 *Law Ed.* 715).

Slavery and Peonage

Prohibition against forced labour may also be regarded as one extreme form in which personal liberty of the individual is protected by means of a constitutional guarantee. Slavery results from the total denial to the individual of his status as a free subject and, in fact, in such a state the human being becomes indistinguishable from a chattel since he is virtually delivered to the master "having unlimited control over his life, liberty and everything that constitutes him as a free subject". Slavery is a sort of servitude in which man's condition of helplessness lasts for the whole length of his life. The conception of forced labour in the case of a slave is meaningless, for the simple reason that the initial postulated condition in terms of which his right to refuse his labour to another could be said to accrue to him, does not so much as exist. Involuntary servitude may take several forms: Peonage, for instance, which means compulsory exaction of labour from a person in lieu of the non-payment by him of any debts he may have contracted, resulting from a breach of contract involving obligation of rendering personal service, would amount to the exaction of compulsory labour and would be a form of forced labour within the prohibition of ART. 16 of our Constitution. The old sections of the Penal Code that were subsequently repealed, like Ss. 490, 491, 492, if they had been available on the Statute Book on the day the Constitution came into force, would have become void as being repugnant to the present guarantee, in that they had declared as punishable breaches of contracts of service in certain circumstances.

The question whether a contract freely entered into by a person involving his obligation to do what is called "overtime" work against payment stands upon

The word 'institution' is not a term of any well defined or unequivocal meaning and is used to mean different things in different contexts For instance, it sometimes is used to mean 'established law, custom or practice' as when we say 'Institutes of Justinian' or 'Institutes of Roman Law'. But the word is also used to mean 'Organisation for the promotion of some public object' and, having regard to the context in which the term religious institution is used in ART 18 of our Constitution, it would appear that it is in its latter of the two foregoing meanings that it has been used—or else the right which is affirmed with respect to it in favour of a "religious denomination" or "every sect thereof" would not become intelligible at all

It is essential that this distinction should be clearly borne in mind ART. 18 cannot be construed to protect the personal law of the Muslims, Hindus, Budhists and Christians It only protects their well-recognised religious institutions like the Mosques or Khankas of the Muslims, Temples and Maths of the Hindus, Pagodas and Monastries of the Budhists and the Churches etc of the Christians The enumeration set forth here is of course illustrative and not exhaustive of the cases falling under the category of "religious institutions" protected by ART 18.

Nor again is it true, as is commonly believed, that the religious foundation of the law of Muslims is anything especial about that faith—the same is true about the law of any other religious denomination Says Tyabji,

> "That religion has a paramount influence on Muhammadan law is not a point in which that system differs from the systems of law governing the nations of the West. The Greeks spoke of law 'as a discovery and gift of God' The priestly colleges moulded the Roman law In 1456, Chief Justice Prisot declared, in England, that 'Scripture was the Common Law on which all classes of Laws were founded' And it would probably be difficult to produce anything in the texts of Muslim law equalling the following dialogue in quaintness or the power and confidence with which religious sanctions are wielded Argument of Counsel: 'There is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor' The Chancellor answers. 'I know that every law is, or ought to be, according to the law of God And the law of God is, that an executor who is badly disposed shall not waste all the goods, &c, and I know well, that if he does so, and does not make amends, if he has the power, unless he repents, he shall be damned in hell' As late as in 1857, Chief Baron Kelly and the Court of Exchequer laid down that 'Christianity is part and parcel of the law of the land' This decision was overruled only in 1917, and then not without the dissent of the Lord Chancellor" (*Tyabji's 'Muhammadan Law' 3rd Ed page 23*).

ART 16 of our Constitution consists of two parts the first relates to the [illegible] injunction that no person shall be held in slavery, and the second prohibits all [illegible] forced labour, subject of course to the power of State to acquire 'compulsory [illegible] for public purposes'.

The 13th Amendment of the Constitution of United States [illegible] practically the same subject-matter is as follows:

"Section 1 —Neither slavery nor involuntary servitude, except as a [illegible] for crime whereof the party shall have been duly convicted, shall [illegible] United States, or any place subject to their jurisdiction".

a different footing and cannot be construed as being a form of forced labour within the general prohibition of ART 16 of our Constitution The argument in support of this view is that no idea of coercion is involved in exacting overtime work from an employee since that is an obligation he freely contracted to impose upon himself In the case of *Dubar Goala v Union of India*, *AIR* (1952) *Calcutta* 496 the case presented to the Court had reference to the constitutionality or otherwise of the petitioners doing over time work they were licensed porters at a railway station and had under a contract freely entered into by them to do two hours extra work for some nominal payment Bose J declined jurisdiction to declare the relevant clauses of the contract as being repugnant to Art 23 observing (at p 498)

> "The very idea that the petitioners had voluntarily agreed to do this extra work by entering into a contract to that effect repels the idea of their work being a forced labour

In yet another Indian case *State v Jorawar*, *AIR* (1953) *Himachal Pradesh* 18, the Chamba Paid Forced Labour Act was declared invalid as violating the constitutional prohibition against forced labour

In the case of *Bailey v Alabama* (1911) 219 *U S* 219 55 *Law Ed* 191, the case presented to the Court involved interpretation of 13th Amendment of the United States Constitution with reference to a situation in which under a State statute, a debtor was liable to be punished for his failure to perform the work he had engaged himself to do Justice Mr Hughes declared the statute unconstitutional remarking (at pp 242 244) Bailey v Alabama

> 'The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute The full intent of the constitutional provision could be defeated with obvious facility if through the guise of contracts under which advances had been made, debtors could be held to compulsory service It is the compulsion of the service that the statute inhibits for when that occurs the condition of servitude is created [illegible] would be not less involuntary because of the original agreement to work [illegible] indebtedness The contract exposes the debtor to liability for the loss [illegible] the breach but not to enforced labor The 13th Amendment [illegible] involuntary servitude except as punishment for crime But the [illegible] allowing full latitude for the enforcement of penal laws, does not destroy [illegible] bition It does not permit slavery or involuntary servitude to be [illegible] maintained through the operation of the criminal law by making it a [illegible] to submit to the one or to render the service which would [illegible] The state may impose involuntary servitude as a punishment for [illegible] compel one man to labour for another in payment of a debt, by [illegible] criminal if he does not perform the service or pay the debt.
>
> "If the statute in this case had authorized the employing [illegible] debtor and hold him to the service until he paid $ 15, or had [illegible] lent in labor, its invalidity would not be questioned [illegible] the state could not authorize its constabulary to [illegible] and to force him to work out his debt But the [illegible] sanction of the criminal law to supply the compulsion [illegible] rize the use of physical force In contemplation [illegible] service by the fear of punishment under a criminal [illegible] which the employer could station ' (Ex parte [illegible] not do directly it may not do indirectly [illegible]

lature must strictly fulfil the requirements of those Articles that set forth the constitutional limits within which those laws have to be passed.

Comment on the combined operation of Indian ARTs. 21 and 19(1) (d) A. K. Gopalan Case

It is in this perspective that the question which has arisen in India about the relationship of Art. 21 (No person shall be deprived of *his life* or *personal liberty except according to procedure established by law*) to Art. 19, clause (1) (d) read with clause (5) may be examined. The problem of the conflict between these two Articles was posed in the case of *A. K. Gopalan v. State of Madras, AIR (1950) S. C.* 27 as follows:

The petitioner in that case was detained under the Preventive Detention Order and it was contended on his behalf that by reason of such a detention several of the rights specified in Art. 19 had been infringed, and since the State had invaded the detenu's right to freedom, the question that had to be determined was whether the action complained of came within the scope of reasonable restrictions visualised by Art.19. In other words, it was argued that the law relating to the deprivation of personal liberty must necessarily be subject to the limitations prescribed by Art. 19, for, deprivation of personal liberty was necessarily a clog on the citizen's freedom of speech and expression, on his freedom to move about freely in the territories of India, etc. etc. Personal liberty must at least mean freedom of movement, and when a person was ordered to be detained under a law relating to preventive detention his right of locomotion was curtailed and, therefore, it became a matter for judicial determination to see if the law relating to preventive detention itself was also not subject to the requirements of reasonable restrictions mentioned under Art. 19. The majority judgment of the Supreme Court rejected this approach to the interpretation of Arts. 21 and 19 of the Indian Constitution, and the ground of their Lordship's decision may be stated in the words of Kania C. J. as follows (at p. 35):—

"The Article (i.e. Art. 19) has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in Art. 19(1) generally must fail. Any other construction put on the Article, it seems to me, will be unreasonable."

To the contention that Arts. 19 and 21 should be read together as supplementing each other, Art. 19 giving substantive rights to citizens, while Art. 21 prescribing that no person can be deprived of his life or personal liberty except by the procedure established by law, Kania C. J. made the following answer (at p. 37):

"Deprivation (total loss) of personal liberty, which *inter alia* includes the right to eat or sleep when one likes or to work or not work as and when one pleases and several such rights sought to be protected by the expression 'personal liberty' in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19 (1) (d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India.

decision it is necessary to advert to the facts of the case The accused in that case had induced the complainants (who he alleged were indebted to him in various sums of money) to consent to live on his premises and to work off their debts The complainants were to, and did in fact, receive no pay but were fed by the accused as his servants He insisted on their working for him and used to punish them by beating them if they did not do so Chief Justice Petheram, who made the majority judgment held that

> "A person who insists that another, who has consented to serve him, shall perform his work, does not unlawfully compel such person to labour against his will within the meaning of section 374 of the Penal Code, because it is a thing which such person has agreed to do, but if he assaults such person for not working to his satisfaction, he commits an offence punishable under section 352 '

Norris J who made a minority judgment came to the conclusion on the facts of that case that the complainants never gave their full and free consent to work and labour for the accused, and that therefore the conviction was right

The important question in the interpretation of this section, as also that of ART 16 of our Constitution is the following Is the unlawfully compelling of any person to labour against the will of that person to be confined to the initial phase of a transaction or is it some thing that can come up for consideration during the course of an engagement which has been freely entered into but which later on the person engaged to do labour, has denounced? Does the expression whoever unlawfully compels any person' merely imply the initial act of entering into an obligation to labour for another at the inception of the engagement or is it that it makes illegal any service which becomes involuntary at any time during its existence? These considerations do not appear to have been present to the minds of the Judges who decided the Calcutta case

SECTION (iii) Rule of Law

145. A general comment on Right to the Rule of Law

Clauses (2) of ART 5 and (1) of ART 15, guarantee that no person shall be deprived of life, liberty or his property save in accordance with law "Life", "Liberty" and "property" are the most valued rights of man and our Constitution enjoins that a person cannot be deprived of these, "save in accordance with law"

ARTs 5(2) and 15 (1) of the Constitution

The executive thus cannot deprive a person of his life, liberty and property without successfully pleading the existence of a constitutionally valid law enabling it so to do Even the legislature, while passing law which has the effect in it of depriving a person of any of these rights, has to function within certain constitutional limits For instance, a law relating to the deprivation of property must comply with the requirements of ART 15, which enjoins that no property shall be compulsorily acquired or taken possession of save for a public purpose and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given Similarly, a law relating to deprivation of man's liberty, like the law which enables the executive to order the preventive detention of a person, must be a law which should conform to the requirements of ART 7, clauses (2), (4) and (5) In other words, there is no absolute and unfettered power reserved to the Legislature to make any law it likes in regard to the deprivation of these rights This law making activity by the Legis-

Restraint on Executive Power

Meaning of liberty—Blackstone quoted.

Would the use of term 'liberty'—as opposed to 'personal liberty'—appearing in clause (2) of our ART. 5 make any difference? Would that term as contrasted from 'personal liberty' receive from our Courts a wider interpretation? It is doubtful if the term 'liberty' would receive the sort of wide meaning as it admittedly has received in America and this, for the simple reason, that the liberties in general, have, in our Constitution, been separately dealt with from ARTs. 8 to 12 much in the same manner in which they have been dealt with in Art. 19 of the Indian Constitution. It is submitted that the word 'liberty' used in ART. 5 means 'personal liberty'. According to Blackstone:

"Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." (*Blackstone's Commentaries on the Laws of England, 4th Ed. Vol. I, page* 134).

Under the theory of the English Constitution, as has been pointed out earlier, 'personal liberty' means merely a negative right in favour of an individual—that is, a right not to be subjected to imprisonment or other forms of physical coercion *in any manner that does not admit of legal justification.*

"Except in accordance with the procedure authorised by Law" and, "save in accordance with law".

Now, although it is true that in our Constitution the words used in ART. 5(2) are not 'personal liberty' but only 'liberty', and instead of the expression in the Indian Constitution "except according to procedure established by law" we have, in Arts. 5(2) and 15(1) the expression "save in accordance with law", it is submitted, that these are not to be construed as those significant textual changes that will radically alter the interpretation of these Articles when an effort is made to read them in conjunction with ARTs 8 to 12. As has been remarked earlier, the constitutional provisions contained in ARTs. 8 to 12 are parallel to those provided in Art. 19 of the Indian Constitution. It becomes necessary, therefore, to analyse the reasoning of the majority decision of the Supreme Court in the case of *A. K. Gopalan v. State of Madras, AIR* (1950) *S.C.* 27, in an effort to discover the proper mode of construing these Articles.

Fazl Ali's views – minority judgment in A. K. Gopalan's Case

The majority view has already been indicated in the judgment of Kania C. J. and it would be instructive to turn to some of the observations of Fazl Ali J., who took a contrary view, and held that the contention of the detenu be accepted:

"It is also argued that since preventive detention amounts to a total deprivation of freedom of movement, it is not a violation of the right granted under Art. 19 (1) (d) in regard to which the word "restriction' and not 'deprivation' has been used in clause (5). This argument also does not appeal to me. There are really two questions which fall to be decided in this case, viz., (a) Does preventive detention take away the right guaranteed by Art. 19(1) (d) ? and (b) if so, what are the consequences, if any? It seems obvious to me that preventive detention amounts to a complete deprivation of the right guaranteed by Art. 19(1) (d). The meaning of the word 'restriction' is to be considered with reference to the second question and I think that it will be highly technical to argue that deprivation of a right cannot be said to involve restriction on the exercise of the right. In my opinion, having regard to the context in which the word "restriction' has been used, there is no antithesis between that word and the word 'deprivation'. As I have already stated, restraint on the right to move can assume a variety of forms and restriction would be the most appropriate expression to be used in clause (5) so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement." (p. 51)

The learned Judge then proceeded to say that the juristic conception of

This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read Therefore, Article 19(5) cannot apply to a substantive law depriving a citizen of personal liberty I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21

'Personal liberty' would primarily mean liberty of the physical body The rights given under Art 19(1) do not directly come under that description *They are rights which accompany the freedom or liberty of the person* By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty If Art 19 is considered to be the only Article safeguarding personal liberty several well recognised rights, as for instance the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution I do not think, that is the intention It seems to me improper to read Art 19 as dealing with the same subject as Art 21 '

It is needless to add that our Art 5 (2) corresponds to Art 21 of the Indian Constitution and our Arts 8, 9, 10, 11, 12 correspond with minor differences to Art 19 of the Indian Constitution (For the text of Indian Art 19 see the appendix) U S Supreme Court's view

146. Concept of "Liberty" and "Personal liberty"

Clause (2) of ART 5 mentions 'liberty', and not 'personal liberty' as has been mentioned in the Indian Art 21 The word 'liberty' standing by itself is capable of receiving a very wide meaning and in fact the United States Supreme Court has so construed it it does not only mean personal freedom, that is, freedom of the person from any kind of restraint but also it includes the right to the free use of one's own property, and also the freedom to enter into contractual obligations In the case of *Allgeyer v State of Louisiana* (1897), 165 *U S* 578 41 *Law* Ed 832 the United States Supreme Court commented on the scope of the word liberty occurring in 14th Amendment as follows (at p 589) Allgeyer v Louisiana

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned"

See also the case of *Meyer v Nebraska*, (1923) 262 *U S* 390 67 *Law Ed* 1042, where Mr Justice McReynolds has given a wider meaning to 'liberty'—as including the right (at p 399) Meyer v Nebraska

" to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men "

The original draft proposals of the Indian Constitution used the word 'liberty' but the Drafting Committee deliberately inserted the word 'personal' before it, so as to limit it they wanted to distinguish it from the broad and sweeping concept of liberty They had already in Art 19 dealt with the problem of 'liberty of the individual' in several ways They were anxious to avoid giving an impression that the word 'liberty' used by them in *Art 21 had any reference to the same subject matter as they had provided for in Art 19* Indian draft constitution Liberty changed into Personal liberty

in its application to the sphere of Property Rights.

property rights. It must have been noticed that our ART. 15(1) provides that no person shall be deprived of his property save in accordance with law, and ART.11 provides the right of citizens to acquire, hold and dispose of property subject to any reasonable restrictions imposed by law in the public interests. It is obvious that the two Articles are to some extent antithetical, in that, a citizen can be deprived of the whole of the property under ART. 15 (1) provided, of course, the law depriving him of his property conforms to the requirements of ART. 15 (2) thereof, whereas ART. 11 (b) gives him the right to acquire, hold and dispose of property subject to any reasonable restrictions imposed by law. The Indian Constitution also mentions in Art. 19(1) (f) the right to acquire, hold and dispose of property subject to reasonable restrictions on the exercise of the right in the interest of general public etc. This right is subject to a judicial review by the Court on the ground of its reasonableness whereas under ART. 15(1), deprivation can take place by law which may not be reasonable so long as it conforms to the pattern of law visualised by clause (2). After all clause (2) of ART. 15 merely confines itself to law relating to deprivation of immovable property whereas clause (1) of ART. 15 talks of property in general which means both movable and immovable property. (See Art. 15(4) of our Constitution).

The right which is preserved by ART. 11 (b) is broadly affirmed whereas what is mentioned in ART. 15 is a specific provision in regard to certain aspects of that right viz. acquisition of property for public purpose. Now, following the well-known principle of *generalia specialibus non derogant* it can be argued that where a question of the acquisition of property for public purpose becomes a fact in issue, it is ART. 15 and not ART. 11(b) that will come into play. Hence, the situation, in which a person is deprived of his property in its entirety, must be treated as being controlled by ART. 15 and not by ART. 11(b) This principle of interpretation has been followed in India (See (a) *Suryapalsing v. U.P. Government, AIR* (1951) *Allahabad* 674 *(FB)*, (b) *Charanjit Lal v. Union of India, AIR* (1951) *S.C.* 41, as also (c) *A. K. Gopalan v. State of Madras, AIR* (1950) *S.C.* 27). In the language of American jurisprudence ART. 11 (b) does not deal with power of 'eminent domain', but only gives 'police power' to the State to regulate, subject to reasonable restrictions, the right to acquire, hold and dispose of property. If the deprivation of property does not fall within the ambit of ART. 15 the question whether or not the right guaranteed by ART. 11(b) can certainly be enquired into. (See the case of *Mahendra Bahadur Singh v. State of Madhya Bharat, AIR* (1953) *Madh. B.* 236).

"Eminent Domain"

In America, the power which the Government exerts when it takes property for public use is described as the power of 'eminent domain' and the Government can take private property by resort to this power whenever it thinks it necessary and proper so to do in order to carry out any of the duties imposed on the national Government. In the 5th Amendment of the Constitution it has been provided that private property shall not be taken for public use without giving just compensation. Similarly, the 14th Amendment prevents the State from taking private property of persons without due process of law. The power of 'eminent domain' in the theory of American constitutional law, exists in every sovereignty to control and regulate those rights of a public nature which appertain to its citizens in common and to appropriate individual property for the public benefit such as the interests of public safety, necessity, convenience and welfare would demand. This power, which is inherent in the idea of sovereignty, can only be exercised by means of a legislation which defines the occasion, method, condition and agency under and by means of which it would be exercised. The State has to carry out the duties of constructing public places such as

'personal liberty' would include the right of freedom of movement to which Art 19 (1) (d) refers Even on the assumption that the two conceptions, namely, that of personal liberty and freedom of movement had nothing to do with one another even then according to the learned Judge the conclusion would be the same

"There can be no doubt", says the learned Judge, "that preventive detention does take away even this limited freedom of movement directly and substantially, and, if so, I do not see how it can be argued that the right under Art 19 (1) (d) is not infringed if the alternative interpretation is accepted We have only to ask ourselves Does a person who is detained retain even a fraction of his freedom of movement in howsoever restricted sense the term may be used and does he not lose his right to move freely from one place to another or visit any locality he likes as a necessary result of his detention? (p 55)

To the argument that Art 22 is a complete code by itself and regulates the entire law relating to preventive detention, the learned Judge answered as follows (at p 66)

"I cannot, however, easily subscribe to this sweeping statement The Article does provide for some matters of procedure, but it does not exhaustively provide for them It is said that it provides for notice, an opportunity to the detenu to represent his case, an advisory board which may deal with his case, and for the maximum period beyond which a person cannot be detained These points have undoubtedly been touched, but it cannot be said that they have been exhaustively treated The right to represent is given, but it is left to the legislature to provide the machinery for dealing with the representation The advisory board has been mentioned, but it is only to safeguard detention for a period longer than three months There is ample latitude still left to the Parliament and if the Parliament makes use of that latitude unreasonably Art 19(5) may enable the Court to see whether it has transgressed the limits of reasonableness"

Interpretation of the combined effect of ART 5 (2) and ARTs 8 to 12—Resting implications of Fazl Ali s views

If the reasoning of Fazl Ali J is correct and can be accepted, the effect would be that the right to the rule of law in respect of deprivation of liberty would be further controlled by the limitation visualised by ARTs 8 to 12 of our Constitution, and it will be a matter for anxious consideration for the Courts to see that the laws passed by the legislature, which curtail or restrict these freedoms, are reasonable and are within the permissible range of legislation contemplated by those Articles

Due Process and our Constitution

Fazl Ali J is virtually endeavouring to read the 'due process clause' of the 5th and 14th Amendments to the American Constitution as an integral part of Art 21, and the short ground on which the view he takes can be shown to be untenable is to say that if that was the intention of the framers of the Indian Constitution they would have said so and in fact the spliting of the content of Arts 19 and 21 could only be due to this anxiety to avoid the necessity of introducing the idea of the 'due process clause' It would have been the simplest thing to do (if the intention imputed by Fazl Ali J was a fact), to draft an Article somewhat on the following lines "No one shall be deprived of his life, liberty and property without due process of law" Had this formulation been adopted the whole unwieldy chapter on Fundamental Rights would have shrunk to one tenth of its present magnitude—and what is more it would have spared every one the need of speculating about the meaning of this clause since the precedents of the U S Supreme Court would in that case have become of immense practical importance

ARTs 15(1) and 11 Rule of law

We might illustrate a further aspect of the same situation which results from the combined operation of the right relating to the rule of law in the sphere of

"The word 'law' ", said Mr. Fazl Ali J., in a minority judgment in the case of *A. K. Gopalan v. State of Madras, AIR (1950) S.C. 27*, at *58* "may be used in an abstract or concrete sense. Sometimes, it is preceded by an article such as 'a' or 'the' or by such words as 'any', 'all' etc., and sometimes it is used without any such prefix. But, generally, the word 'law' has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word 'law' means nothing more than statute law. Now whatever may be the meaning of the expression 'due process of law,' the word 'law' is common to that expression as well as 'procedure established by law' and though we are not bound to adopt the construction put on 'law' or 'due process of law' in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them."

The learned Judge then dealt with the cases of *Bardwell v. Collins, 44 Minn. 97* : 9 L.R.A. 152; *The Trustees of Dartmouth College v. Woodward*, (1819) 4 *Wheaton 518 : 4 Law Ed.* 629; *Hovey v. Elliott*, 167 *U.S.* 409 : 42 Law Ed. 215; *Gatpin v. Page*, (1874) 85 *U.S.* 18 : 21 Law Ed. 959, and summed up the position by saying :

"Thus, in America, the word 'law' does not mean merely State-made law or law enacted by the State and does not exclude certain fundamental principles of justice which inhere in every civilized sytem of law and which are at the root of it. The result of the numerous decisions in America has been summed up by Professor Willis in his book on 'Constitutional Law' at p. 662, in the statement that the essentials of due process are: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) orderly course of procedure."

The learned Judge then examined the English cases in an attempt to show that these four elements are really different aspects of the same right *i.e.* right to be heard before one is condemned, and came to the conclusion that:

"So far as this right is concerned, judicial opinion in England appears to be the same as that in America. In England, it would shock one to be told that a man can be deprived of his personal liberty without a fair trial or hearing. Such a case can happen only if the Parliament expressly takes away the right in question in an emergency as the British Parliament did during the last two world wars in a limited number of cases."

(The cases examined by the learned Judge include *Cooper v. The Wandsworth Board of Works*, (1863) 14 *C.B. (N.S.)* 180 : (32 *L.J.C.P.* 185); *Smith v. The Queen*, (1878) 3*A.C.* 614; *Regina v. The Archbishop of Canterbury* (1859) 1 *El. & El.* 545 *at p.* 559; *Labouchere v. Earl of Wharncliffe*, (1880) 13 *Ch. D.* 346; *Russell, v. Russell* (1881) 14 *Ch. D.* 471; and *Lapointe v. L'Association, etc. de Montreal*, (1906) *A.C.* 535). The learned Judge held that the word 'law' used in Art. 21, does not only mean statute law. But the majority opinion in the case was that principles of natural justice and the procedural due process requirements were not to be read into the expression 'procedure established by law'.

Points of difference between the Indian and our Constitution on this subject.

Now, there are two points that are to be noted by way of differentiation between the Indian and our Constitution before deciding the question of the application of the principles of interpretation by resort to which the question whether or not the word 'law' appearing in ARTs. 5(2) and 15 (1) includes not only the enacted law by the legislature but also principles of natural justice which are a part of the common law and have been continued under the present Constitution by its ART. 224. One of these considerations is that the Indian Constituent Assembly dis-

light houses docks etc, and for those purposes it may require land or material, which the owner may refuse to sell or for which he may demand extraordinary compensation

There may, however, be cases in which State can order the destruction of property in the public interest A building which is dilapidated or which may be adjudged as being in such a dangerous condition that its being allowed to remain undisturbed might constitute a grave source of danger to the public such a building could be ordered to be demolished In such a case the question of reasonable restrictions on the enjoyment of property cannot be said to protect the right of the person to insist that he be allowed to have his property kept intact

In the case of *A K Gopalan v The State of Madras, AIR* (1950) *S C* 27 Justice Mr Das considered the combined effect of the Art 19 (1) (f) and Art 31(1) (2), and came to the conclusion that when property was compulsorily acquired under Art 31 (1) (2) the question of the exercise of the right under Art 19 (1) (f) did not so much as arise The result of this view would be that where the State acts under ART 15 of our Constitution it can deprive a man of the whole of his property even to the prejudice of such rights of owning property as he may have under ART 11 (b) In other words, a law passed under ART 15 need not submit to the test of reasonable restrictions on the citizen s right to hold and dispose of property Similarly in the case of *Charanjit Lal v Union of India AIR* (1951) *S C* 41 the same learned Judge observed that Art 19(1) (f) would continue to be available until the owner was under Art 31 deprived of such property In the words of the learned Judge (Mr Das)

"The fundamental rights said to have been infringed are the right to acquire hold and dispose of property guaranteed to every citizen by Article 19(1) (f) and the right to property secured by Article 31 In Gopalan s case AIR 1950 S C 27 I pointed out that the rights conferred by Article 19(1)(a) to (e) and (g) would be available to the citizen until he was under *Article* 21, deprived of *his life* or personal liberty according to procedure established by law and that the right to *property guaranteed by Article* 19 *(1) (f) would likewise continue until the owner* was, under Article 31, deprived of such property by authority of law

In other words the learned Judge far from construing the right of a person not to be deprived of property, life and liberty, save in accordance with law, being subject to reasonable restrictions contemplated by Article 19 regarded this Article itself as being subservient to Arts 21 and 31 (1) of the Indian Constitution

If there is a law which permits the taking of any of these property rights and also enjoins a particular procedure to be followed then the failure to follow strictly the procedure for the exercise of such power of deprivation must be regarded as a violation of a fundamental right recognised in his favour by Part II of our Constitution There is hardly any distinction between the expression 'according to procedure established law' used by the Indian Constitution and the expression save in accordance with law', used by our Constitution'

Meaning of the term Law — appearing in ARTS 15(1) and 15(2) Does it mean statute law or does it include General Law of the Land

Does the word 'law appearing in our Constitution and the expression 'according to procedure established by law', appearing in the Indian Constitution refer to the law established and enacted by legislature, or does it include also the law which is recognised by Courts in the shape of those principles which must be followed in order that justice may be done to persons whose vested rights are being affected In other words, must the law be read as being equivalent to the American expression 'due process of law clause, appearing in the 5th and 14th Amendments of United States Constitution?

elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or other exercise of legislative authority. It is one of the sources of law in the abstract sense. A law produces statute law or some other form of enacted law, just as a judicial precedent produces case law. There is much law recognised, applied and enforced in the courts of justice which has not been enacted by any law.''

It is submitted that if the distinction between the two meanings of the term 'law', which have been reflected in the extract cited above, is to be imputed to the framers of our Constitution, the term 'law' under ARTs. 15 (1) and 5(2) must be regarded as something wider than what is connoted by statute law or enacted law. The trouble, however, arises when we compare the language of ART. 224, which talks of continuance in force of existing laws, for there the words used are 'all laws'. And if that expression is to be taken in the concrete sense, the words used cannot be deemed to cover such things as *law of torts* or rules of common law, or doctrines of interpretation of statute etc. Of this more would be said when we deal with that Article in its own place. Suffice it to say, however, that the Indian Independence Act in its 18th Section talks of the continuance of the '*law*' of each of the New Dominions and not of the '*laws*' of the Dominion.

Any student wishing to pursue the study of the principles relating to the interpretation of the word 'law' appearing in these Articles would do well to read the article contributed by Shwartz to Indian Law Review Vol. IV upon ''Comparative view of Gopalan's case'' where that learned author has virtually re-examined all these arguments and has registered his disagreement as to the pedantic dictionary meaning of the term 'law' upon which the Supreme Court of India rejected the concept of procedural due process as being connoted by the term 'law' occuring in ARTs. 21 to 22 of the Indian Constitution.

The fundamental right relating to the rule of law that we have been so far considering is itself in certain cases encumbered by certain additional constitutional limitations and these we shall now proceed to consider. These limitations may be broadly categorised as falling within the following descriptions:

(a) Limitations on the making of law relating to compulsory acquisition or taking of property.

(b) Limitations on the making of law relating to arrest and detention.

(c) Limitations on the making of penal laws.

174. Right to Property—A Comment on ART 15

ART. 15 of our Constitution prohibits the making of a law relating to compulsory acquisition or taking possession of property *unless:*

(a) it is for a public purpose,

(b) it provides for compensation in respect of such compulsory acquisition or taking possession of property, and

(c) either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given.

The property which is to be the subject-matter of compulsory acquisition or possession whereof is to be taken means ''immovabe property, or any commercial or industrial undertaking, or any interest in any such undertaking.''(See Art. 15(4,).)

cussed the question, viz whether or not the American concept of the due process of law should be retained in their Constitution, and after a great deal of discussion lasting several days decided not to retain that concept and deleted the expression 'without due process of law from the original draft Constitution as presented by the Drafting Committee (See Art 15 of the Draft Constitution of India and the foot note to it by the Drafting Committee) The debates in and the report of the Drafting Committee of, the Indian Constituent Assembly tend to show that it was aware of the expression 'due process of law' as it was known to exist in the American Constitution but after a prolonged discussion it decided not to adopt that phrase Now, whether or not the proceeding of a legislature can be relied upon for the purpose of controlling the meaning of a clause enacted is a question which by itself is a controversial one It is not even clear if the debate can be looked at even for the purpose of resolving ambiguities (See *Municipal Council of Sydney v Commonwealth*, (1904) 1 *C L R* 208 and *United States v Wong Kim Ark* (1898) 169 *U S* 649 42 Law Ed 890) The authorities tend to show that although it is not proper to take into consideration individual opinions of the legislators for the purpose of construing the meaning of particular clauses, but all the same reference to the debates may be helpful to determine whether or not a certain phrase or expression was at all considered by the House (See also the case of *Administrator General of Bengal v Prem Lal Mullick* (1895) 22 passing of an Act by the of a particular section *ion of Statute* 3rd *Ed* *pages* 28 29, *Crawford on Statutory Construction*' 1940 *Ed* 379 *Article* 214)

The Constituent Assembly of Pakistan did not discuss this phrase and there is no basis therefore for the inference which could be drawn in India namely that the 'due processs clause was deliberately abandoned by it

The second consideration is that in some sense the Indian formulation contained in the expression except according to procedure established by law is in a sense limited if we take law to be synonymous with enacted law for then it can mean only the violation of such rules of procedure as have been prescribed by enacted law as giving rise to a ground of complaint that the rights have been taken away in a way other than that in accordance with the procedure established by law But the formulation of our Articles tends to show that there are no such words of limitation The expression save in accordance with law can only mean law in general and must anyhow mean something more than what is meant by enacted law

Meaning of the term law' as used in these Articles can be set forth in two ways the following observations in *Salmond s Jurisprudence* 1947 Ed *at page* 37 would show that 'law may be used in the abstract or in the concrete

> The term law says he is used in two senses which may be conveniently distinguished as the abstract and the concrete In its abstract application we speak of the law of England the law of libel criminal law and so forth Similarly we use the phrases law and order, law and justice courts of law In its concrete application, on the other hand we say that Parliament has enacted or repealed a law, we speak of the by laws of a railway company or municipality we hear of the corn laws or the navigation laws In the abstract sense we speak of law, or of the law in the concrete sense we speak of a law or of laws The distinction demands attention for this reason that the concrete term is not co extensive and coincident with the abstract in its application Law or the law does not consist of the total number of laws in force The constituent

are *ipso facto* saved against a challenge on the ground that they contravene clause (2) of Art. 31. But with regard to laws passed within 18 months before the coming into force of the Constitution, it has been provided that if they have been certified by the President, they will be immune from such a challenge but not otherwise.

(iv) In sub-clause (b) of clause (5), the three categories of cases with respect to provision of any law relating to acquiring or taking property which the State *hereafter* may make has been saved.

(v) As opposed to clauses (3), (4), (5) and (6) of the Indian Article, we have only clause (3) of ART. 15 which as has been remarked earlier, saves the four kinds of laws from the limitation imposed on the law-making power of the legislature by clause (2).

S. 299 of the Government of India Act 1935

The legislative predecessor of the Indian Art 31 and our ART. 15 was Section 299 of the Government of India Act, 1935, which was entitled as "Compulsory Acquisition of Land etc." This has already been reproduced at page 319. Certain points of difference between that Section and our Article may be noted, for they are relevant for the purpose of intelligently applying the principles evolved by our courts in regard to the interpretation of that Section.

Sub section (2) of Section 299 applies to acquisition of property and not to requisition thereof. In its sub section (3) there was a prohibition to the effect that no bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein including rights or privileges in respect of land revenue shall be introduced or moved in the legislature without the previous sanction of the Governor-General or the Governor in their discretion. There is no such prohibition now in ART. 15 of our Constitution.

S. 51 of the Australian Constitution

Section 51 of the Australian Constitution too, in clause (xxxi), has given power to the legislature to acquire property on *just* terms from any State or person for any purpose in respect of which the Parliament has power to make laws. (See page 228)

The position under the U.S. Constitution

In the United States the position with regard to the taking of property is controlled by the 5th and the 14th Amendments: the former provides for *just* compensation being made whenever private property is taken for public use as a limitation on the Federal power and the same limitation is provided for upon the State power under the latter Amendment. It should be noted that the expressions used in the two Amendments are somewhat different (cf. 5th Amendment "Nor shall private property be taken for public use, without just compensation".) But then the due process clause is available to do the necessary trick, and the American Courts have read the provision regarding the requirement of just compensation into the 'due process' clause of the fourteenth Amendment.

Relation between the two clauses of ART. 15 of our Constitution

The scope of our ART. 15 may now be considered. This Article has two essential parts, the one prohibiting the *deprivation* of property "except in accordance with law" and the other prescribing that a law which authorises compulsory *acquisition* of property or the taking of its *possession* must provide for compensation either by fixing the amount or by specifying the principles on which and the manner in which compensation is to be determined and given.

Broadly considered, the first part corresponds to the power which in American jurisprudence is called the 'police power' of the State and the second, the power of 'eminent domain'. (See for the meaning of these terms p. 365-367).

In clause (3) of ART 15, we have four categories of laws which are immune from being attacked on the ground that the laws in question do not conform to the limitations mentioned in clause (2)

Our ART 15 corresponds to the Indian ART 31, with a few minor differences which are to be carefully noted, if the case law of that country is at all to be properly appreciated

ART 31 etc of Indian Constitution—Distinction between our ART 15 and Indian ART 31 etc

(a) The general requirement of the Constitution to the effect that no person shall be deprived of his property save in accordance with law has been mentioned in clause (1) of the Indian ART 31 as, "No person shall be deprived of his property save by authority of law" The word 'property' in this clause, of course, includes both in the case of our as also in the Indian Constitution, all kinds of property movable and immovable There is hardly any difference, so far as the effect of this guarantee is concerned, between the expressions used 'save in accordance with law or save by authority of law'

(b) The constitutional limitations on the making of law authorising the taking possession of property or the acquiring of it for public purpose or the taking of such possession or such acquisition is *confined* in our Constitution only to immovable property or any commercial or industrial undertaking or any interest in any such undertaking whereas in the Indian Article the word property has been used in the widest possible sense as including property "movable or immovable including any interest in, or in any company owning, any commerical or industrial undertaking

(c) In clauses (2), (3), (4), (5) and (6) of Indian Art 31 we have the following kinds of savings

(i) The legislature of the State cannot pass a law authorising the taking possession or acquisition of the kind of property mentioned in clause (2) of the Indian Article unless such law having been reserved for the consideration of the President has received his assent (We have no such limitation imposed on the law making power of the Provincial legislatures in our Constitution They can pass a law on their own and they have not to obtain the assent of the President before such laws can be effective)

(ii) If a bill pending at the commencement of the Indian Constitution that is on 26th of January 1950 in the legislature of a State has after it has been passed by such legislature and having been reserved for the consideration of the President has received his assent then such a law so assented cannot be challenged in any court on the ground that it does not conform to the provisions of clause (2) of Art 31 (We have no provision parallel to this in our Constitution)

(iii) The existing laws (other than laws enacted by the State not more than 18 months before the commencement of the Indian Constitution which are required under clause (6) within three months from such commencement to be submitted to the President for his certification) are saved under sub clause (a) of clause (5) In other words if a law of the kind mentioned in clause (6) has been certified by the President it shall not be called into question in any court on the ground that it contravenes the provision of clause (2) of Indian Art 31 or has contravened the provision of sub section (2) or S 299 of the Government of India Act, 1935 But if President has not so assented, it is not saved against the challenge based on clause (2) of Art 31 The effect of the combined operation of clauses (5) and (6) thus is, that all existing laws passed more than 18 months before the commencement of the Constitution

ng possession of property for public purposes. In
neither acquired title to the property nor taken
t of beneficial enjoyment of the undertaking by
is not covered by Art. 31(2) and compensation
required to be paid. But a person may still be de-
though the State may not have acquired or taken
meaning of Art. 31(2) For example, the State may
in structure on the ground that it is dangerous to
ts dilapidated condition In such a case, there has been
te or taking possession of the property but still the per-
y has been deprived of it. That is why we said in
1(1) was wide in scope than Art 31(2) and there may
's property without there being acquisition or taking
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31(1) has provided, therefore, is that if a person is
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under Art 31(2), there should be authority of law

ion' has also been considered in *Dwarkadas Shrini-*
Weaving Co Ltd and others, AIR (1951) *Bombay* 86,
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ART 11(b) guarantees that citizens shall have right to acquire, hold and dispose of property subject to any reasonable restrictions When, however, property is taken it must be done in accordance with the requirement of ART 15 Whether or not a citizen is allowed to exercise his right of acquiring holding and disposing of property, subject to any reasonable restrictions, is a question that falls to be determined under ART 11 and has nothing to do with ART 15

There has been a difference of opinion in India in regard to interpretation of the requirements of Art 31(1) and 31(2) which correspond to our ARTs 15(1) and 15(2) respectively The earlier view regarded the term 'deprivation' as being something wider than acquisition, and considered that in order that a person be deprived of the property it is enough if the source of the authority of the executive to effect such a deprivation is traced to some law authorising some one so to do But where property is *acquired* or *taken possession of*, it must not only be shown to have been done for a public purpose but also by a law which itself provides for compensation etc In other words, deprivation pure and simple can be effectuated by ordinary law but where deprivation is accompanied by acquisition of property by Government it must be done by the kind of law contemplated by clause(2)

This view, for instance was taken in the case of *Surajmal v Rajasthan State AIR* (1953) *Rajasthan* 78 This was a case in which the Government of Rajasthan State, (India), took over possession of a Power House belonging to the applicant without providing for compensation The contention of the applicant was that the action of the State had been such as would virtually amount to depriving him of his property and as the deprivation had taken place without making provisions as to the payment of compensation it was contrary to Art 31(1) The court dealt with the contention as follows (at p 81) Sura Raja Stat

"In order to understand the full import of the words shall be deprived of his property', a comparison may be made between the provisions of Art 31(1) and Art 31(2) A question arises whether Art 31(2) is merely complementary to Art 31(1) or whether the two deal with somewhat different matters and one is wider than the other Learned Counsel for the State had argued that Art 31(1) deals with what is called the Police Power' of the State in the United States of America, while Art 31(2) with what is called the law of eminent domain there We do not think it necessary to enter into an elaborate discussion of what is meant by Police Power' and what is meant by the law of 'eminent domain Our Constitution being elaborate and written, it is best to confine ourselves to the plain meaning of words used in it without importing unnecessarily expressions like 'Police Power and 'eminent domain' Looking, therefore, at the words of the two articles, it is clear that Art 31(1) is wider in its application than Art 31(2) The reason for this is that there might be deprivation of the property of a person without there being acquisition of it or taking possession of it for public purposes This will be clear if we consider what is the meaning of acquisition or taking possession under Art 31(2) and then compare it with the meaning of deprivation used in Art 31(1) Acquisition is clearly acquiring of title to the property and includes taking possession of it by the State On the other hand, taking possession obviously negatives the idea of acquiring title But at the same time, the taking of possession under Art 31(2) for which compensation has to be paid must be for the purpose of beneficial enjoyment by the State or the person taking possession Thus beneficial enjoyment whether it be merely taking possession or it be taking over title as well as possession is necessary before Art 31(2) is attracted

Definition of some terms occurring in ART. 15.
(a) Property

ART. 15 of our Constitution can best be understood if we could define for ourselves some of the terms and expressions which have been used therein. To begin with we may consider the term 'property' itself.

"Property", says Professor Paton, "is an extremely ambiguous term and the adjective 'proprietary' conveys the same confusion". (See page 227 of "*A Text Book of Jurisprudence by G. W. Paton*).

The difficulty in the definition of the term 'property' stems from the fact that the term is in common parlance indiscriminately applied either to convey the idea of ownership or title, or the very thing over which such a claim of ownership or title is exercised. A useful distinction, however, to draw in such circumstances is to find out what are rights *in rem* as contrasted from the rights *in personem*. The term 'property' may usefully be reserved for covering rights *in rem*, whereas the term 'obligation' should be applied to convey the idea of rights *in personem*. A wider term still, however, is 'assets': assets of a person include not only the rights *in rem* which are vested in such a person but also the rights *in personem*.

In clause (4) of ART. 15 it has been provided that the property shall in clauses (2) and (3) mean immovable property or any commercial or industrial undertaking or any interest in any such undertaking. The term 'immovable property' has been defined under the General Clauses Act as property including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to earth (See S. 3(24)).

It would seem to follow that 'safeguards' in clause (2) of ART. 15 are not available where the property acquired is movable. Why has this distinction been made between clause (1) which applies to the cases where a person has been deprived of his movable and/or immovable property and clause (2) which exludes movable property is hard to understand. Surely safeguards against the compulsory acquisition of movable property are as very important as they are in the case of immovable property

The term 'property', as used in ART. 15, includes not only the real estate in personal property but also intangible and incorporeal rights such as patents, copyrights, leases, accounts and choses in action. In short everything which can command an exchangeable value would be designated as property. It is to be noticed that right to vote or right to reputation, although valuable rights in themselves, can hardly be spoken of as the *property* of a person. Our Constitution does not *define* what the juristic meaning of the term property is: but it following Austin, ownership were described as the entirety of the powers of use and disposal allowed by law, then, all things over which a man has dominion and disposing power would be his property. Following the Roman lawyers if we were to break up the complex conception of property into several rights like *Jus Possedendi*, *Jus Utendi*, *Jus Fruendi*, *Jus Domini* etc., each one of these rights taken by itself could be regarded as being a property. Now it is not essential for the principle of ART . 15 to be attracted that the totality of the rights which are vested in a person owning a thing should be divested before there can be either *deprivation* of property so far as he is concerned or *acquisition* of property so far as the State is concerned.

Mr. Das J. while delivering his judgment in the case of *Charanjit Lal v. Union of India AIR* (1951) *S.C.* 41, adverted to the question of defining the concept of 'property' in order to determine the real scope of Art. 31 of the Indian Constitution and in reaching the conclusion that will presently be stated, he relied on the observations of Rich J. made in an Australian case *Minister of State for the Army v. Dalziel* (1944) 68

ssion of the property referred to in clause (2) "

See also *State of West Bengal v Subodh Gopal*, *AIR* (1954) *S C* 92, and *Dwarkadas Shriniwas v Sholapur Spinning and Weaving Co*, *AIR* (1954) *S C* 119, where the same view is taken by the Indian Supreme Court

It would be for our courts to decide what construction to impose on the two clauses of ART 15 Are the clauses disjunctive?' Does 'deprivation of property and its acquisition or possession refer to the same universe of discourse? Can the State *deprive* a person of the property without making a provision in the law for compensation? Does clause (1) of ART 15 refer to the police power of the State and clause (2) to its power of eminent domain?

It is submitted that if the view of the Supreme Court of India namely that deprivation' and acquisition mean the same thing were correct, clause (1) of ART 15 would be redundant—as it would furnish to us no conclusion which is not already contained in clause (2) of ART 15 It would thus appear that the reasoning contained in *Surajmal v Rajasthan State AIR* (1953) *Rajasthan* 78, has not been effectively dealt with in the later Supreme Court decisions

It would be useful for the student to study the dissenting opinion of Latham C J of the High Court of Australia in *The Minister of State for the Army v Dalziel* (1944)68 *C L R* 261 in defence of the proposition that temporary acquisition of possession of land by Federal Government of Australia did not constitute acquisition of property within the placitum (xxxi) of S 51 of the Australian Constitution so as to entitle the person deprived of such possession to claim just terms After reviewing the definitions offered by some of the leading exponents of the concept of property as it is known to English Common Law, the learned Chief Justice sets forth his opinion as follows

Minister of State vs Dalziel 86 C L R 261 meaning of acquisition of Property

"Accordingly in my opinion, the facts that the right to possession is the most valuable attribute of ownership, that possession is *prima facie* evidence of ownership, and that possession may develop into ownership do not justify an identification of possession with ownership, but, on the contrary emphasize the distinction between the two ideas The fact that the Commonwealth is in possession of land as a result of action under the Regulations does not show that the Commonwealth has become the owner of the land or of any estate in the land If nothing more were known of the facts than that the Commonwealth was in possession, then in such an imperfect state of evidence the presumption would be that the Commonwealth was owner in fee simple But when possession has been taken of land under the Regulations it is plain that the Commonwealth is not the owner of an estate in fee simple There is no room for a presumption of ownership based upon possession The Commonwealth has precisely the rights which the Regulations confer upon it and no more The only question which arises in the present case is whether those rights the existence and reality of which are undisputed and not a matter of inference or presumption are proprietary rights so that it can be said that the Commonwealth has acquired property That which can be owned in respect of land is, as already stated, an estate

The Commonwealth is in my opinion, in the position of a licensee with rights as stated in the Regulations the rights (created by the Regulations) are inalienable personal rights and Commonwealth is not a grantee of property but a licensee Such personal rights are not proprietary rights (and do not) bring about an acquisition of property within the meaning of S 51 (xxxi) of the Constitution " (pp 277 279)

rights is taken away: but what happens if a substantial part of the rights is taken away. Could it be then said that a deprivation of property has taken place within the meaning of ART 15(1)? The answer to this question must depend upon the nature, degree and extent of the invasion of proprietary rights: if what is left behind is something so illusory and practically useless so far as the enjoyment of the property is concerned, it could hardly be disputed that substantially the victim of this subtle ruse has been deprived of his property.

When rights one by one are detached, that is, they are one by one either extinguished or acquired, the case is to be governed by ART. 11, but right to compensation arises under ART. 15 provided substantial interference with the use of any property has taken place. The distinction between the two Articles, to borrow the felicitous phraseology of a Madras High Court Judge, is the difference between plucking feathers of a bird one by one and killing it. (See *Lakshmindra Theertha Swamiar v. Commissioner, Hindu Religious Endowments Madras and others, AIR (1952) Madras* 613, where this observation has been made regarding distinction between Arts 19(1) (f) and 31(1) at p. 634.)

) Public Purpose

Clause (2) of ART 15 enjoins that property can only be acquired or taken possession of for a public purpose and that too by means of a law *which fixes the compensation payable or settles the principles upon which it is to be paid*. This raises the question of the meaning of expression 'public purpose'. The exercise of power relating to 'acquisition of property' under the Fifth Schedule is not fettered in any sense. It is not, for instance, stated therein to be available only in cases where acquisition or requisition takes place in connection with a public purpose. This limitation that acquisition must be for a public purpose, is mentioned in clause (2) of ART 15 and clearly the intention is to make the issue as to the existence or non-existence of a 'public purpose' to be a justiciable one—it is in fact made a condition precedent to be complied with before power to acquire can at all be exercised. (See *Abdul Hamid v. State of West Bengal AIR (1953) Calcutta* 223, *State of Bihar v. Kameshwar Singh, AIR (1952) S C* 252.)

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But this is not to say that the law acquiring property must on its face indicate that the acquisition is in connection with a public purpose. Unlike the question relating to provision about compensation, which has anyhow to be clearly mentioned in the law authorising the acquisition of property, the public purpose need not be expressly mentioned in the statute. A court of law, however, is not prevented, upon an issue being raised that the acquisition was not in fact in connection with a public purpose, from enquiring into the allegation made in that behalf. But at the outset, the court would *presume* that the acquisition is for a public purpose and would give effect to that presumption unless that presumption be rebutted by the production of proper evidence. It is from the nature of the case an extremely difficult burden to discharge but if it could be proved that the property has been, in fact, acquired by the State, not for a public purpose but for a private one, the law would be declared as invalid as offending against ART 15(2) of our Constitution.

Any provision of law which is designed to exclude the jurisdiction of courts to enquire into the allegation that the state has acquired property for purposes other than public purposes, would itself be *ultra vires* of the powers of the legislature and on that account would be ineffective. It is the duty of our courts to denounce as unconstitutional any Act that is calculated to enable the executive to acquire properties of subjects for purposes other than public, and any legislative provision which seeks to oust the jurisdiction of courts to perform this function is

C L R 261—question in that case was whether taking possession of property temporarily for an indefinite period was acquisition for the purposes of placitum (xxxi) of S 51 of the Australian Constitution,—which are to the following effect (at p 285)

'Property, in relation to land, is a bundle of rights exercisable with respect to the land The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle But there is nothing in the placitum to suggest that the Legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating *Possession vaut titre* in more senses than one Not only is a right to possession a right of property, but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights So feeble and precarious was property without possession, or rather without possessory remedies in the eyes of medieval lawyers, that Possession largely usurped not only the substance but the name of Property, and when distinction became necessary in modern times the clumsy term special property' was employed to denote the rights of a possessor not being owner (*Pollock & Wright, Possession in the Common Law*, (1888) p 5) Possession confers more than a personal right to be protected against wrong doers it confers a qualified right to possess a right in the nature of property which is valid against everyone who cannot show a prior and better right Possession is a root of title' (ibid , p 22) The rule that Possession is a root of Title is not only an actual but a necessary part of our system (ibid p 93) The standing proof that English law regards, and has always regarded Possession as a substantive root of title is the standing usage of English laywers and landowners' (ibid p 94) It would, in my opinion be wholly inconsistent with the language of the placitum to hold that, whilst preventing the legislature from authorizing the acquisition of a citizen s full title except upon just terms, it leaves it open to the legislature to seize possession and enjoy the full fruits of possession indefinitely on any terms it chooses or upon no terms at all '

The view of Mr Das the learned Judge, was [A I R (1951) S C 41, 61] —

In my judgment the question whether the Ordinance or the Act has deprived the shareholder of his property must depend for its answer, on whether it has taken away the *substantial bulk* of the rights constituting his property In other words, if the rights taken away by the Ordinance or the Act are such as would render the rights left untouched illusory and practically valueless, then there can be no question that in effect and substance the property' of the shareholder has been taken away by the Ordinance or the Act

Similarly Property says *Weaver in his book on Constitutional Law at p 374*, ' is ownership It consists of the free enjoyment of one s acquisition without control or diminution save by the law of the land It consists not merely of ownership and possession but in the unrestricted right of use and disposal Anything which destroys any of these elements to that extent destroys the property itself The right of property is a natural right and neither the Federal Government, nor the State Government can deprive its owners of it or its possession except by the due process of law

' Property includes not only real estate and personal property, but also incorporeal rights such as patents, copyrights leases, accounts and choses in action and every other thing of an exchangeable value which one may have "

Indeed deprivation of property does take place when the entire collection o

ment to pass a law relating to acquisition of property and provide nominal compensation, that is compensation which is out of all proportion to the value of the property actually acquired. In *Weynes' Legislative and Executive Powers in Australia*, the expression 'just terms' appearing in S. 51 of Australian Constitution has been interpreted as warranting the view that whether or not compensation is paid on just terms is not a matter for courts of law to go into. The learned author sets forth his opinion as follows:

"It is submitted that the view that Commonwealth Act authorising acquisition of property and fixing a nominal sum for compensation would be a valid enactment is correct. No measure of justice is laid down in the Constitution, and it is not specified that the courts would question the judgment of Parliament on this matter. But if the Commonwealth pass an Act seizing the property without fixing or referring to compensation or terms at all this would undoubtedly be of little force for such an Act could not be described as a law with respect to 'the acquisition of property on just terms' at all; it would require no investigation by the court into question of policy to see that such an enactment was not within the Commonwealth's legislative power." (p. 248)

It is submitted the foregoing extract does not correctly state the law as it obtains at present in Australia. Besides, the view of the learned author is not supported by any authority. On the other hand, in the case of *Minister of State for the Army v. Dalziel* (1943-44) 68 *C.L.R.* 261, referred to earlier, the question whether compensation provided for by Regulation 60-H of the National Security (General Regulations) on just terms was considered and answered in the negative by the majority of the Judges who composed the Bench. Consult further—

(a) *Grace Brothers Proprietary Ltd. v. Commonwealth*, (1946) 72 *C.L.R.* 269 at p. 285,

(b) *Andrews v. Howell*, (1941) 65 *C.L.R.* 255 at p. 282,

(c) *The Australian Apple & Pear Marketing Board v. Tonking*, (1942) 66 *C.L.R.* 77 *at* 106;

(d) (1951) *A.C.* 34 (*P.C.*),

(e) (1951) *A.C.* 53 (*P.C.*),

In our Constitution safeguards against arbitrary acquisition of property are provided for in the chapters relating to fundamental rights, and this of necessity means that these are justiciable matters. One manner of looking at the situation would be to say, in regard to cases where compensation provided for by the law relating to acquisition of property is grossly inadequate, that it is no compensation at all, and that, therefore, the Act in question, in effect, does not provide for compensation. The term "Compensation" has a well-known meaning, and any monetary return which has been declared by the legislature as being admissible to the person whose property has been acquired must be fair enough to correspond to the commonsense notion of compensation.

Principles [u]pon which [co]mpensation is paid. [Ce]dars Rapid [Man]ufacturing Co. v. Lacoste

The principles upon which compensation is assessed in England are summarised by Lord Dunedin in *Cedar Rapids Manufacturing and Power Co. v. Lacoste* (1914) *A.C.* 569, in two simple propositions:

"(1) The value to be paid for is the value to the owner as it existed on the date of taking, not the value to the taker.

(2) The value to the owner consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that he is entitled to.

See also *In re Lucas and the Chesterfield Gas and Water Board*, (1909) 1 *B .K.* 16; *Fraser v. City of Fraserville*, (1917) *A.C.* 187.

self inoperative for being plainly opposed to the Constitution [See *West Bengal ttlement Kanungoe Co operative Credit Society Ltd v Mrs Bella Banerjee, AIR* (1952) *alcutta* 554]

We may next consider the meaning of the expression '*acquisition of property*' early this means the assumption of the dominion over property *thus acquired*, so iat instead of the original owner of the property it is the State that steps in his ace One can acquire property only by acquiring the title, whereas by merely king possession one only acquires the *corpus* of the property When you take ossession of a thing you exclude another in whose possession it was before you ok over its possession Another cognate expression is 'requisitioning of property' operty 'requisitioned' is merely a property in respect of which the acquisition of *temporary* use has taken place as opposed to 'acquisition', 'requisition' implies temorary occupation

(c) Acquisition of Property

The Bombay High Court has ruled in *Dawarkadas Shriniwas v Sholapur Spinning Weaving Company, AIR* (1951) *Bombay* 86 that, " 'taking possession' is not synonymous ith 'requisitioning', but has a wider connotation " In this case would be found an structive discussion of the meaning of the term 'property', as it has been held plicable to the provisions of the Indian Constitution (Arts 19 and 31)

In the case of *Mira Khan and others v Meharban Husain and others PLD* (1956) *arachi*, 338, it has been ruled that the term 'acquisition' is a wide concept, mean g procuring or taking property permanently or temporarily and it does not neces rily mean acquisition of legal title by the State in the property taken possession , and that the word 'acquisition' in item 9 of list 11, of Schedule VII of the overnment of India Act, 1935, includes requisition The Court declined to impose upon ie term 'acquisition occurring in item 9 List 11 of the 7th Schedule a narrow eaning on the ground that such a construction would introduce a technicality which ould unnecessarily curtail the meaning of the expression, with the result that a law iacted to deal with requisition would be valid even if it did not make provision for iyment of any compensation—an interpretation which would tantamount to cutting own the beneficial construction of S 299 of the Government of India Act, 1935 and ould adversely affect the interest of the subject In the words of Rahman C J t p 344)

Mira Khan vs Meharban and others

"In the context of immovable property, acquisition may be accepted as trans rence of the ownership rights to the acquiring authority, as contrasted with re uisition which would vest a temporary right of use of the property in that ithority The right of possession is but part of the full right of ownership *mne majus continet in se minus*—the greater contains the less, is a well known iaxim of the law "

The word '*compensation*' *appearing in clause* (2) *of* ART 15, *may next be* onsidered Broadly defined 'compensation' represents the money value of the roperty acquired By 'compensation', courts invariably have understood just comensation, i e compensation adequate to the person who has been deprived of proerty to compensate him for the loss Whether or not compensation is just and lequate is therefore a justiciable matter and one which courts of law in approriate proceedings are bound to enquire into and determine To accept any other iew of clause (2) of ART 15 is to rob it of just the one safeguard which it is alculated to provide, namely the safeguard against arbitrary attempts by the Govern ient to acquire property belonging to private persons If any other construction ere accepted the result would be that it will be perfectly open to the Govern-

(d) Compensation

courts are not entitled to substitute, as if by a process of academic consideration, what in their judgment should have been the quantum of compensation which the legislature ought to have fixed. Legislature is presumed to know and has to be credited with the intention of following the constitutional safeguards in regard to the acquisition of property. It is true that here, as elsewhere, a line has to be drawn somewhere. How many grains of sand make a mound of sand, is undoubtedly a question which is incapable of being answered in terms of mathematical notations. But all the same, we do recognise a mound when we see it, although we may not be able to say how many particles of sand must go into it to make a mound. The whole scheme of the impugned Act has to be examined by the courts, its objectives appreciated and effect has to be given to the usual presumption in favour of the constitutionality of legislative action—namely, that the legislature has properly and honestly exercised a power given to it by the Constitution to acquire property. It is only where the court discovers that by no stretch of imagination could, what has been awarded by way of compensation, be regarded as compensation that it would feel impelled to interfere and declare the law to be unconstitutional.

The Attitude of English Courts.

In England the safeguards against arbitrary exercise of power relating to acquisition *of property is not a matter of constitutional limits on the exercise of legislative* power. In the theory of English Constitutional Law, Parliament can pass a valid law relating to acquisition of property without providing for compensation, and if such a thing were to take place courts of law would be bound to give effect to such a legislation. Property in England can be compulsorily acquired for public purposes only if the statute authorises the executive to do so. It is an established rule of construction that express words must exist in such a statute before the intention to authorise the taking of property without compensation could be given effect to. [See (a) *New Castle Breweries v. King* (1920) 1 *K.B.* 854; see also (b) the cases of *Hudson Bay Co. v. Marclay* (1920) 36 *TLR* 469 (c) *Robinson v. King* (1921) 3 *K.B.* 183, where the former decision i.e. the one referred to at (a) has been disapproved although the principle of construction laid down therein has not been departed from.]

Under the theory of the English Constitutional Law there exists prerogative power with the Crown to deprive the subject of the use or possession of any property with a view to securing the defence of the realm in times of emergency. An important case on this subject is *De Keysers' Royal Hotel Ltd. v. The King* (1920) *A.C.* 508. This was the case which arose out of a petition of right presented by De Keysers' Royal Hotel Ltd., for compensation in respect of compulsory occupation of certain parts of their premises by the War Office, "acting in the name and on behalf of the Crown for purposes connected with the defence of the realm during the Great War." The House of Lords on the facts and circumstances of that case found that as a matter of fact acquisition was not countenanced pursuant to the exercise of prerogative power of the Crown but was under the Defence of Realm Regulations. It was held that—

"The Crown had elected to act under the authority of that statute and that it, like any other person, must take the powers that it thus uses *com onere*. It cannot take the powers without fulfilling conditions statute imposed on the use of such powers."

Although their Lordships decided the case on a short ground and accepted the case of De Keysers for compensation upon the construction of the Defence Regulations, and the Act under which those regulations had been made, they, having regard to the general importance of the issue raised in that case, proceeded

The content of the expression "just terms" in placitum (xxxi) of S 51 of the Australian Constitution has been construed by the High Court of Australia somewhat differently than the expression "just compensation"

Meaning of "Just terms" occurring in S 51 of Australian Constitution

"Unlike just compensation," says R W Baker, "which following in the main general Common Law principles has been interpreted to require a full monetary equivalent the Australian Courts have construed just terms in the light of reasonableness and fairness. If the term may reasonably be regarded by the Court as providing just terms they comply with the placitum (xxxi) even though the Court may be of opinion that other terms might be fairer. Moreover, in considering the question of reasonableness and fairness the Court has regard to the interests of the community as well as those of the person dispossessed (See further *Grace Bros Proprietary Ltd v Commonwealth*, (1946) 72 *C L R* 269 *at pp* 280 *and* 290 and *Jhonston Fear v Commonwealth* 67, *C L R* 314)

In those constitutions where the word 'just compensation' is used the idea is not so much to add something to the inherent meaning of the term compensation as to *amplify* it. The words of Brewer J in the case of *Monongahela Navigation Co v United States* (1893) 148 *U S* 312 37 *Law Ed* 463 are apposite in this context

"The noun 'compensation'" says he "standing by itself carries the idea of an equivalent. Thus we speak of damages by way of compensation or compensatory damages as distinguished from punitive or exemplary damages the former being the equivalent for the injury done and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted and the provision was simply that property should not be taken without compensation the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'"

Quotation from Nichols on Eminent Domain

This idea finds support from an authority of the eminence of Mr Nichols who in his celebrated work on *Eminent Domain Vol* 3 at page 29 observes

"Many of the State Constitutions require that the compensation shall be just 'reasonable' or adequate but these words are mere epithets rather than qualifications and add nothing to the meaning. The phrase 'just compensation' means the value of the land taken and the damage if any to land not taken. More than this it does not imply. The adjective 'just' only emphasises what would be true if omitted—namely that the compensation should be the equivalent of the property. It has been said in this regard that it is difficult to imagine an unjust compensation. The word 'just' is used evidently to intensify the meaning of the word compensation to convey the idea that the equivalent to be rendered for property taken shall be real substantial full and ample and that no legislature can diminish by one jot the rotund expression of the constitution. Substantially this same meaning is attributed to the term 'compensation' and 'adequate compensation'."

The principles of judicial caution in the matter of accepting challenges against property Law

It is necessary to emphasize that although it is perfectly competent to a court of law to enquire into the adequacy or otherwise of the compensation provided for by the legislature in a law relating to acquisition of property, care must be taken to be vigilant about the exercise of this species of judicial power. This power is not to be utilised to question the propriety of the legislative decision as to the *quantum* of compensation awarded the enquiry by the court must be confined to the *purpose of merely determining whether the exercise of the power to acquire property has been resorted to in accordance with the constitutional safeguards provided in ART* 15. In other words,

the power of the State to take property without compensation would undoubtedly be there, although the right of the subject to receive compensation in respect of such acquisitions of property as are made by the State during the continuance of emergency will get revived when the period of emergency itself is declared to have been concluded. The important question to determine in such cases would then be, whether courts of law would enforce claims to compensation as against the State in respect of acquisition of property made during the period of emergency. One view would be to say that it is the inherent right of the State to face emergencies by resort to all manner of power it can command, and it is not liable to compensate anyone in respect of such acts. The other view would be that since the remedies to enforce fundamental rights were merely held in abeyance and not that the rights themselves had been abrogated, the right to receive compensation becomes enforceable after the cessation of the period of emergency. And once the remedies to enforce fundamental rights are revived they would be available to the subject to enforce all his claims arising out of acts which impinge upon the fundamental rights of the persons affected thereby. If the latter view be accepted, it would follow that the claim to compensation would be enforceable in respect of acquisitions of property during the period of emergency.

Art. 196

The above statement of the constitutional position has been offered upon the supposition that Parliament does not pass an Act within the scope of the authority reserved to it under ART. 196 which *inter alia* enables the Legislature to "validate senstence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area." The powers of the Parliament under ART. 196 are sufficiently wide to preclude the courts from questioning the validity of acts countenanced by the executive including confiscatory deprivations of property odered by it during the pendency of the state of emergency.

Recent development of Law in England

Even in England, in recent years, the catalogue of restrictions on the enjoyment of the rights over private property, (which the law of England too recognises as sacrosanct) has swelled to unusual dimensions. Socialistic ideas have invaded the economic life of the State even in England and a system of a more or less controlled economy has necessitated a type of interference with the rights of persons to their property which would have been resisted by British citizens two centuries earlier. Statutes like Coal Industry Nationalisation Act of 1946, the Town and Country Planning Act, 1947, are instances of the kind of legislation which has become a matter of every day occurrence in England.

Distinction between the constitutional safeguards in U.S.A. and in our country.

One essential distinction between the American concept of safeguards against the taking of private property for public use and the safeguards under ART. 15 of our Constitution should be carefully noted. In America, the law relating to the taking of property need not contain any provision relating to the award of compensation, but with us it is of the essence of the constitutional requirement under ART. 15(2) that the law relating to acquisition of property must *itself either fix compensation or settle the principles in terms of which such compensation is to be determined and paid.* In America, the right to compensation is an incident of the Constitution and if property is proved to have been taken by the State its liability to compensate flows from the constitutional provisions themselves. With us, the requirement of the Constitution is that the *law* made by the legislature relating to acquisition of property must itself contain provisions as to the fixing of compensation etc. and if this is not done the law in question would be *ex facia* bad.

Ss 23 and 24

Under the Land Acquisition Act, 1894, in its 23rd and 24th Sections, matters

to consider the question "whether apart from the fact that the Crown expressly purported to be acting under powers given to it by statute such a claim could be maintained"

They proceeded to say,—

"To decide this question one must consider the nature and extent of the so called Royal Prerogative in the matter of taking or occupying land for the better defence of the realm I have no doubt that in early days when war was carried on in a simpler fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the realm was entrusted had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances where the rule *Salus populi supremea lex* was clearly applicable The necessity would in almost all cases be local, and no one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy if it were necessary so to do"

Their Lordships reviewed the constitutional history bearing on the course of 'acquisition legislation' across a period of five centuries and assessed the effect of it on the present legal position in England as follows

"What effect has this course of legislation upon the Royal Prerogative? I do not think that it can be said to have abrogated that prerogative in any way but it has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself But it has done more than this It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community

"This being so when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and therefore subject to the equitable provision for compensation which is to be found in it There can be no excuse for reverting to prerogative powers simpliciter—if indeed they ever did exist in such a form clear in such a case as the present—when the Legislature has given to the Crown statutory powers which are wider even than anyone pretends that it possessed under the prerogative, and which cover all that can be necessary for the defence of the nation, and which are moreover accompanied by safeguards to the individual which are in agreement with the demands of justice Accordingly, if the commandeering of the buildings in this case had not been expressly done under statutory powers, I should have held that the Crown must be presumed to have acted under these statutory powers, and thus given to the subject the statutory right to compensation"

These extracts from the decision of their Lordships are relevant for us in Pakistan since they are of assistance in the comprehension of the constitutional position in regard to the executive power of our State during times of emergency like war etc During normal times the fundamental rights guaranteed by Part II of the Constitution are available but the enforcement of these rights can be suspended upon the declaration by the President of the existence of an emergency The enforcement of these rights will get revived after the proclamation of emergency has been revoked in the manner prescribed by the Constitution But, during the [illegible]

[illegible]

to accrue from the use to which the land acquired will be put; or,

seventhly, any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date of the publication of the notification under S.4, sub-section (1)."

148. ART. 15 and Savings in Respect of Existing Law

Clause (3) of ART. 15 says, under four distinct heads, the kinds of legislation in relation to which provisions of clauses (1) and (2) of ART. 15 would not apply. Although a law relating to acquisition of property which answers the description of any of the four categories of cases excepted by clause (3) would survive the limitations imposed by ART. 15, the question that has arisen for solution is: Would the same legislation be deemed to be open to attack under some other Article contained in Chapter II of our Constitution. In particular, we might see the effect of those provisions that guarantee the right to equality upon the validity of that class of expropriatory legislation to which the provisions of ART. 15 would normally apply, but in relation to which, thanks to the saving made in the 3rd clause of ART. 15, they have expressly been declared as not being applicable. This was the problem that arose in the case of East Bengal State Acquisition case before the High Court of Dacca, more popularly known as the East Bengal Zamindari Abolition case. The facts of the case were as follows:—

The East Bengal State Acquisition Act was passed on 16th of July, 1950. This was an Act which provided for the acquisition by the State of the interests of rent-receivers and certain other interests in land in East Bengal, and gave power to the Provincial Government to acquire by notification in the official gazette all interests of such of the rent-receivers as may be specified therein and with effect from the date of the notification all those interests "in the Estates, Taluka or Tenancies specified in the notification, including their interests in all lands in their *khas* possession etc., would vest absolutely in the Provincial Government free from all incumbrances." Under S. 37 of the East Bengal State Acquisition Act, compensation payable to the rent-receivers in respect of the acquisition of their rent-receiving interests was provided upon a scheme which showed that rate of compensation payable varied in inverse proportion to the ascending scale of the classes of rent-receivers who had been grouped according to the amount of annual net-income which had to be worked out in keeping with the several provisions mentioned in the impugned Act. For instance, if net income from the rents received by a rent-receiver did not exceed Rs. 500/- the rate of compensation payable was 'ten times such net income', and where the net income computed exceeded Rs. 500/- but not Rs. 2000/- it was to be eight times such net income and so on and so forth. In other words the rate of compensation was progressively of the diminutive size in respect of categories of higher groups of income: more particularly, the scheme showed that the rate of compensation varied inversely in respect of groups of income of ascending scale. Higher the income relatively less was the rate of compensation declared payable by S. 37 of the Act.

Now this law being an *existing law* was saved under clause (3) of ART. 15 from being questioned in relation to the requirements of clause (2) of that Article. To be more concrete, such a law could not be attacked on the ground (say, for instance), that it was not for a public purpose or that it did not provide for compensation etc. But the petitioners in the writ-petitions that they had filed, contended before the High Court that it violated the equal protection of law clause of the 5th Article in that different classes of rent-receivers who had been divided in an artificially conceived income group had been treated, in respect of compensation payable to them, in a manner that violated their right to be treated as equal before law and to be entitled to the equal protection of the law. It was complained

which have to be considered, and the matters that have *not* to be taken into consideration in determining the amount of compensation payable, are mentioned in meticulous details, and these provisions are reproduced as they, in the opinion of the writer, do furnish a guidance in the matter of fixing principles upon which compensation could be paid in cases where property is acquired by the State According to their Lordships of the Judicial Committee of the Privy Council (*Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*, (1939) *A C* 302) A I R (1939) P C 98, these principles differ in no material respect from the principles upon which compensation was awarded under the Land Clauses Act, 1945, and

of the Land Acquisition Act, 1894

"therefore the compensation must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser "

Sections 23 and 24 of the Land Acquisition Act, 1894, are in the following words

"23 (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration —

first, the market value of the land at the date of the publication of the notification under S 4, sub section (1),

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector s taking possession thereof,

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land,

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner of his earnings,

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business the reasonable expenses if any incidental to such change, and

sixthly, the damage, if any, *bona fide* resulting from diminution of the profits of the land between the time of the publication of the declaration under S 6 and the time of the Collector's taking possession of the land

(2) In addition to the market—value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market value, in consideration of the compulsory nature of the acquisition "

"24 But the Court shall not take into consideration —

first, the degree of urgency which has led to the acquisition,

secondly, any disinclination of the person interested to part with the land acquired,

thirdly, any damage sustained by him which, if caused by a private person, would not render such person liable to a suit,

fourthly, any damage which is likely to be caused to the land acquired, after the date of the publication of the declaration under S 6, by or in consequence of the use to which it will be put,

fifthly, any increase to the value of the land acquired likely to accure from the use to which it will be put when acquired,

sixthly, any increase to the value of the other land of the person interested likely

The court held that S. 37 was not discriminatory and held that there was rational classification in respect of compensation that is payable under its scheme to rent-receivers who had been divided into different groups. (See the case in Writ Petition No. 13 of 1956, dated 7.8.1956, delivered by the High Court of Judicature at Dacca, in East Pakistan *PLD* (1957) *Dacca* p. 1).

The matter went in appeal to the Supreme Court of Pakistan where the learned Judges of the Supreme Court by a unanimous judgment held that the provisions of S. 37 of the impugned Act were not capable of being successfully attacked as unconstitutional and void in view of the saving contained in the 3rd clause of ART. 15, and they also ruled that quite apart from that saving, the classification attempted by the legislature in S. 37 did not come in conflict with the guarantee of the equal protection of law.

Dealing with the first objection the learned Chief Justice, who delivered the judgment, with which his companion Judges concurred, observed (at pp. 36-37):

". . . . the essential nature of the appellants' objection to the acquisition is the inadequacy of compensation, and this objection seems to me not to be open to persons who have been expropriated under the existing laws. The 'equal protection' clause applies only where unequal treatment has not been recognised by the Constitution. I have given my reasons for the view that the impugned Act is a confiscating enactment inasmuch as it does not provide what is called compensation to the expropriated rent-receivers and is clearly discriminatory in the matter of compensation. This broad feature of the Act must have been fully present to the minds of the Constitution-makers when they inserted in ART. 15 the provision that —

'Nothing in this Article shall affect the validity of any existing law'. If being fully cognizant of this discriminatory character of the Act, they for reasons better known to them decided to protect the Act, they must be deemed to have affirmed its discriminatory provisions. Thus inequality in the matter of compensation having been recognised by Article 15, no equality in that matter can be claimed under the general provisions of Article 5. It is not contended in the present case that the acquisition was not for a public purpose; all that is complained of is that some of the appellants have received less than they should have received if no discrimination had been observed and compensation had been paid in full. The essence of the objection, therefore, is the inadequacy of compensation and this complaint the court is expressly prohibited from entertaining by the Constitution. Mr. Das has urged that in order to bar an objection to the constitutionality of the Act on the ground of inadequacy of compensation, the case contemplated by Article 15 is that of a single person considered by himself, and that an objection to an enactment under Article 5 necessarily proceeds on a comparison of the aggrieved party with other persons in his situation. In my opinion, this is not an invariable distinction between the two Articles; nor is the latter circumstance alone sufficient to cause an objection cease to be an objection to the adequacy of compensation because a person who does not receive due compensation cannot be held not to complain of want or inadequacy of compensation when what he says is 'Others have received more, I have received less', irrespective of whether what others have received is or is not due compensation. I am, therefore, of the view that equality in the matter of compensation having been disallowed by Article 15 to the persons affected by the Act they cannot invoke the 'equal protection of the law' clause in an endeavour to obtain a declaration as to the invalidity of the Act. I recognise that Mr. Das succeeded on this part of the case in the Patna High Court, but I consider that the correct approach to this question is to be found in the decision of the Allahabad High Court in *Rajasuryapal Singh v. The U.P. Government*, (*AIR* (1951) *Allahabad*, 674, decided by a Full Bench

that the provisions relating to compensation contained in S 37 of the impugned Act were arbitrary and discriminatory and unreasonable inasmuch as in accordance with the scheme provided therein, rent receivers, whose income is low, were given compensation at a higher rate than those given to rent receivers whose income is higher, irrespective of the value of the land acquired It was further contended that, although it was open to the State to fix any multiple of income it liked, but once, in the determination of compensation payable to rent receivers whose interests were acquired, a certain rate of compensation had been fixed, it should be same for every one and should not be made to vary according as the net income of the rent receiver was more or less It was pointed out that this was virtually an attempt at classification which was arbitrary and which had no rational relation to the objects of legislation It was suggested that the value of the land does not vary according to the means of the rent receivers and if there was one law for A who is rich and another law for B who is not rich, it amounts to a violation of the guarantee of right to equality before law since the different rates at which compensation had to be given to different persons had no rational connection whatsoever with the objects of legislation

The case of *Kameshwar Singh v State of Bihar, AIR* (1951) *Patna* 91, was pressed into the service of this argument, a case wherein a similar argument having been raised, the Patna High Court had ruled that the impugned legislation was discriminatory and therefore void, under ART 14 of the Indian Constitution And it was pointed out that although the State of Bihar had filed an appeal before the Supreme Court of India, the Constitution of India had itself to be amended by the incorporation of ARTs 31(a) and 31(b) in order to save the legislation that had been declared void by the Patna High Court

Two distinct questions arose in this case and they may be formulated as follows —

(a) Could an 'existing law' (that dealt with the acquisition of property) that had been expressly saved from the operation of constitutional safeguards that are available under clause (2) of ART 15 be attacked under ART 5?

It was contended by the Government of East Bengal that ART 15 being a complete code with regard to the protection given to the property rights of private persons and existing laws having been saved it was not permissible to speculate whether that law came in conflict with any other Article in Part II of the Constitution The right of equality was a general right, no doubt, but then ART 15 was a special Article dealing with the specific question of acquisition of property, and if a law had been expressly saved from the operation of a specific Article, was it not permissible to further consider whether it was hit by any other Article? It was also pointed out that the entire argument which was sought to be made at the Bar to bring the case within the mischief of ART 5, was more or less an attempt to get an adjudication from the court as to the inadequacy of the *quantum* of compensation which the law relating to acquisition of property had provided, and that this attempt, if successful, would undo the effect of clause (3) of ART 15, which had expressly saved the existing law In other words, if the object of clause (3) of ART 15 was to save the existing laws from being challenged on the ground of adequacy or otherwise of compensatien, that protection was in reality being undone by raising the same question in another form so as to bring it within the prohibition against discrimination contained in ART 5

(b) The second question was whether the provisions of S 37 were at all violative of ART 5?

The position of the East Bengal Government was that the 5th Article of our Constitution was, as compared with ART 14 of Indian Constitution, somewhat differently worded and the question was—Can there be equal protection of law "where the ideal of equality before law had to be attained in an unequal system of human relations"?

reported in (1947) *A.C. page* 573 : (1947) 1 All E.R. 567 would be found the statement of the English law in regard to the duty of the arresting authority to disclose to the person arrested what the charge against him is and of the desirability of informing such a person, as soon as it be possible, of the facts which are said to constitute a crime on his part. This was a case in which the respondent had been arrested without a warrant and at the time of his arrest the detectives who effected his arrest charged him under Liverpool Corporation Act 1921, with the offence of 'unlawful possession', an offence for which, under the circumstances of that case, arrest without warrant was not allowed by law. The charge was subsequently withdrawn against the respondent who was immediately then arrested on charges of larceny and handed over to the police of another district where the offence was said to have taken place. The respondent was acquitted of larceny charges. He then brought an action against the arresting authorities for false imprisonment. The defence was that the arresting authority reasonably suspected that the respondent was guilty of larceny and this defence was accepted. With regard to the first arrest, however, since the arresting authority had not disclosed to the respondent at the time of the first arrest their suspicion that he had committed larceny, or given him any indication of the nature of evidence on which suspicion was founded, the Court of Appeal as well as the *House of Lords* held the arrest to be illegal and actionable. Lord Simonds dealt with the case as follows :

"First, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? It is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen. Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified proposition, see whether any qualification is of necessity imposed on it. This approach to the question has, I think, a double support. In the first place, the law requires that, where arrest proceeds on a warrant, the warrant should state the charge on which the arrest is made. I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot, as it appears to me, justify or demand either a refusal to state the reason of arrest or a misstatement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay take such steps as will enable him to regain it. In the second place, I find assistance in the analogous procedure in civil proceedings in olden days and in imprisonment for debt. On the former, the judgment of Scott L. J., in this case is illuminating. The sheriff, who by judicial writ was directed to bring the defendant before the Court, was not left, nor did he leave the defendant, in ignorance of the demand that must be met. Common justice and common sense required that the defendant should know why he should on such and such a day be brought before the *King's justices* at *Westminster* or wherever it might be. So also in regard to imprisonment for debt. On this subject much information is to be found in *Hooper v. Lane*, (1857), 6 *H.L.C.*

of five Judges There are also certain observations to a similar effect by Das J in the decision of the Supreme Court of India at p 980 of the report of Kameshwar Singh's case in 1952, S C R 889 " (*PLD* (1957) *S C* 9)

149. A Comment on ART. 7—Limitation on the State-Power of Arrest and Detention.

ART 7 consists of two parts (a) general direction in respect of a person who is arrested that he must be informed, as soon as may be, of the grounds for such arrest and that he shall not be denied the right to consult and be defended by a legal practitioner of his choice, and (b) the second part deals with laws relating to preventive detention and the constitutional safeguards within the limits whereof a law relating to preventive detention can be made Whenever a person is arrested and thus deprived of personal liberty it is his constitutional right that he should be informed of the grounds upon which his arrest has been directed, and, secondly, it is his right to consult and be defended by a legal practitioner of his choice

Under S 340 of the Criminal Procedure Code, the right to be defended by a lawyer in a criminal case is affirmed in the following words S 340 of Criminal Procedure Code

"Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such court, may of right be defended by a pleader "

This section does not only contemplate that the accused should be at liberty to be defended by a pleader at the time proceedings are actually going on but also implies that he should have a reasonable opportunity, if in custody of the police, of getting into communication with his legal adviser for the purpose of preparing for his defence (See *the case of Jahangiri Lal v Emperor*, A I R (1935) *Lahore p* 230)

It would be noticed that in the present Article this right has been given the status of a fundamental right and to some extent it has been given a more extensive scope Section 340 of the Criminal Procedure Code gives the right only to an accused person that is to say one *who is accused of an offence before a criminal court, or against whom proceedings are instituted under that Code*, but Article 7 confers an absolute right in favour of all persons who are arrested subject only to the exceptions mentioned in clause 3, i e , a person who for the time being is an enemy alien or who is arrested or detained under any law that provides for preventive detention cannot take advantage of this Article The right conferred by Article 7 is not only confined to the right of being defended by a legal practitioner but also includes the right to consult such a legal practitioner The right under Article 7 attaches to a person

legal practitioner of his choice, must, to the extent of their inconsistency, be deemed as void

The right to be defended merely opens up the question of an option in favour of

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... the arrest of a person has Right to be informed of the grounds of arrest Christie v Leachinsky

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grounds upon which his arrest has been directed In the case of *Christie v Leachinsky*

443 I think it necessary only to cite a single passage from the speech of Lord Cranworth, C , (ibid) 550 'The sheriff', he said, 'is bound, when he executes the writ, to make known the ground of the arrest, in order, among other reasons, that the person arrested may know whether he is or is not bound to submit to the arrest ' Here is a clear illustration of the principle on which I base this opinion that if a man is to be deprived of his freedom, he is entitled to know the reason why '

ART 7(2) Right to be produced before a magistrate

Under clause (2) of ART 7, authority effecting arrest of any person or detaining him in custody is charged with the duty of producing such a person within the period of 24 hours of such arrest exclusive of the time necessary for the journey from the place of arrest to the court of a magistrate for procuring the magistrate's authority for legalising continued detention of such a person thereafter

This requirement of the Constitution as to production before a magistrate is to be dispensed with in the case of the person arrested being an enemy agent or one whose arrest and detention has been secured under any law relating to preventive detention (ART 7(3))

S 167 of the Code of Criminal Procedure

Under section 167 of the Code of Criminal Procedure it is provided that whenever

Station, or the Police Officer making the investigation if he is not below the rank of Sub Inspector, shall forward the accused to a magistrate along with a copy of the entries in the Diary relating to the case and it will be then for the magistrate to authorise from time to time, the detention of such accused person in custody for a term not exceeding 15 days This safeguard which has been provided by the Criminal Procedure has been now accorded a constitutional status in ART 7, and now it is the fundamental right of every person who considers that his arrest and detention beyond first 24 hours has been allowed to stand without any authority of the magistrate to ask for and obtain relief from such arrest and detention by approaching either the High Court or the Supreme Court direct for their intervention in his case

Safeguards against arbitrary Preventive Detention

The 4th and 5th clauses of ART 7 lay down safeguards in the case of a person who is being detained under a law relating to preventive detention These are —

(a) No law that provides for preventive detention can authorise the detention of a person for a period exceeding three months unless the appropriate Advisory Board *before the conclusion of the said period of three months reports* that in its opinion there is sufficient cause for such detention

(b) The authority directing the detention of a person under any law relating to preventive detention is required "as soon as may be" to communicate to such person the grounds on which the order has been made, and

(c) He is further required to afford him the earliest opportunity of making a representation against his Detention Order

The proviso to clause (5) entitles the authority making such an order to refuse to disclose such facts which such authority considers it to be against the public interest to disclose

Now it should be noted that clause (4) of ART 7 does not by itself provide for preventive detention It only enjoins certain safeguards which have to be incorporated in any law that provides for preventive detention

Legislative

The legislative competence to make a law relating to preventive detention is derived

has been made to comply with the requirements of law relating to preventive detention. (See *A. K. Gopalan v. The State of Madras*, (1950) *S.C.* 27; *Machindar Shivaji v. The King*, *AIR* (1950) *F.C.* 129; *State of Bombay v. Atma Ram*, *AIR* (1951) *S.C.* 157).

Whether or not the grounds have been communicated "as soon as may be" being a question of fact, it is for the court of law before which that question comes to be raised to say, on the facts and circumstances of such case, whether an unreasonable amount of delay has intervened between the date on which the detenu has been detained and the date on which the grounds have been communicated. (*Ujagar Singh* v. *The State of Punjab*, *AIR* (1952) *S.C.* 350). In short, if the court of law comes to the conclusion that the detaining authority has done something to side-track the intention of the law (which is to afford to the detenu an opportunity with reasonable practicable speed to make a representation against the orders of his detention) it would not hesitate to declare detention illegal and order the release of the detenu. Any unnecessary obscurity on the part of the detaining authority in stating the grounds of the order would be construed as an attempt to side-track the intention of the law which expressly provides for enabling the detenu to make a representation against his detention and is bound to incline the court to declare his detention illegal (See *State of Bombay v. Atma Ram*, *AIR* (1951) *S.C.* 157).

150. Comment on ART. 6—Prohibition against Ex post facto penal laws

ART. 6 of our Constitution prohibits what in the language of American jurisprudence is known as the making of *ex post facto* laws. It also prevents the State from subjecting any person to a punishment greater than that prescribed by law for an offence at the time when the offence was committed.

It should be the requirement of any system of civilised law that retrospective effect ought not to be given to penal legislation. Normally, the State acting through its legislatures has the power to make laws having retrospective operation. The effect of the present Article is to confine the sphere of retrospective legislation only to non-penal laws. Any law which makes of certain acts and omissions a crime or an offence punishable as such, would offend against the prohibition contained in ART. 6 and would to that extent be void, if it is shown to have been enacted after the acts and omissions in question took place.

The Constitution of Brazil (September 24, 1946) has guaranteed that no *ex post facto* laws would be passed in terms that can hardly be improved upon:

"ART. 141. The Constitution assures Brazilians and foreigners residing in the country the inviolability of the rights respecting life, liberty, individual security, and property in the following terms:

(1) ....

(2) No one may be obliged to do or refrain from doing anything except by virtue of law.

(3) The law shall not prejudice any vested right, any juridical act accomplished, or any adjudicated matter.

(4) The law shall not exclude any injury to individual rights from consideration by the judicial power."

And in clause (29) it has been provided:

"Penal law shall determine the individualization of the punishment and shall only be retroactive when it shall so benefit the accused."

American Constitution.

In American Constitution, in ART. 1, Section 9, clause (3) it is provided:

"No bill of *attainder* or *ex post facto* law shall be passed."

however, has to consider whether the executive authority was really *satisfied* at all upon the question that the order of detention be made The onus of proof of satisfaction ordinarily would lie on the Government but if an order duly authenticated by a competent authority is produced which contains a statement that the authority was satisfied that a particular person be detained, it would be sufficient for the purpose of putting the detenu on his [illegible]

exercise of power, or having indulged in a colourable exercise of the power with a view to advancing ends that are extraneous to the purposes of the law that has conferred this power on the executive, his order should be regarded as inoperative and ineffective (*In re Narahari Balaji Parkhi, AIR* (1949) *Madras* 438)

The *grounds* that have to be supplied to the detinue by the detaining authority could be looked at by the courts with a view to seeing whether they are *relevant* for the purposes for which the legislature has sanctioned the preventive detention

Mala fides of Detention Order Burden of proof

Whenever a question of the *mala fide* character of the order of detention comes to be determined by a court of law, it would be for the detenu to place proper material on the record of the case with a view to substantiating his contention that the order is in fact a *mala fide* one A *mala fide* order does not mean necessarily that there was dishonest motive that prompted the detaining authority to pass the order in question The order would be denounced as *mala fide* even without any such motive being alleged and proved, if upon examination of the case it turns out to be one where the Authority has acted without *due care and caution* or where the order manifestly appears to be for purposes other than those stated in the order or for purposes other than those that have any rational connection with the objects for which preventive detention has been sanctioned by law (See *Dayanand Modi v State of Bihar, AIR* (1951) *Patna* 47) Every thing thus, in effect depends upon circumstances of each case, and there can be no abstract statement of a principle which can at all assist the court in coming to the conclusion whether or not an order is a *mala fide* one

A summing up of the Law re Preventive Detention

From the foregoing analysis it would appear that a detenu in order to succeed must establish any of the following contentions in a court of law where the legality of his detention comes to be considered

(1) That the law relating to preventive detention does not conform to the requirements *of clauses (4) and/or (5) of ART 7*

(2) That although the law is valid, the detaining Authority has not followed in *fact* the procedure prescribed by the law relating to preventive detention When a person is deprived of his liberty otherwise than in strict conformity with the requirements of the law relating to preventive detention, it would be declared that he has been deprived of his liberty otherwise than "in accordance with law" under ART 5(2)

And finally,

(3) that although the law relating to preventive detention has been followed in the sense that the steps required to be taken before the executive can under the law direct detention of a person have been taken, nevertheless if in *fact* there *is a fraud on the statute committed by the detaining authority who has acted mala fide or for purposes other than those for which preventive detention has been sanctioned by law* the court will order the detenu to be released forthwith

technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone in his commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr Wooddeson; and by the author of the Federalist, who I esteem superior to both, for his extensive and accurate knowledge of the true principles of government."

The Rule under the English Law.

Even in England the rule of construction in respect of any substantive law is that it is presumed to be prospective. It is only in respect of procedural or adjectival laws that the presumption is that they are retrospective and this, on the theory that nobody has a vested right in procedure and can be heard to say that any procedural provisions have been altered or omitted to his prejudice. (See page 220, (supra)

A Bill of Attainder is a legislative Act which inflicts punishment without a judicial trial. If the punishment be less than death, the Act is termed a Bill of Pains and Penalties.

Ex post facto laws, in the words of Justice Blackstone, are those laws which;

"after an action, indifferent in itself, is committed, the Legislature, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must of consequence be cruel and unjust." (See *Phillips v. Eyre* (1870) 6 *Q.B. 1. at p. 25*).

The English criminal law did not recognise the maxim expressed in the Latin tag "*mett a poena sine lege*" i.e. there must be no punishment inflicted unless a previous law provided for it. But there can be no doubt that although the maxim was strictly speaking no part of the law of the land, it constituted a political ideal and the Judges in England converted the substance of the principle of prohibition against penal retro-active legislation into a rule of interpretation. The English court "will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature". (*See Phillips v. Eyre* (1870-1) 6 *Q.B.* 1). In the same case it was emphasized, "But to affirm it is naturally and necessarily unjust; to take away a vested right of action by Act subsequent is inconsistent both with the common law of England and the constant practice of legislation (see p. 23) . . . . In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the State or even the conduct of individual subjects the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of precision fail to meet and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, *summum jus summum injuria*. Whether the circumstances of the particular case involve matter of policy and discretion fit for debate and decision in Parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which ordinary municipal law is not commissioned to inquire or adjudicate". (See p. 27).

It should be carefully noted that what the Constitution prohibits under ART. 6 is the *creation of an offence* out of acts and omissions which were committed at a time when such an *offence* had not been in existence. But this will not prevent the Legislature from making laws prohibiting the doing of, say, certain kinds of business, that is, laws affecting even a particular business which might have been commenced before the prohibitory legislation came into force: such a legislation cannot conceivably be construed as contravening ART. 6 for the simple reason that what that Article prohibits is merely the crea-

Similarly, in section 9(1), the same Article provides

"No State shall pass any bill of attainder or *ex post facto law*"

There is yet a third restriction contained in the Fifth Amendment of the Federal Constitution which also prohibits the making of laws that are calculated to subject a person for the same offence to be twice put in jeopardy of life or limb but it would be noticed that, in our Constitution, there is no such parallel rule against double jeopardy Under the General Clauses Act, however, we have in S 26 a provision as to the liability of an offender in respect of acts and omissions that are offences punishable under two or more enactments The Section reads —

"When an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to punishment twice for the same offence '

In view of this provision an express mention against rule of double jeopardy was not at all necessary unless, of course, the intention was to raise the rule contained in S 26 of the General Clauses Act to the status of a constitutional prohibition Then there is S 403 of the Criminal Procedure Code which also prevents any person from being subjected to a second trial in case he has already been punished by a court of *competent* jurisdiction

The rule against the making of *ex post facto* laws has been interpreted in America in the case of *Calder v Bull*, (1798) 1 *Law Ed* 648, as being confined to securing a safeguard in the favour of personal security of the subject, "to protect his person from punishment by legislative Acts having a retrospective operation ' The distinction between *ex post facto* laws and laws having retrospective operation was explained in that case by Mr Justice Chase as follows (at p 650) Calder v Bull

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition 1st Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action 2nd Every law that aggravates a crime, or makes it greater than it was, when committed 3rd Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed 4th Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender All these, and similar laws, are manifestly unjust and oppressive In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law The former, only, are prohibited Every law that takes away or impairs, rights vested, agreeably to existing laws is retrospective, and is generally unjust, and may be oppressive, and it is a good general rule, that a law should have no retrospect but there are cases in which laws may justly and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion, or of pardon They are certainly retrospective, and literally both concerning, and after, the facts committed But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law, but only those that create, or aggravate, the crime, or increase the punishment or change the rules of evidence, for the purpose of conviction Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective But such laws may be proper or necessary as the case may be There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime The expressions "*ex post facto* laws," are

tion of an offence by means of an *ex post facto* legislation out of acts and omissions that have been countenanced before the coming into force of such an *ex post facto* legislation. Similarly, if the prosecution for an offence could not be commenced without the happening of a condition precedent, as when a sanction to prosecute an offender is required by the provisions of some law, the passing of a law which has the effect in it of dispensing with the necessity of complying with such a requirement would not offend against ART 6—and this for the simple reason that what would be done in such a situation would not amount to the creation of an offence but only the removal of an impediment to the prosecution of an offender.

The second part of the 6th Article prohibits the legislature from enhancing the punishment that has been previously prescribed in respect of a given offence. Whenever any such attempt is made to impose punishment which is greater than the one originally prescribed by law the person who is affected thereby would be entitled to claim relief against such enhanced punishment. It may be a somewhat difficult question for a court to resolve if in a given case what is shown is that the *quality* of punishment has been changed as for instance, in cases where punishment for a term of imprisonment is converted into a solitary confinement or an offender is subjected to whipping. The severity of the punishment cannot be judged from the view point of the sufferer, but it will be for the court to [illegible] in each case whether a punishment *greater* than that prescribed by law has been inflicted. Care must be taken to distinguish the expression "a punishment greater than that prescribed" from "a punishment different than that prescribed". It is only the former which is within the prohibition contained in ART 6.

Justice is the earnest and constant will to render to every man his due.

Institutes of Justinian, 533 A.D.

I know of no duty of the Court which is more important to observe and no power of the Court which it is more important to enforce than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from such operations of public bodies.

per *Justice Lindley*
(in Roberts v. Gwyrfai District)
Council, 1899.

A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization.

per *Night Bruce, L. J.*
(in Slim v. Croacher, 45 E.R. 462;)
2 *L.T.* 103.

What is the argument on the other side? Only this that no case has been found in which it has been done before. The argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still while the rest of the world goes on; and that would be bad for both.

per *Denning, L. J.*
(in Packer v. Packer (C.A.) 1953,)
2 *All E.R.* 127.

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

per Benjamin Franklin
(Historical Review of Pennsylvania, 1759)

CHAPTER VI

INDIVIDUAL AND THE STATE (CONSTITUTIONAL REMEDIES)

(5) In any enactment references to any writ of mandamus, prohibitions or *certiorari* shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as reference to the making of the corresponding order.

8. The power of the High Court under any enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, or to require any court of summary jurisdiction or court of quarter sessions to state a case for the opinion of the Court, in any case where immediately before the commencement of this Act the Court had by virtue of any enactment jurisdiction to make a rule absolute or to make an order, as the case may be, for any of those purposes, shall be exercisable by order of mandamus.

9.—(1) Informations in the nature of *quo warranto* are hereby abolished.

(2) In any case where any person acts in an office in which he is not entitled to act and an information in the nature of *quo warranto* would, but for the provisions of the last foregoing subsection, have lain against him, the High Court may grant an injunction restraining him from so acting and may (if the case so requires) declare the office to be vacant

(3) No proceedings for an injunction under this section shall be taken by a person who would not immediately before the commencement of this Act have been entitled to apply for an information in the nature of *quo warranto*."

Language of Article 22 is very wide

The language used in *ART.* 22(2) is sufficiently wide to cover within its protective wings any case that may arise from the violation of any of the fundamental rights: the Supreme Court has not only the jurisdiction to issue writs mentioned therein but also to issue directions and orders, the writs that it can issue are not limited to the five kinds of writs that have been specifically mentioned therein but the power extends to the issuance of any other writs which are known to the common law of England and could have been issued on the date of the coming into force of our Constitution. These writs can be issued to any person or authority and in appropriate cases to any Government—which term would include the Provincial or the Federal Government.

Our Supreme Court has, in the case of *Fazal Ahmad v. The State*, (1956) *PLD S. C. p.* 306) declined to affirm that *ART.* 170 of our Constitution could be justifiably invoked for issuing an old, obsolete and unpractical writ of *coram nobis* the object of which was to secure a review of a considered decision of a High Court on grounds entirely "abstract and unpractical" in character.

Analogous Pre-Constitutional Power. S 491, Cr.P. C., and 45 of the Specific Relief Act.

It is necessary to bear in mind the *scope* of the power that has been reserved to the Supreme Court under *ART.* 22. And here it would be instructive to compare and contrast the language of S.491 of the Criminal Procedure Code and of S.45 of the Specific Relief Act where a cognate power to issue orders to public authorities has been mentioned, with the language employed in *ART.* 22, just to be able to appreciate the direction in which the power of the Supreme Court to issue orders, directions or writs, has been rendered more effective.

S. 45 of the Specific Relief Act as adapted in Pakistan is as follows:

"45.—*Power to order public servants and others to do certain specific acts.*—

The High Court of East Bengal may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature:
Provided—

151. Introductory statement—Arts. 22 & 170

ART 22 of our Constitution has virtually made the Supreme Court of our country the custodian of peoples' fundamental rights guaranteed in Part II, and has made the very right to move the Supreme Court by means of appropriate proceedings commenced for the enforcement of these rights, itself a fundamental right Any legislation that directly or *indirectly takes away this right would, to the extent of its derogation, be void* Constitutional Remedies General Introduction ARTS 22 & 170

Normally, the subject matter of ART 22 should have been dealt with in the chapter relating to the 'Nature, Structure and Reach of Judicial Power where jurisdictional aspects of the authority of the Supreme Court have been dealt with but in the opinion of the present writer it is more in keeping with the scheme of the present work that analysis of the present Article should be separately presented as an independent subject matter along with a treatment of the powers of the High Courts under ART 170 of our Constitution After all, we cannot be oblivious of the fact that although right to these remedies under ART 22 is, itself, a fundamental right of considerable constitutional significance, the constitutional remedies sanctioned by ART 170 are equally important and deserve our careful attention and consideration when we are studying the principles of ART 22

Our ART 22 corresponds to ART 32 of the Indian Constitution even as our ART 170, which defines the jurisdiction of the High Court in relation to its power to issue prerogative writs corresponds to ART 226 of the Indian Constitution In fact the language used in these Articles is practically the same in both the Constitutions The jurisdiction affirmed by these Articles, is analogous to the one which the Court of the Queen s Bench Division exercises in England, that is, the jurisdiction which is described as "Proceedings on the Crown side of the Queen's Bench Division Before the First of January, 1939, the means by which this jurisdiction was exercised were Prerogative Writs' , so called because under the Common Law of England, King being regarded as a source or fountain of justice the resort by the Judges of the Court of the Queen s Bench to give effect to extra ordinary remedial measures and processes was justified in the name of the Sovereign who was always present in the contemplation of Law Now the same jurisdiction is conferred by statute on the High Court (See *Supreme Court of Judicature (Consolidation) Act*, 1925, and *Administration of Justice (Miscellaneous Provisions) Act* 1938) *Sections* 7, 8, *and* 9 *of the Administration of Justice (Miscellaneous Provisions) Act*, 1938 are as follows Correspondence and Articles 32 and 226

"7 —(1) The prerogative writs of *mandamus*, prohibition and *certiorari* shall no longer be issued by the High Court 1 and 2 Geo 6, c 63

(2) In any case where the High Court would, but for the provisions of the last foregoing subsection, have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or [illegible] urt [illegible] act

(3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of *certiorari*

(4) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858."

Jurisdiction nder S.45 is a limited one.

Under S. 45 of the Specific Relief Act the jurisdiction conferred is clearly of a very special kind and the conditions which must pre-exist before any relief could be granted under S. 45, are the following:—

(1) That the application for the order could only be made by the *person* whose property, franchise or personal right would be affected or jeopardised by the forbearing or doing of the act in question.

(2) That there exists an *obligation* upon any public officer or any corporation or any inferior court *under a law for the time being in force* to do such a thing or to forbear to do such an act.

(3) A *finding* by the High Court that the order prayed for is in consonance with right and justice.

(4) That the applicant has no other *specific and adequate legal remedy* for securing that which he has prayed for in his petition.

(5) That the remedy given by the order applied for will be *complete* in itself.

Then there are three additional limitations on the power of the High Court to act under S. 45 :—

(a) It cannot issue any order which is binding on Government.

(b) It cannot issue any order binding on any servant of the Government as such, merely to enforce the satisfaction of a claim upon the Government, or,

(c) To make any order which is otherwise expressly excluded by any law for the time being in force.

Pre-Constitution East Bengal High Court in Pakistan alone could act under S.45 of the Specific Relief Act.

When Pakistan was established, East Bengal High Court at Dacca was constituted under *G.G's High Courts (Bengal) Order*, 1947, *dated 11th August* 1947, and its jurisdiction was defined to be the same as that which at the relevant time was being enjoyed by the High Court of Calcutta (see S. 5 of the Order), and thus, in effect, it became the only court which, until the time when S. 223-A was brought in by way of Amendment to the Government of India Act, 1935 (as adapted in Pakistan), could exercise the power under S. 45 of the Specific Relief Act. Every other High Court in Pakistan, not being the kind of the High Court for which power under S. 45 was available, could not give any relief under that section.

Scope of ARTS. 22 and 170 compared with S.45, S.R. Act.

A comparison of the terms of ARTs. 22 and 170 of our Constitution with S. 45 of the Specific Relief Act would show that the present constitutional power that has been reserved to the Supreme Court and the High Courts for the enforcement of fundamental rights, is wider in scope than the one vested by S. 45 in the Presidency High Courts. In particular, it would be noticed that the power is not confined to the issue of prerogative writs of *Mandamus*, *Certiorari*, Prohibition, *Habeas Corpus*, *Quo Warranto*, but can go much beyond the scope of such writs in proper cases. Neither the Supreme Court nor the High Court in the exercise of its constitutional jurisdiction is any more restricted by any of those statutory limitations mentioned in clauses (f), (g) and (h) of S. 45 of the Specific Relief Act. Nor again does the statutory limit of S. 45, which provides that an order under that section can be issued only when property, franchise or personal right is likely to be injured, in any sense qualifies, or limits the power of the Supreme Court or the High Court to act in appropriate cases for the enforcement of the Fundamental Rights,

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act,

(b) that such doing or forbearing is under any law for the time being in force clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character,

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice,

(d) that the applicant has no other specific and adequate legal remedy and

(e) that the remedy given by the order applied for will be complete

Exemptions from such power

Nothing in this section shall be deemed to authorize the High Court—

(f) to make any order binding on the Central Government or any [illegible] Government,

(g) to make any order on any other servant of the Crown as such [illegible] enforce the satisfaction of a claim upon the Crown or

(h) to make any order which is otherwise expressly excluded by any [illegible] the time being in force '

It would be noticed that the power under S 45 of the Specific Relief Act [illegible] nally enacted, to begin with was conferred on the 3 Presidency High Courts [illegible] Madras and Bombay) for being exercised within the limits of the Presidency [illegible] S 50 of the Specific Relief Act puts a ban on the issue of writ of *mandamu* [illegible] The High Court had also no power to issue writs of *certiorari* or prohibition [illegible] persons exercising quasi judicial functions in respect of land situate outside [illegible] jurisdiction

Section 45 of the Specific Relief Act [illegible] Power only on the three Presidency Courts

The power of issuing directions in the nature of *habeas corpus* is pro[illegible] S 491 Criminal Procedure Code and this power was available for being exercis[illegible] High Courts i e irrespective of the fact whether that High Court was the Presidenc[illegible] Court or not

S 491 of the Criminal Procedure Code is in the following terms

'491 (1) *Any High Court* may, whenever it thinks fit, direct—

(a) that a person within the limits of its *appellate criminal jurisdiction* [illegible] brought up before the Court to be dealt with according to law

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court

(d) that a prisoner detained as aforesaid be brought before a Court martial or any Commissioners for trial or to be examined touching any matter pending before such Court martial or Commissioners respectively,

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial, and

(f) that the body of a defendant within such limits be brought in on the Sheriff s return of *cepi corpus* to a writ of attachment

where it arises. It is impossible to uphold the contention put forward on behalf of the petitioner that by the deletion of the words 'within those territories' it was the intention to get rid of the condition of residence. If a writ is issued against a person or authority or any Government outside the territorial jurisdiction of the High Court, there is nothing to prevent such person, authority or any Government, to flout the order of the High Court as it is not amenable to its territorial jurisdiction. The Government of Pakistan is situated in Karachi and the office of the Secretary to the Government of Pakistan, Ministry of Law, is also located there. It does not follow that because the Central Government has authority all over the country, it can be said that it carries out all its normal functions throughout the country though some branches of the Central Government such as the Income Tax Department, Customs, Radio Pakistan, Posts and Telegraphs Department, etc., are located in this Province and this distinction cannot be ignored. If the Government of Pakistan or the Secretary, Ministry of Law, had its branch office in this Province, a writ against them could be issued in fit cases as they would not be outside the territorial jurisdiction of this Court. In that event, issuing a writ to any person, authority or any Government outside the territorial jurisdiction would not arise."

The reasoning of the Court, it is pointed out with respect, is open to the objection that the power to issue writ to any person or authority throughout the territories in relation to which it exercises its jurisdiction is artificially being confined by it to those persons or authorities that are situate within those territories. Assuming the Government of Pakistan is to be regarded as being situate only at Karachi, by reason of the fact that its offices are at Karachi, the point of difference between the Indian formulation in ART. 226 as contrasted from the formulation in ART. 170, namely that these persons or authorities must be within those territories, has not been given their due and full effect. The idea that the Government of Pakistan would ever disobey the mandate issued by the Court having jurisdiction in respect of the cause of action that has emerged within its territorial limits is, it is pointed out with respect, not one that can be seriously taken into account. The Federal Government exercises authority in respect of Federal affairs throughout the territories of Pakistan and if, in the administration of Federal affairs, it should give some cause of action to a party he would be entitled to seek redress in respect of his grievances in all courts, within whose territorial limits that cause of action has arisen, and consequently it would be liable to be sued at the instance of such a person in the court of his choice. What is challenged is the authority of the Government to act or not to act in a certain way and if this is the whole of the subject-matter in respect of which the jurisdiction is to be exercised, it is immaterial for the purpose of application of the principle of ART. 170 that the seat of the Government is outside the territorial limits in relation to which power to issue writs is to be exercised.

Power under ART. 22 and the Enforcement of Fundamental Rights.

Once it can be shown that fundamental rights have been invaded, the Supreme Court and the High Court will not be at a loss to find what 'directions', 'orders' or 'writs' they must issue in order to ensure that the fundamental rights of the subjects are respected by the State. In fact, in regard to the enforcement of fundamental rights, the range and sweep of the power of the Supreme Court and the High Court is enormous indeed. The power to issue writs is not restricted to the 5 prerogative writs mentioned specifically in the two Articles, and what is more, that power is not merely confined to the issue of such writs as have been mentioned, but is sufficiently wide to include the issuance of any directions, orders or writs which the Supreme Court or the High Court may deem fit. As remarked by Mukherjea J. of the Supreme Court of India, ART. 32 gives to the Supreme Court a very wide discretion in the matter of framing of writs to suit the exigencies of particular cases, and the application of a given petitioner cannot be thrown out simply

and what is more, in the case of the High Court in addition there is under ART 170 the power to issue "orders, directions or writs", "for any other purpose"—an expression which would *at least* include the purposes enumerated in S 45 of the Specific Relief Act

The jurisdiction of the Supreme Court to issue the writs, considered from the point of view of territorial extent, is practically unlimited it comprises of the entire territory of the two Provinces in which the two High Courts have been established and the Federal Capital The High Courts however can exercise their powers under ART 170 only within the territorial limits of their appellate jurisdiction But care should be taken to remember that neither the Supreme Court nor the High Court can exercise their powers under ARTs 22 and 170 respectively in relation to Special Areas (See ARTs 22(4) and 178) Territorial Extent

In the case of *A K M Fazlul Qader Chowdhury v Government of Pakistan, PLD* (1957) *Dacca*, 342, the East Pakistan High Court considered the contention put forward by the Attorney General to the effect that as the respondents impleaded in the petition were outside the territorial jurisdiction, the Court had no jurisdiction to entertain the request for the issue of writs under ART 170 The respondents in the case before the East Pakistan High Court were the Government of Pakistan and Secretary to the Ministry of Law, and the relief sought was that the Electoral Act (36 of 1956) being unconstitutional the Government be restrained from giving any effect to it by way of securing the delimitation of constituencies or the preparation of electoral rolls etc It was contended that since ART 170 was expressly limited to conferring power upon the High Court to issue to any person or authority including in appropriate cases any Government directions orders and writs "throughout the territories in relation to which it exercises jurisdiction the Court could not exercise that power to issue writs etc to Government of Pakistan or to the Secretary, Ministry of Law, because they were not *within* the territories in which High Court of East Pakistan exercises its jurisdiction After considering some of the Indian cases like (1) *Ramesh Chandra Chatterjee v Director General of Observatories AIR* (1953) *Calcutta* 767, (2) *Krishna Khandelwal v Director of Lands, Hirings and Disposals and others* 56 C W N 306 (3) *Election Commission India v Saka Venkata Rao, AIR* (1953) *S C* 210 (4) *K S Rashid & Son v Income tax Investigation Commission, AIR* (1954) *S C* 207, (5) *A Thangal Kunju Musaliar v M Venkatachalam Potti and another, PLD* (1956) *S C* (*India*) 291, the Division Bench of the High Court came to the conclusion that the contention of the Attorney General be accepted and the jurisdiction to issue writs to the two respondents be declined 1957 PLD Dacca 342

It is submitted with respect that the Indian decisions had to reckon with words of limitation viz , "within those territories" occurring after the word "Government" and before the words "directions, orders, or writs etc " in ART 226 of the Indian Constitution and as these words are conspicuous by their absence in ART 170, the principle of the cases decided in India is not attracted to the situation created by the language of ART 170 of our Constitution The Court no doubt, noticed this difference in the language between the two Articles but felt that the existence of these additional words did not materially alter the scope of *ART* 226 from the one which could be affirmed in respect of ART 170 of our Constitution and observed (at p 357)

> "In spite of the omission of those words, the other condition remains namely, that the power of the High Court is to be exercised throughout the territories in relation to which it exercises jurisdiction, that is to say, writs issued by the court cannot run beyond the territories subject to its jurisdiction We are unable to accede to the argument that because the cause of action, so to say, arose within this Province, this High Court can issue a writ against the respondents The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and does not apply to *writs* which are issued under ART 170, which makes no reference to any cause of action or

plus the power that enables the High Court to enforce any other legal right which, having regard to the nature of the contest before the High Court, it might in its discretion, feel inclined to enforce. The expression "any other purpose", it is submitted, should be construed to refer to all purposes for which under the English Common Law the high prerogative writs are issued, that is, all kinds of writs that the Court of the King's Bench Division issues for the protection of the rights of individuals and for checking the excess or abuse of judicial or executive power. (*See the observations of Dixit J. in Harendranath Sharma v. The State of Madhya Bharat, AIR* (1950) *M. B.* 46 *at p.* 50, and in the Full Bench case of *Anant Bhaskar v. The State of Madhya Bharat, AIR* (1950) *M B.* 60, see the remarks of *Mehta J.*).

Negatively stated, High Court *cannot* issue writs for any and every purpose it pleases. The foundation for the issue of writs is the right in the petitioner which has been violated and which he seeks to enforce. In the total absence of such a foundation the writ petition to the High Court is incompetent. That is also the view of the Supreme Court of India in the case of *State of Orissa v. Madan Gopal, AIR* (1952) *S.C.* 12, where Chief Justice Kania interpreted the scope of ART. 226 of the Indian Constitution as warranting the High Court to issue writs or directions only if, in its opinion, a legal right of the aggrieved party had been violated: the existence of the right, observed the Chief Justice, is the foundation of the exercise of the jurisdiction of the Court. (See also the case of *Aswini Kumar Ghose v. Arabinda Bose, AIR* (1952) *S C* 360, and the case of *Election Commission India v. Saka Venkata Rao, AIR* (1953) *S.C.* 210 at p. 212, as also the case of *Madhaorao Ramrao v. State of Madhya Bharat, AIR* (1953) *M B.* 257, at 261). Similarly, it was observed in the case of *Commonwealth of Massachusetts v. Andrew W. Mellon*, (1923) 262 *U. S.* 447: 67 *Lawyers Edition* 1078) by Sutherland, J. (at p. 484).

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that Courts of justice can interpose relief".

These remarks were made with reference to a suit but the principle of the case applies with greater force to proceedings under ART. 170 of our Constitution.

The courts of law are concerned only with legal rights, and unless an aggrieved person makes out a case that his legal rights have been infringed, he cannot ask any relief from any court. There must be an actual infringement of a right for the High Court to be able to acquire jurisdiction to deal with the situation; but whether it will actually interfere or not is a matter which depends on numerous considerations such as whether or not any other expeditious alternative remedy is available, whether the applicant has come to the court with clean hands, etc.

The Supreme Court and the High Courts have thus these paramount powers to deal with all those cases where fundamental rights have been abridged or taken away, but the exercise of those powers will always be controlled by certain well established principles and they will not be suffered to be exercised arbitrarily or capriciously.

ARTs. 22 & 170 confer Concurrent Jurisdiction in respect of the enforcement of Fundamental Rights.

ARTs. 22 and 170 thus bestow *concurrent* jurisdiction in relation to the enforcement of the fundamental rights on the Supreme Court and the High Courts. *Two* questions of procedure, however, arise. They are:

(1) Would the usual principle, namely that where there is a concurrent jurisdiction vested in two courts it is proper in the first instance to approach the court of inferior jurisdiction for relief before applying to the higher Court, apply in the matter of securing enforcement of fundamental rights? In other words, must a person who wishes to have his fundamental rights enforced necessarily petition the High Court first under ART. 170 before approaching the Supreme Court?

(2) Assuming that a person applies to the High Court in the first instance and is not able to get the relief he wants, is he to take the matter by way of *appeal* to the Supreme

because the proper writ has not been prayed for [Charanjitlal v Union of India, A I R (1951) S C 41]

It is submitted that ARTs 22 and 170 in so far as their application to the question of the enforcement of fundamental rights is concerned, would not be allowed to be encumbered by mere technicalities or suffered to be defeated by recourse to mere procedural manoeuvres To do that *would be virtually going counter to the letter and spirit of the* Constitution indeed

The expression "for any other purpose" appearing at the end of ART 170 calls for a detailed comment, for upon the meaning that can be given to this expression must depend the extent of the jurisdiction of the High Court to issue directions orders or writs etc In order to be able to do so effectively it is necessary to look at the constitutional history of this power

Meaning of For any other purpose

The constitutional predecessor of the power of our High Courts given to them in ART 170 was S 223 A, which had been inserted by the Government of India (Amendment) Act, 1954, but which took effect only from the 2nd of October 1955—being the date of the commencement of that Act (See the Validation of Laws Act 1955 S 3) That section was in the following terms —

> "S 223 A —Power of High Courts—Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any government within those territories writs including writs in the nature of *habeas corpus mandamus* prohibition *quo warranto* and *certiorari* or any of them "

S 223 A of the Govt of Ind a Act

It would be seen that this power was restricted to the issue of writs only—there was no power to issue directions and orders When under the new Constitution the provisions of this section had to be given due effect care had to be taken to harmonise its language with that of ART 22, which had been designed to confer special power upon the Supreme Court to issue writs, orders, directions etc for the enforcement of any of the fundamental rights guaranteed by Part II of our Constitution The shape that ART 170 has acquired in the Constitution is largely due to the intention of the framers of the Constitution to preserve the jurisdiction of the High Court "notwithstanding anything in ART 22" from this it follows that the High Court too has jurisdiction to enforce fundamental rights by means of the issue of writs, directions, orders, etc

Language of Article 170 analysed

The expression "for any other purpose" has been, it is submitted added out of abundant caution to avoid the possibility of construction of ART 170 as confining the power of the High Court to the issue of writs, orders and directions only in relation to the enforcement of fundamental rights It would have been better if the language in the ART 170, instead of "and for any other purpose", had been "and for the enforcement of any other legal rights" But it is submitted that the only rational interpretation of ART 170 is to construe the expression ' for any other purpose" *ejusdem generis* with the expression "for the enforcement of any of the rights conferred by Part II" And so read, the word "purpose" can only be construed to imply the purpose of enforcing any other *right* The avowedly clumsy language of ART 170 can be attributed to the tyranny of a precedent which the language of the Indian ART 226 has exercised over the minds of the framers of our Constitution It cannot be denied that that Article has to a considerable extent dominated the adoption of the language of ART 170 But even ART 226 has this unsatisfactory feature, namely of employing a somewhat loose language (in as much as it too uses the expression "and for any other purpose"), and the construction of that Article has been a subject matter of several, *by no means unanimous, pronouncements of the various High Courts* and the Supreme Court of India In India, the present view of the scope of ART 226 is that it confers precisely the same powers that the Indian ART 32 does upon the Supreme Court,

Meaning of Any other purpose to be restricted to the *ejusdem generis* rule

remedy etc. But no such consideration can be validly pleaded before the Supreme Court; once it is shown that a right guaranteed by Part II of the Constitution has been abridged or taken away, the Supreme Court has no option but to enforce it under ART. 22 of our Constitution. Besides all this, from the point of view of procedure, it is advantageous to apply to the High Court for the enforcement of fundamental rights in the first instance and this for the simple reason that whereas the High Court can, the Supreme Court cannot, issue writs, orders, directions for "any other purpose". If the petitioner has also some rights other than the fundamental rights to enforce, he would find the High Court forum more appropriate for his purposes than the Supreme Court. If the Supreme Court finds that no fundamental rights is proved to have been infringed, it must stay its hands and the petitioner might then have to go to the High Court to obtain relief in respect of the violation of his ordinary rights.

Is there a right vested in a subject o ask for the enforcement of the onstitutional mandates?

Has a subject of the State of Pakistan *a right* to insist upon the High Court to enforce a provision of the Constitution which has been violated? Is it a sufficient basis for a petitioner to say that since the Constitution has been violated the court ought to command the organ or agent charged with the duty of performing it or his duty to obey the mandate of the Constitution? Would the right to the enforcement of the Constitution not be embraced by the expression "for any other purpose" appearing in ART. 170 of the Constitution. (See Ahmed Saeed Kirmani's case at p. 152 supra)

These appear to be vital questions to which answers have yet to be given by our courts.

152. The Nature of Writ Jurisdiction

Writ jurisdiction for want of better expression should be characterised as "constitutional" jurisdiction so as to distinguish it from any other form of proceedings known to our courts of law. In the first place, it should be distinguished from a *suit* which is the form that an action normally takes when instituted in the ordinary courts of civil jurisdiction; and in the second place, it should be distinguished from "civil" and "criminal" proceedings of which several of our statutory enactments speak.

The observations of various judges of the Indian and Pakistan High Courts who have charactered writ jurisdiction as being in the nature of either "civil" or "criminal" proceedings have reference to the question of determining the appropriate provision of the Constitution under which the matter by way of appeal can be taken to the Supreme Court [see, for instance the case of *Collector of Monghyr v. Maharaja Pratap Singh, AIR* (1957) *Patna* 102]. Such a question is also important for the purpose of determining the question of costs to be paid by the defeated party. In the latter mode of regarding the situation, for instance, a writ of *certiorari* arising out of criminal proceedings, that is proceedings of a criminal nature instituted before inferior tribunal, would itself be deemed to be a criminal proceedings. So also a writ of *habeas corpus* arising out of a sentence passed by a criminal court would become, for the purposes of determining the question of costs, a criminal matter. But both of these species of writs, if issued in connection with adjudications by inferior tribunals upon the civil rights of the parties agitated in civil proceedings, would themselves be characterised as "civil" proceedings.

Can the exercise of writ jurisdiction be regarded as a proceeding"

Nor, again, is writ jurisdiction a "proceedings" *stricto sensu*. This question came up for consideration in connection with a writ petition lodged in the Calcutta High Court against adjudication made by the Collector under the Sea Customs Act. The objection to the jurisdiction of the High Court under ART. 226 was taken on the premises of *S.* 198 *of the Sea Customs Act which provides*:

Court or can he directly apply to the Supreme Court in the exercise of his funda mental right under ART 22 and invoke its primary jurisdiction?

Supreme Court Rules, 1956

Our Supreme Court in the exercise of its rule making power has not indicated the pre cise answers that must be given to these questions For instance, in Part III, Order XXV, Rules 1 and 6 of the Supreme Court Rules, 1956, prescribe the procedure in accordance with which, applications for writs of *habeas corpus, mandamus prohibition, certiorari* and *quo warranto* etc have to be made It is provided that the person making application for all or any of the writs shall also state whether the applicant has moved the High Court for the same relief and, if so, with what result There is no requirement in the rules that a person must apply to the High Court in the first instance or that he is bound to apply only by way

the Supreme Court can entertain the petition in the exercise of its primary jurisdiction The Supreme Court of India, however, has not, as yet expressed itself on this question, and there are some dicta in the case of *Janardhan Reddy v State of Hyderabad, AIR* (1951) *S C* 217, as even in *Aswini Kumar Ghose v Arabinda Bose, AIR* (1952) *S C* 369, referred to earlier, which tend to show that the question, whether in the event of a relief relating to fundamental right that has been declined by the High Court, a direct application is main tainable before the Supreme Court under ART 32 has been expressly reserved But the Supreme Court of India, in the case of *M K Gopalan v State of Madhya Pradesh, AIR* (1954) *S C* 362, has deprecated the practice of a *direct* approach to it under ART 32, except when there are good reasons for so doing In this case the petitioner having failed to get the relief under ART 226 had approached the Supreme Court under ART 32 and not by way of appeal The Supreme Court heard this petition but observed that it would not encourage direct approach except for good reasons in matters which have been taken to the High Court and found against without first obtaining leave to appeal therefrom

It must be realised that whereas the right to constitutional remedy under ART 22 is itself a fundamental right the right to constitutional remedy under ART 170 has not been declared as a fundamental right and the Supreme Court cannot, in principle, refuse to entertain an application under ART 22 made to it for the enforcement of fundamental right either direct in the first instance or after the relief asked for by an aggrieved person under Art 170 has been declined by the High Court All it can legitimately insist upon is compliance with the direction contained in the Rules that information be made available to it upon the question whether any petition direct has been made to the High Court, and if so, then with what result The order of the High Court disposing of a direct petition to it would be of assistance to the Supreme Court and it is proper that it should be made avail able to that court at the time it is moved under ART 22 to enforce a given petitioner's Fundamental Rights In the case of a High Court it should be remembered that the exercise of jurisdiction to enforce fundamental rights under ART 170 involves (despite the doctrine that words shall have power" in suitable cases imply a duty), the exercise of its own discretion but this cannot be said to be true in respect of the jurisdiction of the Supreme Court The latter court has a jurisdiction which a subject can as of right invoke in the *exercise of his fundamental right under ART 22* For instance, the jurisdiction of the High Court to act under ART 170 to a considerable extent is controlled by considerations such as the existence of an alternative

"No proceeding other than a suit shall be commenced against any person for any thing purporting to be done in pursuance of this Act without giving to such person a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause"

It was first contended that no notice of the kind mentioned in the section having [illegible]

Soorajmull Nagarmull and others, AIR (1952) *Calcutta* 656, observed at p 662 as follows

"English courts have held that applications for prerogative writs are not 'proceedings' within the meaning of that word as used in the Public Authorities Protection Act In the case of *Rex v Port of London Authority*, *Ex Parte Kynoch, Ltd*, (1919) 1 *KB* 176, the question arose as to whether an application for a prerogative writ was a proceeding within the meaning of the word as used in the Public Authorities Protection Act Bankes, L J at page 186 observed **Assistant Collector of Customs v Soorajmull quoted**

"*As to the effect of the Public Authorities Protection Act, 1893, I express no* confident opinion without further considering the dicta cited but my present impression is that the language of that Act does not extend to proceedings of this class [illegible]

of execution or intended execution, nor, as I think, for any neglect or default in the execution, of any Act of Parliament or public duty or authority '

"*Warrington L J* appears to have agreed with that view *Scrutton L J* observed

"As to the *Public Authorities Protection Act*, 1893, the writ of *mandamus* like that of *certiorari* and prohibition, is a high prerogative writ, and, a very valuable right in the Crown for keeping subordinate tribunals within their jurisdiction Clear words are necessary to impair such a right, and the words of this Act, action, prosecution, or other proceedings against any person', are no such clear words as to have that effect There is less inconvenience in coming to this decision because the Court has always a discretion to refuse the writ of *mandamus* after an undue lapse of time "

"The same view was taken by a Divisional Court consisting of *Lord Hewart, C J* and *Avory and Swift JJ*, in the case of *Rex v London County Council* (1929), 141 *LT* 590 in which they held that an application for *certiorari* was not a proceeding within the meaning of that word as used in the *Public Authorities Protection Act* At page 591 *Lord Hewart C J* observed

"We have come to the conclusion that the *Public Authorities Protection Act*, 1893 does not extend to *certiorari* Our attention has been directed to a number of cases in which observations have been made upon this point and particularly to *Rex v Port of London Authority*, *Ex Parte Kynoch Limited*, (1919) 1 *KB* 176, *Rex v Marshland Smeeth and Fen District Commrs* (1920), 1 *KB* 155, *Rex v Kensington Income Tax Commissioners*, (1913) 3 *KB* 870, *Rex v Carter*, (1904) 68 *J P* 466, *Roberts v Battersea, Metropolitan Borough*, (1914), 110 *L T* 566, '*Rex v Hertford Union, Ex Parte Pollard*, (1914), 111 *L T* 716 No doubt the observations in these cases are in some degree of the nature of obiter dicta But all the dicta point in one direction, and though there [illegible]

view, I am satisfied th [illegible]

S 1, that an 'action, [illegible]

in view of the fact that the Governor General had not *assented* to its being enacted as the law under S. 6 of the Indian Independence Act, 1947. Therefore, technically considered, these decisions have not the force in them of a "precedent". But notwithstanding all that, the reasoning contained therein is of considerable assistance in the determination of the present question.

The scope of interference in the exercise of writ-jurisdiction is wider than that warranted by ordinary remedies

Nor again would it be correct to say that the writ jurisdiction merely provides a speedy and effective remedy in respect of the enforcement of rights which have been conferred by the pre-existing state of the law only to the extent to which pre-existing remedies could have been invoked in the ordinary way to enforce those rights in the courts of law. In one sense ART. 170 no doubt embodies a procedural power. But there are some procedural rights that are not merely of procedural character but their content is *something more than those of the mere procedural rights*; as for instance is the right of appeal [see *Colonial Sugar Refining Co. v. Irving*, (1905) *A.C.* 369]. There would be certain grounds upon which the High Court in the exercise of its writ jurisdiction would be entitled to interfere although it would not be able to do so by resort to the content of its normal power assigned to it under the state of the pre-existing ordinary law. For example, no suit or any other form of proceeding, would ordinarily have lain in the civil courts, for questioning the orders, decrees or adjudications made by inferior tribunals created by special Acts on the ground that they exhibited *error apparent on the face of the record* or that in the exercise of their jurisdiction they have misconstrued a provision of law or violated some fundamental requirements of judicial procedure. But, nevertheless, by means of *certiorari* writ, the scope of enquiry in such cases by the High Court has been widened and now it will be possible for High Courts to give relief in respect of complaints made by aggrieved persons as to the misconstruction of law or misapplication of law by the inferior bodies or tribunals, provided of course other circumstances do not hamper such an interference. Writ jurisdiction is therefore not *strictly confined* to questioning determinations *of inferior tribunals or securing compliance with forms of law and procedure to grounds* under which under the pre-existing law their determinations could have been quashed or compliance with their statutory duties could have been brought about. [See also the observations of Akhlaque Husain J. in 1957. PLD. W.P. (Lahore) 487 the case of *Md. Ayub vs Government of West Pakistan* at p. 493].

Writ-Jurisdiction. A Summing-up.

The writ jurisdiction being transcendent in character is of an extensive remedial potency: but on this account alone, its exercise by the High Courts should be resorted to in appropriate cases to maintain the rule of law and give guidance to all the authorities functioning under the Constitution or set up under any of its provisions in the matter of enforcing rights ordinary or fundamental, of persons who, by means of appropriate proceedings, are able to invoke the aid of this benign jurisdiction. It cannot be emphasised too often that although the jurisdiction of High Court to interfere under ART. 170 with the inferior tribunals is practically unfettered, the writ-jurisdiction is not intended to provide an alternate method of redress. The powers conferred by ART. 170 should be sparingly exercised in the clearest of cases involving serious infringement of a person's rights and when there are no other specific, speedy and adequate remedies available. [See *Indian Sugar Mills Association v. Secretary to Government of U.P. AIR* (1951) *Allahabad* 1 (*FB*); *Asiatic Engineering Co. v. Achhu Ram, AIR* (1951) *Simla* 171; *Veerappa Pillai v. Raman and Raman Ltd., AIR* (1952) *S.C.* 192; *Sangram Singh v. Election Tribunal Kotah, AIR* (1955) *S.C.* 425].

153. Are Constitutional Remedies Retrospective ?

The general principle is that Constitution cannot be given retrospective effect and the validity of past transactions, that is, transactions which took place before the com-

"prerogative writ though such can be repealed or altered by Parliament In England, however, it has always been held that to take away the right to a *certiorari*, express words must be used, as was held in the cases to which I have already referred and it may well be that if the right to apply for a *certiorari* can be taken away at all, the English rule should now be applied to India having regard to the changed circumstances In *Besant's case*, 43 Mad 146 PC, the right to a prerogative writ was not expressly given in a written constitution and their Lordships held that the right could be taken away by a statute though no express words to that effect were used I think the decision might well have been different had the right to a *certiorari* been expressly granted by the terms of a written constitution In any event, it appears to me that to curb or fetter that right or to restrict it would be contrary to Art 226 and might be held to be *ultra vires* that Article However, the courts might consider whether or not they should issue a writ if no notice of the intended proceedings had been given That however would be a matter of discretion dependent upon the facts of the case This point is not free from difficulty, but on the whole I am inclined to hold that S 198 is not a bar to these proceedings"

It is submitted with respect that on the premisses of the above reasoning it would [illegible] of writ jurisdiction under an altogether different [illegible] "constitutional jurisdiction —different from [illegible]s of action with which under the Codes of Civil and Criminal Procedure we are familiar in this country

Writ Jurisdiction is Paramount

Being a constitutional jurisdiction, the writ jurisdiction is paramount and every form of limitation which normally fetters the exercise of other remedies as they are reflected in the pre existing state of law of our country, does not in any manner control or delimit its scope

In a case reported in *PLD* (1955) *Lahore* 215 (*Lal Khan v The Crown*), the Full Bench of the late Lahore High Court ruled that exercise of the writ jurisdiction under S 223 A of the Government of India Act (a Section, which, as has been pointed out earlier may be regarded as the constitutional predecessor of ART 170), was of a high and transcendental character and any limiting provisions contained in any law before the enactment of S 223 A must yield place to the constitutional provision and would, on that account, be deemed to be of no effect thereafter This was a case which involved the interpretation of the combined effect of S 10(1) of the Restriction and Detention Ordinance, 1944, (No 3 of 1944) which had expressly taken away the jurisdiction of the High Court to make orders under S 491 of the Code of Criminal Procedure "in respect of any orders made under or having the effect under this Ordinance " The learned Chief Justice, Rahman, relying on "the well settled proposition that an Act which contained a provision offending against the constitutional provision would be *ultra vires*" gave full effect to the argument that any repugnancy between the constitutional provision and the provision of any non constitutional law would have to be resolved in favour of the prevailing power of the constitutional provision In his words, "The limiting provisions of S 10 of the Ordinance that existed at the time of the enactment of S 223 A of the Constitution Act, in so far as they are repugnant to S 223 A, stand abrogated and can no longer be given effect to" This view of the law was affirmed in a later Full Bench case *Haji Mehrban Ahmad v Commissioner, Rawalpindi Division, PLD* (1955) *Lahore* 263 It must however be remembered that both of these decisions were rendered before the passing of the Validation Laws Act which restored life to S 223 A with effect from 2nd of October 1955, that Section having been declared in operative in the case of *Federation of Pakistan v Moulvi Tamizuddin Khan, PLD* (1955) *F C* 240 by the Federal Court of Pakistan on the ground that it was not a valid piece of legislation

orders which themselves become void after the parent Act under which they have been passed becomes void. For instance, the life of an order directing detention of a person under the Preventive Detention Act cannot, in the absence of an interpretative clause providing to the contrary, be prolonged beyond the life of the parent Act itself. Its continuance as a valid order, in the absence of an express provision to the contrary, depends on the continuance of the Act under which it has been passed. It dies with the death of the Act under which it has been passed. And when that happens to be the case, as when the parent Act becomes void as contravening a fundamental right on the date of the coming into force of the Constitution, the order itself becomes void and in relation to such an order the cause of action accrues to a person who is affected by it and the matter can be settled by appeal to the constitutional remedies provided for in the Constitution [see kindred observations in *Brahmeshwar Prasad v. State of Bihar, AIR* (1950) *Patna* 265]. Besides the interpretation of section 6 of General Clauses Act is somewhat misconceived if it is construed to mean that it can save the operation of orders after they become void by reason of the parent Act becoming void. The language of section 6 clearly shows that what the section is calculated to preserve is merely the previous operation of such an order—but not the future operation of the enactment or order that is void.

154. Writ of Habeas Corpus

The writ of *habeas corpus ad subjiciendum et recipiendum* (that you have the body for submitting to and receiving) is undoubtedly a remedy of far reaching importance. It is a remedy which the law allows for the enforcement of the right to personal liberty.

The origin of this writ has been traced to the earliest phases of the history of "Common Law of England", and its origins are shrouded in the mist of antiquity, if not completely lost in obscurity. We are not concerned in this work with the history of the development of this writ, but the student wishing to pursue studies in this field is referred to the speeches of Lord Wright in the case of *Greene v. Home Secretary*, (1941) 3 *All E. R.* 388 *at pp.* 399 *to* 401, *and of Lord Hailsham L. C.* in the case of *Eshugbayi vs. Government of Nigeria*, (1928), *A. C. p.* 459, as an introduction to the study of the development of the scope of this ancient common law-writ which was designed "to secure the subject's immunity from arbitrary arrest and imprisonment save by due process of law." Their Lordships have recapitulated the history of this legal institution and shown how the later development of statutory law (like the *Habeas Corpus Acts of* 1640, 1679 *and* 1816) relating to the subject has influenced this type of common law jurisdiction. For our present purposes, it would suffice to say that the role that this writ has played in the constitutional history of England has been of immense service and importance to the growth of law in all the Commonwealth countries. [See further *Holdsworth's History of English Law, Vol. I, pp.* 227—228 (*7th Edition*) and Vol. IX (pp. 108-125].

The position under U.S.A. Constitution.

The Constitution of the United States in the 2nd clause of the 9th Section of ART. I provides that the privilege of the writ of *habeas corpus* shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it. This provision is also to be found in the several Constitutions of the States composing the United States. And the study of the case-law of that country shows that although the writ of *habeas corpus* is a part of the statutory law, its scope has not been construed as in any manner delimiting or diminishing the common law jurisdiction of the court to issue this writ. While the writ may not be used as a substitute for appeal, it provides a quick and expeditious remedy for securing correction of jurisdictional or constitutional errors without limit as to time. (*United States* v. *Smith*, (1947) 331 U.S. 469: 91 Law Ed. 1610, and *Gusik* v. *Schilder*, (1950) 339 U.S. 977: 94 Law Ed. 1382).

mencement of the Constitution, is not affected by the coming into force of the Constitution But the question relating to the enforcement of the constitutional remedies in relation to past transactions raises some really important issues which require a careful legal appraisal

If a person is convicted and sentenced before the coming into force of the Constitution the sentence undoubtedly has become final But what happens if the law, under which the person had been sentenced, after the commencement of the Constitution becomes void because of its inconsistency with what is contained in Part II of our Constitution? The answer to this would be that the constitutional remedies are not available to undo the effect of a sentence which has become final before the coming into force of the Constitution [See *Keshavan v State of Bombay* (1951) *S C R* 228, *AIR* (1951) *S C* 128 *Janardhan* [illegible] *S C R* 344, *AIR* (1951) *S C* 217] But if the sentence [illegible] be shown to have been passed under a pre Constitution [illegible] Constitution would be available for the purpose of annulling the effect of such a sentence

The essential thing to remember is that if there is a pre Constitution order which is void, having regard to the state of the law as it was in force before the coming into being of the Constitution, the procedural remedies provided for by the Constitution would be available for giving relief to any person who wants to get rid of prejudicial effects of that order [see *Calcutta Pinjrapole Society v S Banerjee AIR* (1952) *Calcutta* 891 as also *Harendranath Sharma v State of Madhya Bharat AIR* (1950) *Madhya Bharat* 46] If a certain proceeding is *ultra vires* under the state of law as it existed before the coming into force of the Constitution its existence as an obstacle in the way of the rights of a person furnishes to him a recurring cause of action and resort by him to the remedies provided for in the Constitution is perfectly in order In fact, such a use of ART 170 or ART 22 is not retrospective but prospective

In the Full Bench case of *Jeshingbhai v The Emperor, AIR* (1950) *Bombay* 363 Chief Justice Chagla dealt with a case in which the application of constitutional remedies arose on the following facts The order that was challenged in this case was passed by the District Magistrate of Ahmedabad to the effect that the petitioner should not remain in any area in the district of Ahmedabad except with the permission of the District Magistrate of that district Now this was admittedly a pre Constitution order and it was challenged by resort to ART 226 of the Indian Constitution as being in violation of fundamental right guaranteed to the citizen under ART 19(1) (d) and (e) It was contended by the State that the order had become final by virtue of S 6 of the General Clauses Act The counsel for the petitioner, on the other hand, contended that he was not so much concerned with challenging the order as it stood in the pre Constitution period as with the assertion of a fundamental right which has come into existence after the Constitution day And the court remarked in relation to these rival contentions as follows

Jeshingbhai vs Emperor

> "If we are satisfied that today when we are hearing this petition the petitioner is deprived of his fundamental right of movement and of residence, then we can undoubtedly interfere The saving of the order under S 6 does not mean that the State is entitled after 26th January to deprive a citizen of a fundamental right which is guaranteed to him These fundamental rights have come into existence after 26th January Our Constituent Assembly has provided remedies for safeguarding these rights These rights have been made justiciable and therefore even though the operation of the order may have been saved by S 6, General Clauses Act, as I said before, we are not so much concerned with the validity of the order as the violation of the fundamental rights which have come into existence after 26th January 1950"

The principle involved in this and several other cognate decisions may be stated as follows There are certain orders that are validly passed under certain laws, but they are

". . . The only possible enquiry of facts, once the authenticity of the order and its application to the appellant are conceded or established, is as to whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause. It is true that, in the words of Lord Bowen, 'the state of a man's mind is as much a fact as the state of his digestion'. If the Home Secretary were to misrepresent the state of his mind, that would be fraud, but that is out of the question here, and need not be considered.

"It would be superfluous to point out that the basis of the conclusion here adopted is that the order and statement are good on their face—that is, that they show a competent exercise of a lawful authority. If an order or warrant is bad on its face, it can give no legal justification for the imprisonment."

The *writ* of *habeas corpus* has now been given a constitutional status in our Constitution and when asked for in relation to the enforcement of fundamental rights, it would be regarded by the Supreme Court, as even by the High Court, as a writ of right. In England, too, it is regarded as a writ of right but not *of course*. In the United States it is regarded as an extraordinary legal remedy and when properly issued it supersedes all other writs (*Pco v. Zimer* 252 *I.L.L.* 9 *and* 13) and in times of peace "every human power must give way to it and no prison door is stout enough to stand in its way." (See *State ex el Evams v. Boaddus*, 245 *Mo.* 123, 140, 149, *SW.* 473). It is a writ of remedial nature and its only purpose is to secure the release of the person who has been illegally and improperly detained.

But it cannot be applied for *after* the illegal detention has ceased. [See the case of *Barnado v. Ford Gossage's case* (1822) *A.C.* 326; and *Rex. v. Crewe* (1910) 2 *K.B.* 576].

Scope of the writ under S. 491. Cr. P.C.

The Privy Council in the case of *C. P. Matthen v. The District Magistrate of Trivandrum* A.I.R. (1939) *P.C.* 213, observed that the High Courts in India could only act under the provisions of S. 491 of the Criminal Procedure Code for issuing directions in the nature of *habeas corpus* and that they had no power to issue the common law writ of *habeas corpus* in matters covered and contemplated by that section.

Now S. 491 which uses the words "Whoever is *improperly* or *illegally* detained" very clearly shows that it is open to the High Court not merely to determine the legality of the order depriving a person of his personal liberty but also its propriety. The latter is a question of fact and can only be answered by appeal to evidence.

Thus the resulting position, with regard to the scope of a *writ* of *habeas corpus*, as it is visualised by ARTS. 22 and 170, is practically the same whether we adopt the rule of English law on this subject as prevailing in England at the time the Constitution came into force or we apply the principles that have governed the interpretation of S. 491 of the Criminal Procedure Code in the pre-Constitution days. The English *Habeas Corpus Act of* 1816, as has been stated earlier, itself, in several ways, has relaxed the rigour of the common law restrictions relating to writ of *habeas corpus* and the existing legal position in England is different from what strictly it would be if the *Habeas Corpus Act*, 1816, had not intervened.

It is true that the courts in the exercise of their jurisdiction to issue writs of *habeas corpus* will not go into questions relating to legality or otherwise of a *conviction* recorded by a court of law and would be contented to limiting these powers of interference to merely scrutinising the warrant of imprisonment in the light of what appears on its face. But instances such as these are however only exceptions to the rule of common law engrafted in England by a statute (see S. 2 Habeas Corpus Act, 1679, see also *Ex Parte Lees* (102) *E. Reports p.* 718 (1858) *E. B. & E* 828, where Lord Campbell, C. J., refused the *writ* of

The object of the writ is to secure the liberty of the subject by means of a summary adjudication of the legality of his detention It is immaterial whether the person applying has been detained in private or public custody The writ is available in all cases where any illegal and improper deprivation of personal liberty of the subject has taken place Object of the Writ

Viscount Maugham in the case of *Greene v Home Secretary* (1941) 3 *All E R* 388 has set forth the scope of this writ as follows

"My Lords, I am certain that this House would be very unwilling to curtail or diminish the rights of an applicant for a writ of *habeas corpus ad subjiciendum*, but we are, of course, sitting in a judicial capacity, and are bound by the law as it exists It is inaccurate to say, as some have said, that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty What the judges of the High Court can do at the instance of the imprisoned person is to command the production of the person and to inquire into the cause of his imprisonment If there is no legal justification for the detention, the party is ordered to be released However there are many cases, and in particular those of a criminal, or supposed criminal, character in which a return to the writ (to use the old fashioned phrase) cannot be traversed or impeached by affidavit *Carus Wilson's case*, (1845) 7 Q B 984, 16 Digest 260, 650 14 L J Q B 105, 201, 4 L T O S 311, 353, 373, 5 L T O S 52, *Ex p Lees* (1858) E B & E 828, 16 Digest 251, 517, 31 L T O S 247 ,*sub nom R v Lees* 27, L J Q B 403 and *Re Newton* (1855), 16 C B 97, 16 Digest 254, 550, 24 L J C P 148, 25 L T O S 99 On the other hand, in cases other than for some criminal, or supposed criminal matter and except cases of imprisonment for debt or by process in any civil suit the judge is empowered by the Habeas Corpus Act, 1816, s 3, *although the return to the writ be sufficient in law*, to examine into the truth of the facts therein set forth by affidavit or by affirmation, and, if the truth of the facts returned appears to him doubtful, he may bail the party and transmit the writ, return, etc , to the court of which he is a judge, whereupon

' it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return, in a summary way by affidavit and to order and determine touching the discharging "

It would be noticed that Viscount Maugham is giving effect to the procedural provisions of section 3 of the Habeas Corpus Act of 1816 which says that the Judge in certain cases is empowered, although the return to the writ be sufficient in law, to inquire into the truth of the facts therein set forth by affidavit or by affirmation

In a case where the writ with the return on its face is found to be legal and there is no question that it relates to a person who has actually been detained, the scope of enquiry by the court gets narrowed down to answering one and one question only, namely whether or not the power has been exercised *bona fide* by the authority who has directed the detention or imprisonment of the person applying for a writ of *habeas corpus* The facts leading to this finding of fact must be related by the detenu and the court must be invited to determine whether or not a proper exercise of power to detain has taken place The remedy by way of writ of *habeas corpus* must not be allowed to be encumbered by technicalities, and even in the days in which technicalities were generally favoured, this particular remedy, in the words of Lord Wright, "was kept as 'simple and expeditious' as possible" And in these more practicable times the need to do so is all the greater

Lord Wright in the case referred to above stated the scope of the enquiry on facts which is admissible to courts of law in the following words —

the necessary conditions for the making of the warrant or order do not exist. The matter can be tested, I think, by considering the former procedure, largely superseded by Crown Office Rules now embodied in R.S.C., Ord. 59, which, while altering the practice, retain the substance of the older procedure. Formerly, on a suggestion supported by affidavit that a subject was unlawfully detained, the court issued the writ of *habeas corpus*. It was directed to the gaoler, or whoever had the actual custody of the applicant, and the court might, and frequently did, cause notice to be given to the person alleged to be responsible for the imprisonment. The writ directed the gaoler to have the body of the prisoner before the court, and directed him to return also the cause of the imprisonment. The gaoler would, in the ordinary course, return the warrant or order which committed the prisoner to his custody, and the court would then examine it. It is not without significance that in the first instance the return had not to be verified by affidavit, for, until impeached, it was to be regarded as true: Watson's Case (1839), 9 Ad. & El. 731; 16 Digest 256, 585; sub nom. R. v. Wixon 8 L.J.Q.B. 129. The prisoner was then allowed, if he could, to controvert the return, and this right is expressly preserved by the Habeas Corpus Act, 1816, S. 4. By sect. 3, the court is given power to inquire into the truth of the return by affidavit. In *Middlesex Sheriff's case*, Lord Denman, C.J., speaking of that section said, at pp. 291, 292:

> 'On the motion for a *habeas corpus*, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged.'

"There was no question in that case as to the warrant of imprisonment being anything but good, and, in my opinion, all that the court can do under sect. 3, where the justification in the return is a warrant or order regular on its face and showing a good cause of commitment, is to inquire if in fact it is a true warrant, and if it is in truth the warrant of the committing authority, and if it is under that warrant that the prisoner is in fact detained. However, this still leaves it open to the subject, under sect. 4, to controvert the return, in which case the onus is upon him."

If the recitals do not disclose sufficient answer to the *rule nisi* on the face of the return, or show facts that are incomplete or incorrect, the burden is on the detaining authority to show by adducing proper evidence what those facts are and in that case of course affidavit would become not only desirable but necessary. But if the return is lawful on its face, it is for the detenu to contradict the statement of facts appearing therein.

In a case of *Harkishan Das v. Emperor*, *AIR* (1944) *Lahore* 33, the return to be valid should have stated "The Provincial Governor was *personally* satisfied", but in fact the recital was "The Governor of the Punjab is satisfied". The court refused, on the circumstances of that case, to act on the presumption in favour of the regularity of governmental acts and since no evidence had been adduced on behalf of the Crown to fill in this deficiency which was apparent on the face of the return, the court proceeded to declare those orders as not having been properly made.

Habeas Corpus and mala fide order of detention.

Reference has already been made to the legal effect of *mala fide* orders passed by the executive directing the detention of persons. It is only necessary at this stage, to refer to the *principle* upon which the courts act in declaring those orders as void. That principle was very clearly stated in the case of *Vimlabai Deshpande v. Emperor*, *AIR* (1945) *Nagpore* 8. The rule of law there stated was that a court is bound to enquire into the truth of an allegation in respect of an order having been passed in *bad faith* or for *collateral* purpose, whenever such an issue is raised before it. And this it would do because a power exercised in *bad*

certiorari or error to issue to the Supreme Court of St Halena to bring before the Queen's Bench in England the record of a case alleged to be erroneous As to the propriety of issuing a writ of *Habeas Corpus*, His Lordship remarked, "It is not grantable in general where the party is detained in execution of a sentence on a criminal charge, after judgment, in an indictment according to the course of Common Law" But the High Court under S 491 Cr P C cannot interfere if the Court Martial, who are the sole Judges of both Law and Fact, make a mistake of law as when they convict on no evidence It would be diffe rent, if the Court Martial convicts an accused person without hearing any evidence The High Court can, in such a case hold that the detention of such a person was illegal because the proceedings of the Court Martial would be irregular on the face of them If on the other hand, evidence was taken which in view of the Court Martial was sufficient to maintain a conviction then the proceedings would be regular and the mistake, if any, would be a mistake of law [See the Full Bench case of *Kartarsing v Imperator, AIR* (1946) *Lahore p* 103, which refers to the cases of (a) *Rex v John Suddi* 1801 1 *East* 306, (b) *King v Governor of Brixton Prison* (1914) 1 K B 77 etc etc) See also *Janardhan Reddy & others v The State of Hyderabad, AIR* (1951) *S C p* 217]

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calculated to prove that the order passed by the executive is contrary to the purposes of the Act and has been passed *mala fide* In the case of *Rex v Home Secretary ex parte Greene* the Court of Appeal [See (1941) 3 All E R page 104] laid down the rule on the footing of which interference would be warranted by courts exercising jurisdiction in *habeas corpus* proceedings

> "The question in such cases is", said Scott L J, 'whether the subject is *lawfully* detained If he is the writ cannot issue If he is not, it must issue "

In the same case Lord Goddard, while dealing with the question of the alleged necessity for the Secretary of State to have made an affidavit, stated

> "If it were possible to say that under the regulation he had to act in a judicial capacity, the matter would, I think, be clear If a person committed by order of a court applies for a writ, and on a return, or, in accordance with the modern practice by an affidavit showing cause, the gaoler produces an order of commitment regular on its face, and showing that the prisoner was committed for matter within the authority of the court, the court to which application for the writ is made, not being a court of error or of appeal, cannot entertain the question whether or not the authority has been properly exercised, per Patterson, J, in *Stockdale* v *Hansard* (1839), 9 *Ad & El* 1, 36 Digest 289, 377, 8 L J Q B 294, and Lord Denman, C J, in Middlesex Sheriff's Case (1840), 11 Ad & El 273, 36 Digest 293, 438, *sub nom R* v *Evans* 9 L J Q B 82 However, there can, I think, be no doubt that the Secretary of State, in making these orders, acts wholly in an executive, and not in a judicial, capacity Counsel for the appellant accordingly relies on the advice of the Judicial Committee, delivered by Lord Atkin in *Eshugbayi Eeko* v *Nigeria Government* (Administering Officer), (1931) A C 662, Digest Supp, 100 L J P C 152, 145 L T 297, at page 670 In my opinion, however, that passage does not mean that, where the executive has detained a person under statutory authority (and the regulations have the force of statute), *he can, merely by saying*, "I don't know why I have been detained," oblige the executive to prove that every condition necessary to the making of the order has been fulfilled In my opinion, once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that

Basanta Chandra v. Emperor, AIR (1945) F.C. 18 : (1945) F.L.J. 40 and Ram Narayan Singh v. State of Delhi, AIR (1953) S.C. 277].

Are proceedings for a writ of Habeas Corpus civil or criminal.

There is no unanimity in the decisions of various courts with regard to the nature of *habeas corpus* proceedings. Are the proceedings civil or criminal? According to Calcutta and Bombay High Courts they are civil [see *Niharenddu Dutta Mazumdar and others v. A.E. Porter and Others, AIR (1945) Calcutta 107 : I.L.R. (1944) Cal.* 489 and *Mahomedalli Allabux v. Ismailji Abdulali, AIR (1926) Bombay* 332 : *I.L.R.* 50 Bom. 616] but the preponderating view seems to be that they are criminal. That is the view taken by Madras, Nagpur, Allahabad and Lahore High Courts [See In *re. Venkatachala Thevar,* (1928) 2 *M.L.J.* 76 ; *Haridas v. Provincial Government, A.I.R.* (1949) *Nagpur* 201 ; *Haidari v. Jawad Ali, A.I.R.* (1934) *Allahabad* 22 *and on Appeal A.I.R.* (1934) *Allahabad* 606 *and* 702 ; *Kishore Lall v. Crown, I.L.R.* (1945) *Lahore* 573.] In *England the question is settled in ex parte Amand,* (1943) *A.C.* 147 *at* 156, *and the answer is stated to depend upon the nature of the proceedings in each case.*

155. Writ of Mandamus—Introductory observations

(a) Halsbury:

'Mandamus' as the word indicates, *is the command which is issued from a court to* any person, authority or inferior court requiring them to perform the specific act which they are under a statutory obligation to do, but which they have either failed or refused to do. *It is a form of writ which is issued in England from the High Court of Justice to the* end that justice may be done "in all cases where there is a specific legal right and no specific legal remedy for enforcing such right, and it may issue in cases where, although there is an alternative legal remedy yet such mode of redress is less convenient, beneficial and effectual." *(See Halsbury's Law of England, Vol 9, p. 744).*

(b) Rex v. Barker.

The prerogative writ of mandamus is not granted to enforce a mere *private right* but is in the nature of a discretionary remedy to be granted in appropriate cases to enforce the performance of *public duties* for which law prescribes no other effective remedy. In the words of Lord Mansfield, Chief Justice:

"A mandamus is a prerogative writ, to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. The original nature of the writ and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of policy. Therefore, it ought to be used upon all occasions where the law has provided no specific remedy and where justice and good government are to be done.

"Within the last century it has been liberally interposed for the benefit of the subject for the advancement of justice.

"The value of the matter or the degree of its importance to the public policy is not scrupulously weighed; if there be a right and no other specific remedy this should not be denied." [See *Rex v. Barker* (1762) 3 *Burr* 1265; (1907) *E.R.* 823].

So also *in Rex v. Wheeler, Cas. temp. Hardwicke,* 99 Lord Hardwicke, C. J. said, "the reason why we grant these writs (mandamus) is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's Charter, and never as a private remedy to the party."

(c) Reg. v. Lambourn:

Similarly, Pollock, B. in the case of *Reg. v. Lambourn Valley Railway Company,* (1888) 22 *Q.B.D.* 463 *(at p.* 466) observed:

"There is no doubt that the granting of a prerogative writ of mandamus is discretionary, and the rule by which we ought to be governed is well established. In *Blackstone's Commentaries,* Vol. III, p. 110, it is stated that a mandamus is "a high prerogative writ, of a most . . . . remedial nature", and "issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its

faith or for a *collateral purpose* amounts to the abuse of power and the action of the executive on that account would be wholly outside the Act under which it purports or pretends to act (See further discussion on ART 149 at p 421)

The power of the court in relation to its controlling jurisdiction in respect of those acts of executive that deprive subjects of their personal liberty as it is exercised in the *habeas corpus* proceedings has been stated in *Halsbury's Laws of England, 2nd Ed Vol 9 page 703* as follows

> "1202 —In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on *habeas corpus* The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the Courts to secure any rights which they may have, and this whether they are alien friends or alien enemies It is this fact which makes the prerogative writ of the highest constitutional importance it being a *remedy available to the meanest subject against the most powerful No peer or lord* of Parliament has privilege of peerage or Parliament against being compelled to render obedience to a writ of *habeas corpus* directed to him "

Failure to make a return or to make a proper return Consequences

When a rule *nisi* issues to a respondent for showing cause why a writ of *habeas corpus* be not issued there is always a direction addressed to the authority having custody of the person detained to make a *return*, and in compliance with this direction the public or private authority having custody of the person by whom or on whose behalf the application has been made, has clearly to state facts and grounds on the basis of which his detention has been directed The return must be drawn up with sufficient particularity and must be cast in an unambiguous language Failure to make a return in these terms would ordinarily result in the discharge of the person detained, but an insufficient return may be amended or supplemented by the leave of the court Although the rules of our Supreme Court are silent on some of these matters, the practice of the King s Bench Division of the High Court in England in relation to the proceedings on its Crown side would ordinarily be followed in this country

Who can make an application for the Writ of *Habeas Corpus*

Habeas corpus application can either be made by the *person who has been deprived of his personal liberty* or it can be made by some one who is *interested* in the detenu In this particular, at least, the *habeas corpus* proceedings differ from other writs [See rule 1 of Order (XXV) of the Rules of the Supreme Court where it has been expressly provided [illegible] nt, to make the affidavit, which [illegible] the application shall be accom [illegible] erson who shall state the reason [illegible] himself] In the case of an application being moved for the release of a minor who has been illegally or improperly detained, ordinarily it is the person entitled to the custody of such a minor or to represent such a minor legally who should make an application to the Court But if it could be shown that such a person, is incapable of making the application, it would be for the court to consider whether another person, who is proved to be interested in the welfare of the minor, be allowed to move the Court [*Raj Bahadur v Legal Remembrancer,* to the Government of West Bengal *AIR* (1953) *Calcutta* 522]

Legality of detention to be determined at the time of return

In proceedings under *habeas corpus*, the legality of the detention is to be judged at the *time* of the return as distinguished from the date of the institution of proceedings in court or the date of the detention If a valid order in support of detention could be produced, the court will not have the power to direct the release of the prisoner merely because it thinks the original order under which he was initially detained was illegal [See

or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice".

[See also the Privy Council case on the interpretation of *S.51 of the Indian Income Tax Act, 1918*, *Alcock Ashdown and Co. v. Chief Revenue Authority, Bombay*, 50 *I.A.* 227: A.I.R. (1923) *P.C.* 138 where the word 'may' was construed as importing a duty. As to the doctrine of power coupled with duty the student would do well to read the speeches of the Law Lords in the case of *Julius v. Bishop of Oxford* (1880) 5 *A.C.* 214, decided by House of Lords referred to above].

Meaning of 'Power' and 'duty' etc.

Writers on Jurisprudence are not agreed as to the precise meaning which is to be assigned to the terms with which Science of Law in the main is concerned. 'Right', 'Duty', 'Power', 'Privilege', 'Liberty', 'disability' etc., are some of the terms that Lawyers have to use frequently and it is upon proper use of these terms, in fact, that the systematic character of the Science of law, in the last resort, depends. In order to appreciate the problems that arise in connection with the enforcement of rights and duties by means of the writs of Mandamus, it is necessary that we review briefly some of these terms and see what are we understand by them. In presenting the following analysis the present writer is following the scheme outlined in "Jurisprudence" by Hughes and Dias.

When I have a *right* it implies that there is some one who owes a corresponding duty to me, so that I can in law say to such a person "You must". But I may have freedom to do something in relation to another person and then I can say to such a one "I may". When I have the ability to alter another's legal condition or position I say in relation to such a situation "I can", and when I cannot alter his legal position I will say "I cannot". Now when I say to another "you must" I am asserting a right and putting him to the obligation of doing his duty. But when I say 'I may', I have only the liberty or privilage to do a certain thing. When I am in a position to alter the legal position of another by saying 'I can', I am indicating that I am possessed of *power* and when I cannot do this, I am suggesting that I am suffering from a *disability*.

Difference between *Right* and *Power* may now be seen. 'Right' in law implies that its owner can compel another to do corresponding duty, but *power* is a mere ability to produce certain result. I have a right to receive the amount you owe to me and I can compel you to fulfil your duty and conform to the conduct enjoined on you by law. But when I appoint another to be my agent, I am exercising a power to confer upon him the capacity to act on my behalf as effectively as I would be able to do myself. Power itself, strictly speaking, has no duty correlative to it. There may be certain rights that may appear as such, but nevertheless are in fact, powers coupled with the option or privilege as to the exercise or non-exercise of them—as for example the right to vote is really a *power* coupled with the privilege of its exercise.

Distinction between duty and liability is easily drawn: when I deposit money with the bank, there is no duty upon the bank to restore it to me until I ask for its return. Until then the bank is only under a *liability* to be placed under duty to return the money—but is at no point of time, until I ask for the return of my deposit, under a liability to return it to me. And when I ask the Bank to return the amount I am exercising *power*; before I exercise the power to demand the return of my deposit I have a right to ask for its return—by exercising power I have altered the position of the Bank in that it is now under a liability to account for my deposit. Right is really power in *motion*. A privilege is a form of right which inheres, in a defined class of persons, to be able to do something e.g. the Parliamentary or Judicial privilege to do certain acts without being called upon to face the ordinary consequences of these acts. Sometimes there is a power coupled with the privilege to exercise it or not to exercise it and at other times it may be coupled with the duty to

performance' In *Rex v Bank of England*, 2 *Doug* 534, at p 526, Lord Mansfield said "When there is no specific remedy the Court will grant a mandamus that justice may be done" These words were amplified by Lord Esher, M R, in the recent case of *In re Nathan*, 12 *Q B D* 461 at p 473, where he said that they meant, 'Where there is no specific remedy, and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go"

In re Nathan 12 *Q B D* p 461 where it was ruled that the *mandamus* ought not to issue, for the statute created no duty between the Commissioner and the Applicant whose remedy, if the decision of the Commissioner could be reviewed was by petition of right, Lord Bowen L J, at page 478 said **(d) In Re Nathan**

"A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice If therefore, there is no other means of obtaining justice the writ of mandamus is granted to enable justice to be done The proceedings, however, by *mandamus*, is most cumbrous and most expensive, and from time immemorial accordingly the Courts have never granted a writ of mandamus where there was another more convenient or feasible remedy within the reach of the subject"

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ence of right (*Ex parte Napier* (1852) 18 *Q B* 692 per Lord Campbell C J at 695)

If a statute enjoins a clear duty of a ministerial character to be performed by a public functionary the problem is a simple one indeed such a duty can be directed by means of a *mandamus*, to be performed But there are cases when the problem is not so very simple as all that there are statutes that confer a mere power to do certain things as opposed to enjoining a mere duty to be performed **Nature of Public Duty for the Enforcement of which Mandamus will issue**

Whenever the statute uses words, "it shall be lawful' it merely prescribes the power or the authority in favour of a public functionary what it achieves by the use of this expression is to say that certain acts *can* be legally done by such an authority The natural meaning of the words used is to make it appear that the thing to be done is permissive, and the provision enabling But there may be *circumstances* in which the court may come to the conclusion that the conferment of power by the use of these words also involves a *duty* to exercise such a power, in which case, of course, it being a case of power coupled with duty' a *mandamus* will lie if there is a failure or refusal to perform such a duty In the case of *Julius v Oxford*, 42 *L T* p 546, (1880) 5 *A C* 214, it was said **Concept of Power coupled with duty** **Julius v Oxford**

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised"

When the thing that may be lawfully done is for public benefit or for the advancement of public interest, the words used may be construed as having a compulsory force, that is, as importing duty as opposed to merely confering power of an enabling or permissive character In the case of *Reg v Tithe Commissioners* 19 *L J Q B* p 177, (1849) 14 *Q B* 459, *Lord Coleridge* remarked

"The words undoubtedly are only 'empowering' but it has so often been decided as to have become an opinion that in public statutes words only directory, or permissive,

opposed to eral Law. Bug Taim versus ollector of Bombay.

power under *S. 45 of the Specific Relief Act*. In the case of *Tan Bug Taim v. Collector of Bombay* AIR (1946) *Bombay* 216, *Bhagwati J.* has ruled that the words "any law for the time being in force" occurring in S. 45(b) do not mean statute law only but include "Royal Charter, Statute or Common Law" as known in England, i.e. not only the statutes or enactments of Indian Legislature but also the Common Law of the land which is being administered by the Courts in British India." He also referred to S.299 of the Government of India Act, 1935, which had enjoined that no body was to be deprived of his property except by the authority of law and felt that there was a general statutory duty on all public authorities not to act contrary to this constitutional mandate. (See however remarks of *Chagla C. J.* in the case of *Lady Dinbai Petit v. M. S. Noronha*, AIR (1946) *Bombay* 407, *at p.* 421, for a slightly different view. In this case the prayer was that a certain arbitrator appointed under a 'void reference' be restrained from determining the amount of compensation payable to him on the ground that the acquisition of land under the Defence of India Rules was illegal and *ultra vires*. The court held that since the very foundation of authority of the arbitrator did not exist there could not be, in his case, any question regarding "the doing or the forbearing of any act incumbent upon him in his public character", and the order prayed for could not be issued under *S. 45 of the Specific Relief Act*). The Supreme Court of India in the case of *Commissioner of Police, Bombay v. Gordhandas Bhanji* AIR (1952) *S.C.* 16, at p. 21 have settled the controversy and have ruled that *mandamus* will issue to enforce not only the statute law but also the general law of the land. "We can see no reason", observed Bose, J. "why statutory duties should be placed on any different plane from other duties enjoined by any other kind of law, especially as some statutory duties are slight or trivial when compared to certain other kinds of duties which are not referable to a statutory provision. In our opinion, the words 'any law' are wide enough to embrace all kinds of law and we so hold".

A writ of *mandamus* is, as has been remarked above, a prerogative writ and not a writ of right and the granting of it is controlled by the discretion of the court. [*See Rex v. The Church Wardens of All Saints Wigan*, (1876) 1 *A.C.* 611].

elevance of Principles English Law relating to he exercise of writ-jurisdiction and the erpretation f ARTS. 22 and 170.

Under ARTs. 22 and 170 of our Constitution the principles of English Law in so far as they throw a light upon the purpose for which a writ of mandamus is issued in England as also the conditions that regulate the exercise of Court's discretion in issuing it, would no doubt guide the Supreme Court and the High Court in the performance of their judicial duties. But it cannot be emphasized too often that the powers conferred upon our superior courts have to be exercised somewhat liberally when it comes to the question of enforcing fundamental rights.

elevance of case law on the erpretation f S.45 & 46 of Specific Relief Act.

The provisions of Ss. 45 and 46 of the Specific Relief Act would also furnish guidance to our courts in the matter of correctly exercising their jurisdiction under these two Articles; but even here care must be taken to realise that the jurisdiction of our superior courts is practically unfettered by any of the limitations to which exercise of power under Ss. 45 and 46 of the Act is necessarily subjected.

K. Banerjee versus J. Simonds.

The principles that govern the exercise of jurisdiction in regard to the issue of mandamus were stated in the case of *P. K. Banerjee v. L. J. Simonds, AIR* (1947) *Calcutta* 307. These principles were no doubt laid down in regard to the interpretation of Ss. 45 and 46 of the Specific Relief Act but they are nevertheless applicable to the exercise of jurisdiction to issue the writ of mandamus under ARTs. 22 and 170 of our Constitution. It was observed in that case (at p. 313):

> "Section 45 can be invoked against a person holding a public office only when the doing or forbearing of an act is clearly incumbent upon him in his public character, as required by proviso (b) of the section. There must be a duty or an obligation, in

exercise it The distinction between 'private' and 'public' powers is invariably drawn with a view to seeing whether the power in question carries with it the attribute of optional or compulsory exercise

Where there is power coupled with duty to exercise it, a remedy would lie for the breach of that duty ' Subject to certain other limits—broadly if there is no other more appropriate remedy *Pasmore v Oswaldwistle U D C* 1898 *A C* 387, *R v Dunsheath, Ex p Meredith* (1950) 2 *All E R* 741, (1951) 1 *K B* 127—mandamus generally lies", say Messrs Dias and Hughes, the authors of "Jurisprudence", ' where duty is a public duty" It is not easy to say what public duty is A difficult case to understand is *Western India Match Co v Lock* (1946) 2 *All E R* 227 (1946) *K B* 601 The Minister of War Transport had requisitioned a ship under the Defence (General) Regulation 1939 and, space permitting had it loaded with the plaintiffs commercial cargo The cargo was destroyed through the negligence of the Minister s representative It was held that for the purpose of Limitation Act, 1939, the damage had been inflicted while the Minister was acting in pursuance of a "public duty or authority" Now the Minister had a power coupled with privilege to requisition the ship Once he had exercised that power, the Court held that he was under a duty to use the ship for public benefit and therefore, the duty was a public duty If we insist that every duty must be correlative to a right, the Minister could not be under a duty since it is impossible to find the correlative right If, on the other hand, we say that there is no reason why every duty should correspond to a right, then this could be a duty, and indeed the Court held that it was

"Even so there is a difficulty In the action of the plaintiff against the Minister, it was the duty owing to the plaintiff that came under consideration and that duty, one would have thought, whether it arose under the contract or in tort, was a purely private one The plaintiff sued for the duty in tort, and the question is how this duty came to be a public duty, or what relevance the Minister's general duty to use the ship and its Cargo in the public interest had to the duty owed to the plaintiff" (See page 270 of '*Jurisprudence*' *Butterworths' publication*, 1957)

It follows from what has been said above that the kind of duty which would be enforced by a *mandamus* must be an absolute or unqualified one and it must not partake of the character of the exercise of a power in the discretion of a public officer Where the grant of a request to state the case by the Quarter Session was a matter within the discretion of the Quarter Session no *mandamus* was held to lie to them in that respect, but it was observed that if the Quarter Session after having granted the request to state the case for some reason, subsequently refuse to state the case, they may be compelled to do so by a [illegible] *Rex v Somerset Justices Ex parte Ernest J Cole etc* (1950) 1 *All E R* 264 In a Canadian case reported in the year 1946 in respect of an official who was required to issue a [illegible] permit "when he is of opinion that the work proposed to be done is in accordance [illegible] the provisions of this and other bye laws" having refused to issue the permit, [illegible] ground that rules had not been observed by the plaintiff but because there [illegible] his superiors to refuse the permit the Court granted *mandamus* on the ground [illegible] circumstances of the case the *discretion of the officer was exhausted and there* [illegible] *duty to grant permit which could be enforced* (See *The Murray Co Ltd v* [illegible] (2) *D L R p* 541 Writ of *mandamus* will also lie if the discretion [illegible] *abused* [See the case of *Re ex rel Lee v Workmen's Compensation Board* [illegible]

Must the specific act, with reference to which *mandamus* is [illegible] enjoined by statute law, or would it be enough if that duty, the [illegible] sought to be enforced, stems from the general or common law of the [illegible] appear to have been taken as to this requirement in cases [illegible]

(1947), *Calcutta* 307] Mr. Justice Gentle deprecated the practice of *affidavits* being sworn by persons other than those applying for orders under S. 45 of the Specific Reief Act.

Relief to be accurately stated in writ petition.

The precise nature of the relief must be accurately set forth and vague and alternative prayers should be avoided as they are likely to come in for judicial condemnation. A clear mention should also be made in the petition of "the demand and refusal of the relief by the respondent" for this is a question of substance and not merely that of form: of course, there would be cases in which this requirement of the procedure, namely that there should be a previous demand for justice and its refusal by the respondent may not be insisted upon by a Court as when from the facts of the case it might be obvious that the respondent had no intention of complying with the demand of justice or where the time within which this could have happened as prescribed by the law has itself passed. [See *Rex v. Hanley Revising Barrister*, (1912) 3 *K.B.* 518. This was a case in which there was an inadvertent failure by the clerk who had omitted to strike off the lists of the names of some persons who had been successfully objected to and whose names had been ordered by the revising barrister to be expunged. The rule prayed for was "to obtain on the register of electors for the parliamentary borough the lists of voters as they were in fact revised by the revising barrister." It was objected that *mandamus* should not issue as no demand to that effect had been made upon the Barrister. The court held that it was futile for the petitioner to make a demand requiring the Barrister to do that which he could not do unless there was an order of the court to that effect "for the mere purpose of obtaining his refusal to do that which he is willing to do if so ordered and which, in fact, he did in the exercise of his judicial discretion when he originally revised the lists"].

Mandamus and discretionary orders.

A writ of *mandamus*, as we have seen, lies to compel the public officer or body to perform statutory *duty* of a *ministerial* nature. Ordinarily *mandamus* will not issue to compel a public officer to exercise his *discretion in a certain way*. (See the case of "*The King on the prosecution of John Whittome v. Marshland Smeeth and Fen District commissioners* (1920) 1 *K.B.* 155.)

But in cases where it is shown that a duty has been imposed upon a public authority to do certain things, in a prescribed way, *mandamus* will lie to compel the authority concerned to follow the steps that have been prescribed by law for reaching that result. (See *Rex vs. Shoreditch Assessment Committee*, (1910) 2 K.B. p. 859.)

A mandamus however will not lie to question the decision of the executive upon matters which they are empowered to decide in their absolute subjective discretion. In the case of *Mayor of Westminster v. London and North Railway Company Ltd.* (1905) *A.C.* 426, Earl of Halsbury observed:

> "Where the Legislature has confided the power to a particular body with a discretion how it is to be used it is beyond the power of any Court to contest that discretion. Of course this assumes that the thing done is a thing which the Legislature has authorised": (See *London Briton and South Coast Railway Company Ltd. v. Truman* 1885, 11 *Appeal Cases page* 45.)

But it is entirely a different matter if it can be shown that the public authority has not exercised its discretion *bona fide* for the purposes contemplated by law or that it has been influenced by irrelevant or extraneous considerations. [See *Rex v. Bowman* (1898) 1 *Q.B.* 663; *Rex v. Bishop of London* (1889) 24 *Q.B.D.* 213; *Rex v. Paddington Rent Tribunal* (1949) 1 *All E.R.* 720; see also the case of *Rex v. London County Council* (1915) 2 *K.B.* 466]. All statutory powers must be exercised reasonably and with due care (*Sanitary Commissioners of Gibraltar v. Orfila* (1890) 15 *A.C.* 400; see also *Robest v. Hopwood* (1925) *A.C.* 578; *Rex v. Bishop of London* (1889) 24 *Q.B.D.* 213).

n an order is sought, to do or The remedy under the section which, by S 50 of the Act, is no longer available, but the provisions of S 45, in substance, give statutory effect to the principles governing *mandamus* The decisions of the Courts in England, reference to some of which will be made, relate to *mandamus* and are applicable to S 45"

The learned Judge in that case has also dealt with the question whether rights under the common law and under a Royal Warrant are such as can be enforced by means of a writ of *mandamus* and has referred to the decision on that point of their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v Bombay Trust Corpn* 63 *Indian Appeal page* 408 *AIR* (1936) *P C* 269, where it was clearly laid down that

"Before *mandamus* can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal "

J P Mitter, J in the case of *Carlsbad Mineral Water Manufacturing Co Ltd v H M Jagtiani, AIR* (1952) *Calcutta* 315, referred to the conditions precedent to the issue of *mandamus* in the following terms

"Some of the conditions precedent to the issue of *mandamus* are

(i) the applicant for a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the *mandamus* is sought,

(ii) the Court will not interfere to enforce the law of the land by the extraordinary remedy of a writ of *mandamus* in cases where an action at law will lie for complete satisfaction In order, therefore, that a *mandamus* may issue to compel something to be done, it must be shown that the statute imposes a legal duty,

(iii) the writ is only granted to compel the performance of duties of a public nature,

(iv) the Court will as a general rule, and in the exercise of its discretion, refuse a writ of *mandamus* when there is an alternative specific remedy at law which is not less convenient, beneficial and effective,

(v) when *mandamus* is refused on the ground that there is another special remedy, it is a remedy at law that is referred to "

Procedural requ rements in the case of petitions for *mandamus*

In S 46 of the Specific Relief Act the procedure of making application has been prescribed and *inter alia* it is stated therein that the application must be founded on an *affidavit* of the person injured stating his right in the matter in question, his demand for justice and the denial thereof In the rules framed by our Supreme Court, however, the only requirement prescribed for the making of an application for the grant of a writ of *mandamus* for the enforcement of a fundamental right is that it shall set out the name and description of the applicant, the relief sought, the grounds on which it is sought and shall be accompanied by an *affidavit* verifying the facts relied on It shall state "whether the applicant has moved the High Court concerned for the same relief, and if so, with what result " Despite the fact that the above quoted rule (Rule No 6 of Order XXV of the Supreme Court Rules 1956) does not in terms require a statement to be made in the petition, namely, that a demand for justice has been made by the petitioner and has been denied by the respondent, it is submitted that such a state of facts should be pleaded in an application for *mandamus* whether it is made to the Supreme Court under ART. 32 or to the High Court under ART 170, for it constitutes an essential condition precedent for the issue of writ of *mandamus* In the case referred to earlier [*P K Banerjee v L J Simonds, AIR*

ART. 170 confers extra-ordinary power which has to be used cautiously—so as not to prejudice the normal system of Administration of Justice.

ART. 170 was not intended to dislocate the pre-existing system of subordinate courts and the procedure governing the conduct of normal litigation in the country, and the powers under this Article particularly in respect of issuing writs of mandamus have to be sparingly exercised. It is only in those rare cases where rights of persons have been infringed and *there is no other equally convenient, adequate and specific remedy available* that this kind of writ would issue. The High Court would allow resort to constitutional remedies only when it finds that unless the remedy prayed for is granted to the person aggrieved he will suffer irreparable loss or damage.

Principles governing the grant of Discretionary Remedies—King versus Stafford.

In the case of *The King v. Stafford Justices Ex parte Stafford Corporation,* (1940) 2 *K.B.* 33, the following general observations, concerning the grant of discretionary remedies, would appear to be instructive in the context of the present discussion:

"In all discretionary remedies it is well known and settled law that in certain circumstances, I will not say in all of them but in a great many of them, the court although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised must exercise the discretion in a particular way, and if a Judge at a trial refuses to do so, then the court of appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the court is entitled to enquire into the conduct of the applicant and the circumstances of the case in order to ascertain whether it is proper or not proper to grant the remedy sought, the case in my judgment must be one of discretion."

This was a case relating to a prayer for the order of *certiorari* and the court declined to exercise its discretion on the ground that there had been undue delay in bringing up the proceedings. Similarly it has been held that the writ of *mandamus* is not a writ of right and the granting of it is, in that sense, discretionary. See also the case of *Rex v. All Saints Wigon* 1876, 1 *A.C.* 611.

It is true that the existence of alternative remedy does not constitute an insuperable bar in the way of invoking constitutional remedies, but it is certainly a matter which ought seriously to weigh with every High Court before relief under ART. 170 could at all be granted.

In the case of writ of prohibition or *certiorari* the existence of alternative remedy will not be given that much weight which is to be given in those cases where writs of *mandamus* and *quo warranto* are asked for. In *Halsbury's Law of England, 2nd Edition, Vol.* 9, *Para* 1397, this much has been said on the subject:

"The Court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, (see *Channel Coaling Co. v. Ross* (1907), 1 K.B. 145) or an appeal lies against such an absence or excess. Similarly the fact that an appeal on the merits of the case has already failed, or that the party applying for prohibition has himself initiated the proceedings in the inferior court, is not material to the decision of the court to grant or to refuse the writ."

[See further per Lord Halsbury (1) *Pasmore's case (Pasmore & others versus The Owswald twistle Urban District Council)* (1898) *A.C.* 387 *(H.L.) at* 394 where the importance of the principle, namely 'where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form than that given by statute' in relation to its application to the exercise of discretion to issue writs of *mandamus* has been lucidly stated; and (2) *Rex v. Wandsworth, JJ. Ex parte Read* (1942) 1 *All E. R.* 56, where in relation to the contention that the applicant had a remedy by way of appeal the court remarked that where there has been a denial of natural justice, the applicant is

Similarly, where some conditions precedent for the exercise of a power have been prescribed, the Court of law empowered to issue a writ of mandamus will inquire into those collateral, or what the American jurists characterise as, "Jurisdictional facts" to see if the exercise of power by a public functionary is in accordance with law If the 'named conditions' upon which the exercise of power conferred upon a public officer itself is made contingent, is not complied with, the power has not been exercised in accordance with law. In an inquiry of that kind, the Court is not really questioning the discretion of the officer at all; it is only examining the foundation of the exercise of power In the case of *State of Bombay v. Laxmidas, AIR* (1952) *Bombay* 468, the Court observed that the principal object of the writ of *mandamus* is to compel Government and its officers to carry out their statutory obligations (p 471)

> "If the Legislature lays down that the power cannot be exercised except on the satisfaction of certain conditions and the officer exercises the power although the conditions are not satisfied, the Court will intervene and prevent the officer from acting contrary to the statute . . . . . The Court will pull up the Government or the officer and compel them to obey the mandate which the legislature has issued "

[See also the case of *Adams v Nagle* (1938) 303 *U S* 532 82 *Law Ed* 999]

A court of law "will not interfere with or revise the opinion of an administrative public body if there is anything on which that body could reasonably have come to its conclusion But the discretion should be exercised in a judicial spirit, not allowing extraneous considerations to affect their decisions "

[See the case of *S K Ghosh and others v Vice Chancellor of Utkal University, AIR* (1952) *Orissa* 1] In this very case it was observed (at p 11).

> "A writ of *mandamus* cannot, in any event, be used as a substitute for an appeal or a writ of error to revise or correct the alleged errors by a public body in the proper exercise of its lawful jurisdiction, however inequitable and inconsistent its decision may be We should not interfere if the errors of law or wrongful conclusion of fact result from a mistaken judgment A line of distinction, however fine, should, however, always be drawn between a mistaken judgment and misguided judgment Where a tribunal, whether administrative or judicial, allows its judgment to be vitiated by lack of reasonableness and care, the decision shall be subject to the superintendence and control by *mandamus* "

This case was upset in appeal by the Supreme Court of India [See *Vice Chancellor, Utkal University* v *S K Ghosh, AIR* (1954) S C. p 217) where Bose J remarked (at p 219)

> "The learned Judges (of the High Court of Orissa) rightly hold that in a *mandamus* petition the High Court cannot constitute itself into a Court of appeal from the authority against which the appeal is sought, but having said that they went on to do just what they said they could not The learned Judges appeared to consider that it is not enough to have facts established from which a leakage can legitimately be inferred by reasonable minds but that there must in addition be proof of its quantum and amplitude though they do not indicate what the yardstick of measurement should be That is a proposition to which we are not able to assent "

Observations of Lord Mansfield in Dr Askew's case

These observations are in line with what Lord Mansfield said in a case known as Dr. Askew's case (*Rex v. Askew* (1768) 4 *Burr* 2186: 98 *English Reports p.* 139;). This was a case in which a [illegible] of Physicians to [illegible] them to admit D [illegible] that although in the case of a party who has a right but has no other specific remedy the

'An application for prohibition is never too late as long as there is something left for it to operate upon.'

'In the case of 1927, 1 K.B. 491 (*Rex v. North*) Scrutton L.J. after expressly approving this dictum as that of a Judge who had great familiarity with this subject, remarked at p. 503: 'When the sentence is unexecuted statement of intention to execute it may be followed by a writ or prohibition, however long a time may have elapsed since the original sentence was pronounced."

Their Lordships in issuing the writ took into consideration the fact that the respondents gave the appellants no opportunity of applying for prohibition or certiorari before they sent the declaration to the Governor-in-Council. The difficulty in the case was that the Governor-in-Council was not a party to the proceedings and the originating summons, as framed, was limited to prohibition and there was no claim founded on *certiorari*. All the same, their Lordships issued the writ of prohibition to the respondents not to require the appellants to demolish the building under S. 61 which was a discretionary power to be execrised by the respondent after the approval by the Governor-in-Council. Their Lordships concluded the consideration of this question by a significant remark (at p. 271):

"It must not be forgotten" observed their Lordships, "in considering the technical aspect of the case that, on the conclusion at which their Lordships have arrived, their declaration was *ultra vires* and that if the respondents were to attempt to exercise their powers under S. 61 they would be relying on an order which, if challenged in time by suitable proceedings, could not have been made."

When would writ of certiorari lie.

King vs. The Electricity Commissioners

In the case of *King v. The Electricity Commissioners*, (1924) 1 *K.B.* 171, said Atkin L.J.:

"Whenever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In an earlier case, May, C. J. drew the distinction between the classes of cases in which certiorari would lie and those in which it would not, in the following terms:

"It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, under consideration of facts and circumstances, and imposing liability or affecting the rights of others, and if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district it would seem to me that the acts of such a body involving such consequences would be judicial acts." [See in *Regina (John M'Evoy) v. Dublin Corporation* (1879) 2 *L. R. Ir.* 371].

This dictum has been approved by Lord Atkinson as "one of the best definitions of a judicial act as distinguished from an administrative act" in *Forme United Brewery Co. Ltd. v. Bath Justices* (1926) *A.C.* 586 *at p.* 602. The distinction between judicial and quasi-judicial acts on the one hand and merely ministerial acts on the other has been more fully examined in the case of *The King v. London County Council*, (1931) 2 *K.B.* 215, and the observations of Scrutton L. J. at p. 233 are often cited as representing the best that has been said on the subject.

The King v. London County Council.

"It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the

entitled to an order of *certiorari* even though another remedy be available to him]

In the case of *The King v North Ex parte Oakey*, (1927) 1 K B 491, the Court of Appeal consisting of *Bankes, Scrutton* and *Atkin, L JJ* reversed the decision of the Divisional Court refusing prohibition on the ground that appeal lay Atkin L J felt that it is "quite plain that the fact of there being a remedy by way of appeal is no answer to a writ of prohibition where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice, such as I conceive to have been the case here"

In this case no notice had been issued to the applicant before issuing the order with which he was aggrieved

A *mandamus* cannot issue to restrain legislature from the performance of its legislative business or to interrupt the progress of a bill [See the case of *Chotey Lal v State of Uttar Pradesh, AIR* (1951) *Allahabad* 228 See also *Legislative Committee of Church Assembly Ex parte Haynes—Smith*, (1928) 1 *K B* 141, where an application made to restrain by prohibition together with *certiorari* the National Assembly of the Church of England from proceedings with prayer book measure was unsuccessful on the ground that neither the National Assembly nor its legislative Committee was empowered to act, or did in fact act, judicially]

156. Writs of "Certiorari" and "Prohibition"

[illegible]

judicial bodies of inferior jurisdiction

Writ of *certiorari* is so called because the record of the lower tribunals under the rule issued by the court of King's Bench Division is to be "certified' and sent up for the purpose of being investigated by that court By means of *certiorari* the records and proceedings are called for by the High Court with a view to examining their legality, and if the High court comes to the conclusion that the inferior tribunal has acted in excess of its jurisdiction or in a manner which is opposed to the principles of natural justice or that there is an error apparent on the face of the record, the impugned orders are quashed by it and put out of the way

A writ of Prohibition, as its name indicates, is issued to prohibit an inferior body [illegible] ter which is beyond its authority or [illegible] with a view to quashing orders [illegible] will go to stop them from going on further with proceedings that are adjudged to be without foundation **Difference between certiorari and prohibition**

Lord Atkin, in the case of *Rex v Electricity Commissioners Ex parte London E J Co* (1924) 1 *K B* 171 *C A* remarked **Rex versus Electricity Commissioners**

' I can see no difference in principle between *certiorari* and prohibition except that the latter may be invoked at an earlier stage If the proceedings establish that the body complained of is exercising its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think the prohibition will lie to restrain it from so exceeding its jurisdiction "

"The object of the writ was to protect the jurisdiction of Common Law Courts from being usurped and the writ could reach any tribunal with limited jurisdiction that was exercising a jurisdiction that belonged to Common Law Courts or was found exceeding the jurisdiction conferred upon it by law The writ could issue from the Court of King's Bench Division in England even to Privy Council while exercising appellate

and did some thing which was beyond their jurisdiction. But since under the authority of *Reg. v. Sharman*, (1898) 1 Q.B. 578, application of the rule of correction by *certiorari* was out of question, the question arose regarding the application of the writ of *mandamus*: Willis J. as to this said:

"We have next to consider whether the case is one in which a mandamus ought to be granted directing the justices to hear and determine the matter according to law. It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be fine, and the cases on the subject and law say that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a Section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them these decisions cannot be reviewed by mandamus. That is so whether there is appeal or not. If there is appeal, *mandamus* will not lie; if their is not, then decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters by law ought to be taken into consideration, then they have not heard and determined the matter according to law. *Certiorari* has to get rid of impugned order of a Tribunal, while *mandamus* has to compel it to proceed further to a decision which may be required in the interests of the petitioner."

(4) *Mandamus* lies to compel a public officer to do something or to omit the doing of that which it is directed by law that he should do or, as the case may be, not do. *Certiorari*, however, is a mere *ex post facto* relief in that, it lies only to get rid of orders passed by judicial and quasi-judicial bodies upon certain well defined grounds. And what is more, even a superior court in *certiorari* proceedings cannot convert itself into a court of appeal and do that which the inferior tribunal ought to have done and it would interfere with the orders of subordinate tribunals as will be indicated later only on certain well defined principles.

Certiorari and the Power to summon record.

Power to summon record by the High Court or the Supreme Court is unqualified and unlimited and whenever a rule *nisi* is issued summoning the record, the authority to whom the rule is addressed is bound to submit the record to the Court concerned, and if he has any objection as to the disclosure of any part of the record a separate prayer has to be made and the Court would then dispose of the matter in accordance with what it considers is reasonable and right.

"The proper return", it was observed in a Full Bench case of *P. Joseph John v. The State AIR (1953) Travancore Cochin 363 by Travancore Cochin High Court of India* "to an order issuing notice upon an application (for a writ of certiorari to bring up the proceedings)... should be a return producing the records forming the subject matter of the proceedings in certiorari . . . Every document in the Secretariat file (from the beginning) and terminating in the orders sought to be quashed must necessarily form part of the proceedings . . . It is not competent for the State to take objection for production of any of the documents forming part of the record, based on sections 123, 124 and 162, Evidence Act."

It was also observed that "if any document not expressly excluded heretofore forming part of the said proceedings is apprehended to be injurious to public interest if disclosed, liberty is given to the respondent to produce the same in Court in a sealed cover with an explanatory note and the said document will be dealt with by the Court appropriately."

The record could be summoned from the person having legal custody of it, should the tribunal whose determination is sought to be corrected has become *functus officio*. [See the case of *Hari Vishnu Kamath v. Ahmad Ishaque, AIR* (1955) *S.C* 233].

sense that it has to decide on evidence between a proposal and an opposition, and it is not necessary to be strictly a Court, if it is a tribunal which has to decide rights after hearing evidence and opposition it is amenable to the writ of *certiorari*, and I do not discuss further the nature of the writ, because very elobarate discussion of it will be found in the recent cases of *Rex vs Electricity Commissioners*, (1924) 1 K B p 171, and *Rex vs Minister of Health* (1929) 1 K B p 619"

Ryots of Garabandho v Zamindar of Parlakimedi

Again in the case of *Ryots of Garabandho v Zamindar of Parlakimedi* 70 *Indian Appeal* 129 (1943) *P C* 164, Viscount Simon, L C laid down the following test as to the existence of those conditions which must subsist before the nature of the act can be deemed to be within the scope of the writ of certiorari

"This writ does not issue to correct purely executive acts but, on the other hand, its application is not narrowly limited to inferior 'Courts in the strictest sense Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior Courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions This principle has been transplanted to other parts of the King's dominions, and operates within certain limits, in British India "

Certiorari and Mandamus—compared and contrasted

Enough has been said to determine the province of the writ of certiorari and it would be useful at this stage to compare and contrast the scope of this writ from that of *mandamus*

Following points may help the comprehension of the scope of the two writs —

(1) The range of the writ of *mandamus* is, comparatively speaking, wider than that of *certiorari* it can be issued to any public officer, tribunal of inferior jurisdiction or a corporation whereas *certiorari* can issue only to a judicial or quasi judicial body [See *Union of India v Elbridge Watson AIR* (1952) *Calcutta* 601]

(2) *Certiorari* and prohibition are very nearly writs of *rights* and would issue *ex debito justitiae* upon the application of party aggrieved, whereas *mandamus* is a discretionary writ and one of the most important condition precedent for its issue is the consideration whether or not there is equally effective alternative remedy to secure that which the writ of *mandamus* is designed to achieve [See *Halsbury's Laws of England*, 3rd *Ed*, *Vol* 9 *p* 130, as also the case of *Rex v Post Master-General Ex parte Carmichael*, (1928) 1 *K B* 291 at 299)

(3) The scope of *certiorari* is from another point of view somewhat wider than that of *mandamus* and this can be seen if a comparison is made from the point of view of the extent to which powers of superintendence over inferior tribunals can be exercised under both the writs A *mandamus* may issue where an inferior tribunal or authority has either failed to exercise or refused to exercise its jurisdiction *Certiorari* lies to quash the decision itself in case it be shown that the tribunal in reaching the decision has either acted in excess of its jurisdiction or has acted in a manner which is plainly opposed to the principles of natural justice or its decisions bear the imprint of "an error apparent on the face of the record " An erroneous decision is quashed by *certiorari*, but when there is failure to hear and decide the case, mandamus may be issued to get the Tribunal to move further in accordance with law [*Rex v Woodhouse* (1906) 2 *K.B* 501] When the decision is based only on material which cannot be considered as proper basis for decision, *certiorari* lies to quash such a decision and *mandamus* would be issued to direct the authority to hear and decide the application according to law The case *Reg v Cotham* (1898) 1 Q *B* 802, presents this principle in a clearcut way This was a case in which the licensing Justices were clearly shown to have acted outside the law

Views of Committee on Minister's Powers.

In the report of the Committee appointed by the Lord Chancellor on 30th October, 1929, "to consider the powers exercised by or under the direction or by persons or bodies appointed especially by Ministers of the Crown by way of: (a) delegated legislation, and (b) judicial and quasi-judicial decisions, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of the Parliament and the supremacy of the law," we find the following stated in the third section of that report:

". . . A 'quasi-judicial' decision is . . . one which has some of the attributes of a judicial decision, but not all . . . A true judicial decision presupposes an existing dispute between two or more parties and involves four requisites:

(1) the presentation (not necessarily orally) of their case by the parties to the dispute;

(2) if the dispute between them is a question of fact by means of evidence . . .;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties; and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice . . ."

The Committee further observed that the distinction between purely administrative decisions, on the one hand, and the judicial and qasi-judicial decisions, on the other, consists in the fact that there is, according to them, no legal obligation in the matter of reaching administrative decisions to consider and weigh submissions or arguments or to take any evidence or to entertain any objections that may be raised. This is so because the grounds upon which the person deciding acts, and the steps which he takes to inform himself before acting, are left entirely to his *discretion*.

To the question: "What then is 'administrative decision?", the Committee returned the following answer:

"In the case of administrative decisions, there is no legal obligation upon the person charged with the duty of making the decision to consider and weigh submissions and arguments, or to collate any evidence or solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting are left entirely to his discretion."

But they nevertheless are cautious enough to add: "But even large number of administrative decisions may and do involve in greater or lesser degree at some stage in the procedure which eventuates in administrative action, a certain of the attributes of a judicial decision. Indeed, generally speaking, a quasi-judicial decision is only an administrative decision, some stage or element of which possess judicial characteristics."

(See further C. K. Allen's observations on this nebulous concept of '*quasi*' under the caption "The Ghost-Land of the 'Quasi' " in the Second Edition of his "Law and Orders" (1956) at p. 389 and in particular the remarks of Cohen, L. J. in *Johnson & Co. v. Minister of Health* (1947) 2 All England Reports, 395, at p. 405: "Counsel for the Respondent would seek to make him (Mini r) not only a *quasi*-judge, but a *quasi*-litigant, bound to give *quasi*-discovery to each or the parties to the *quasi*-lis. Logically, on this kind of argument he would be bound to supply copies of all relevant documents and to answer *quasi*-interogatories.")

Revisional Jurisdiction under Criminal and Civil Procedure and Certiorari

Under the Codes of Criminal and Civil Procedure of our country the High Court has the power of revision and in the exercise of that power has also the power of summoning the records and proceedings of the courts subject to its appellate jurisdiction for the purpose of satisfying itself as to their "legality" and "propriety" S 435 of the Code of Criminal Procedure gives to the High Court (even as it does to the Sessions Judge or District Magistrate or any [illegible]
ment in that behalf) the p [illegible]
any inferior criminal cour [illegible]
the kind of orders that can be passed by the High Court while exercising its revisional jurisdiction Similarly S 115 of the Code of Civil Procedure contains provisions that define the power of the High Court while exercising its revisional jurisdiction This section says:

"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears

(a) to have exercised a jurisdiction not vested in it by law, or,

(b) to have failed to exercise a jurisdiction so vested, or,

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit "

But whereas this power of revision is exercisable only in respect of courts that are *subordinate to the High Court* the powers to issue writs of *certiorari* and prohibition are available in respect of all the *inferior* bodies exercising judicial and quasi judicial functions The extent of the power to interfere with the determination of these inferior judicial and quasi judicial tribunals is, of course, comparatively speaking, of a limited kind and is not as wide as it would be when the High Court is exercising its revisional jurisdiction

157. Bodies or Authorities to whom Certiorari will lie

A difficult question to answer

What are the bodies and authorities to which writ of *certiorari* could be addressed, is a question which bristles with difficulties in particular, the answer to it depends on the distinction between judicial and quasi judicial bodies, on the one hand, and the merely ministerial bodies, on the other Any student of jurisprudence who sets out to discover some useful principle from his browsing in the "immense pasture" of legal literature on that subject would not be able to find any such principle much less a useful practical test by resort to which in a vast majority of cases this distinction without difference, can be properly drawn by him All he would be told would be somewhat on the following lines: a writ of *certiorari* lies in respect of tribunals that are required to follow, in the determination of the causes before them, the principles of natural justice. And when he further asks "How best can one find out what bodies or tribunals are required to follow principles of natural justice", the answer will be "only those bodies that are required to follow principles of natural justice in respect of which writ of *certiorari* lies "

Prof Robson's views on the impossibility of formulating a test on this matter

Professor Robson, for instance, after a laborious, careful and thorough examination of all the relevant cases that may be said to have a bearing on the question of formulating a test for distinguishing between 'Judicial', and 'quasi judicial' bodies on the one hand, and purely administrative ones, on the other, with a sigh of weariness, confesses that "these decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view from which we are now discussing it save to demonstrate, by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction " (*Justice and Administrative Law p 5*).

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(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice . . ."

The Committee further observed that the distinction between purely administrative decisions, on the one hand, and the judicial and qasi-judicial decisions, on the other, consists in the fact that there is, according to them, no legal obligation in the matter of reaching administrative decisions to consider and weigh submissions or arguments or to take any evidence or to entertain any objections that may be raised. This is so because the grounds upon which the person deciding acts, and the steps which he takes to inform himself before acting, are left entirely to his *discretion*.

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Province of Bombay v Khushaldas

In the case of *Province of Bombay v Khushaldas S Advani, A I R* (1950) *S C* 222, the nature and scope of the writ of *certiorari* as it could issue under S 45 of the Specific Relief Act was fully examined

This case was brought to the Supreme Court by way of appeal from the decision of the Bombay High Court reported in *AIR* (1949) *Bombay* 277 (*P I Rao v Khushaldas*), and the latter case is important because of the scholarly discussion therein of the pre existing limits of the jurisdiction of that Court to issue writs before the advent of the Constitution—the cases reviewed being (1) *Venkataratnam v Secretary of State for India, AIR* (1930) Mad 896 53 *Madras* 979, (2) *Thyagarajan v Government of Madras, I L R* (1940) 53 *Madras* 204, (3) *In re Banwarilal Roy*, (1943) 48 *C W N* 766, (4) *Lady Dinbai Petit v Noronha, AIR* (1946) *Bombay* 407 48 *Bombay L R* 255 and (5) *Kandaswami Mudaliar v Province of Madras, AIR* (1947) *Madras* 444

Now a word about the decision of the Supreme Court in *Khushaldas case* AIR (1950) S C 222 at p 231

"A petition for a writ of *certiorari*", observed Fazl Ali J of the Supreme Court, in *Khushaldas case* "can succeed only if two conditions are fulfilled firstly the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi judicial function, and secondly, such Court or quasi judicial body has acted in excess of its legal authority "

Thus, at least this much is clear, that *certiorari* is not available for quashing merely administrative, ministerial or executive orders It lies only in cases where the inferior tribunals are required to act judicially

As to the question, when can a person or body be said to have a duty cast upon it to act *judicially*, the majority view in *Khushaldas* case is reflected in the following observation of Kania C J (at p 226)

"It seems to me that the true position is that when the law under which the authority is making a decision itself requires a *judicial approach*, the decision will be quasi judicial Prescribed forms of procedure are not necessary to make an enquiry judicial provided in coming to the decision the well recognized principles of approach are required to be followed "

In each case, therefore, the question as to whether there is imposed upon the ... nalysis of the provi ... the relevant provi ... o hear evidence to entertain the objections and then decide the question submitted for its adjudication it could fairly be presumed that the authority is charged with the duty of acting *judicially* and is amenable to be controlled in certiorari proceedings

But even this test is not an absolute one, for cases are known in which its application would appear to be clearly one of doubtful validity As observed in *Rex v Manchester Legal Aid Committee* (1952) 1 *All E R* 480,

"The true view as it seems to us is that the duty to act judicially may arise in widely different circumstances which it would be impossible and indeed inadvisable to attempt to define exhaustively "

Illustration of the difficulty of formulating test Two cases examined

As an illustration of the difficulty involved in formulating any universally valid test for the demarcation of the boundary line between the two provinces, that is between (a) merely ministerial acts on the one hand, and (b) the judicial and quasi judicial acts on the other, reference should be made to the case of (i) *Franklin v Minister of Town and Country Planning*, (1948) *A C* 87, and (ii) the case of *King v Postmaster General* (1928) *I K B* 291 The former

(a) Franklin v. Minister of Town Planning.

was a case which involved appreciation of the provisions of the Town and Country Planning Act and New Towns Act of 1946 with a view to determining the question whether under that Act the functions of the Minister, who was required to pass an order after following the prescribed procedure, could be regarded as being of judicial or quasi-judicial character. The requirements of the procedure prescribed was that Minister was to cause to make a public enquiry before passing the order: in the words of the Rules mentioned in the Schedule to the Act.

"(3) If any objection is duly made to the proposed order and is not withdrawn, the Minister shall, before making the order, cause a public local enquiry to be held with respect thereto, and shall consider the report of the person by whom the enquiry was held.

(4) Subject to the provision of the last foregoing paragraph, the Minister may make the order in terms of the draft or subject to such modification as he thinks fit. . ."

Despite these provisions Lord Thankerton held that the functions of the Minister were not judicial but merely ministerial. He observed:

"In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under S. 1 of the Act and Schedule-I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty. It is obvious that, before making the draft order, which must contain a definite proposal to designate the area concerned as the site of a new town, the respondent must have made elaborate inquiry into the matter, and have consulted any local authorities who appear to him to be concerned, and, obviously, other departments of the government, such as the Ministry of Health, would naturally require to be consulted. It would seem, accordingly, that the respondent was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation, and it is important to note that the development of the site, after the order is made, is primarily the duty of the development corporation established under s. 2 of the Act. I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."

The only way to understand the *ratio decidendi* of the above case is to say that the enquiry which the statute required the Minister to make was merely for the purpose of helping the Minister himself to reach a correct conclusion but this requirement of the law could not be regarded as providing a basis for anyone saying that the Minister's decision itself or the act of deciding by the Minister was a quasi-judicial one so as to make it amenable to be quashed by a writ of *certiorari*. It is true that in that case the power of the Court to question the order of the Minister was provided for by sub-section (1) (b) of S. 16 of the Town and Country Planning Act 1944: it was provided that the Court if satified that the order or any provision therein is not within the powers conferred by the Act or that the interest of the applicant having been substantially prejudiced by any requirement of the Act or of any Regulation made thereunder not having been complied with, may quash the order or any provision contained therein either generally or as it affects any property of the applicant. The point whether there was a duty on the Minister to decide the question judicially arose in relation to the contention of the applicant that the order had been vitiated by the *bias* of the Minister. The question of bias would have been material if upon the

In the case of *Province of Bombay v Khushaldas S Advani, A I R* (1950) *S C* 222, the nature and scope of the writ of *certiorari* as it could issue under S 45 of the Specific Relief Act was fully examined Province of Bombay v Khushaldas

This case was brought to the Supreme Court by way of appeal from the decision of the Bombay High Court reported in *AIR* (1949) *Bombay* 277 (*P* [illegible] *Rao v Khushaldas*), and the latter case is important because of the scholarly discussion therein of the pre existing limits of the jurisdiction of that Court to issue writs before the advent of the Constitution— [illegible] *dia*, *AIR* (1930) Mad [illegible] (1940) 53 *Madras* 204, [illegible] *ai Petit v Noronha AIR* (1946) *Bombay* 407 48 *Bombay L R* 255 and (5) *Kandaswami Mudaliar v Province of Madras*, *AIR* (1947) *Madras* 444

Now a word about the decision of the Supreme Court in *Khushaldas case* AIR (1950) S C 222 at p 231

"A petition for a writ of *certiorari* ", observed Fazl Ali J of the Supreme Court, in *Khushaldas case* "can succeed only if two conditions are fulfilled firstly the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi judicial function, and secondly, such Court or quasi judicial body has acted in excess of its legal authority "

Thus, at least this much is clear, that *certiorari* is not available for quashing merely administrative, ministerial or executive orders It lies only in cases where the inferior tribunals are required to act judicially

As to the question, when can a person or body be said to have a duty cast upon it to act *judicially*, the majority view in *Khushaldas* case is reflected in the following observation of Kania C J (at p 226)

"It seems to me that the true position is that when the law under which the autho rity is making a decision itself requires a *judicial approach*, the decision will be quasi judicial Prescribed forms of procedure are not necessary to make an enquiry judicial, provided in coming to the decision the well recognized principles of approach are required to be followed

In each case, therefore, the question as to whether there is imposed upon the tribunal the duty to act judicially [illegible] sions of the statute creating the t [illegible] sions in the statute it could be s [illegible] entertain the objections and then decide the question submitted for its adjudication, it could fairly be presumed that the authority is charged with the duty of acting *judicially* and is amenable to be controlled in certiorari proceedings

But even this test is not an absolute one, for cases are known in which its application would appear to be clearly one of doubtful validity As observed in *Rex v Manchester Legal Aid Committee* (1952) 1 *All E R* 480,

"The true view as it seems to us is that the duty to act judicially may arise in widely different circumstances which it would be impossible and indeed inadvisable to attempt to define exhaustively "

As an illustration of the difficulty involved in formulating any universally valid test for the demarcation of the boundary line between the two provinces, that is between (a) merely ministerial acts on the one hand, and (b) the judicial and quasi judicial acts on the other, reference should be made to the case of (i) *Franklin v Minister of Town and Country Planning*, (1948) *A C* 87, and (ii) the case of *King v Postmaster General* (1928) *I K B* 291 The former Illustration of the difficulty of formulating test Two cases examined

"I do not think that it was contemplated at all that the judgment of the Medical Referee should in the smallest degree be influenced by the certifying Surgeon by a wholly unauthorised person and I do not think Mrs. Carmichael would be in the same position before the Medical Referee as that in which she would have been if there had been a refusal on the part of proper officer to give her any certificate at all".

Similarly, Salter J. regarded that the certificate was invalid and he held that "it is a judicial decision, to which a proceeding by way of *certiorari* would apply", and Avory J. did not "differ from the view that the certificate being a condition precedent to the right of the workman to claim compensation may be a proper subject for a writ of *certiorari*...."

In this case it would appear that the certificate of the Surgeon gave or deprived a person of right to compensation and the giving or withholding of such a certificate was thus considered a judicial act and if the person had no jurisdiction to give such a certificate, a writ of *Certiorari* was considered a proper remedy. But why must the act be considered "Judicial" merely because of the part which the certificate must play in the making "of any claim for compensation"? Is duty to act judicially a necessary adjunct of the sort of effect a given order would have upon the rights of a third person?

On comparing this case with the case of *Franklin v. The Minister of Town and Country Planning* (1948) A.C. 87, it is difficult to understand the principle in terms of which both the decisions could be said to be consistent with each other. In both the cases it would be noticed that an enquiry had been provided for and in both the cases the ultimate orders that were to be passed on the footing of those enquiries and the results did involve interference with rights of third persons. Why should the action of the Minister in the latter case be not regarded as falling in the same species of acts in which the action of the Surgeon who gave or withheld the required certificate should fall? It is impossible to reconcile the two decisions.

Justice Amir Ali's views in the case of In re "Banwarilal".

There is no universally valid test that has been evolved which is capable of being applied to all the cases that might arise for the solution of the problem, namely, whether in a given case the Public Officer who is charged with a duty of taking decision is required to act judicially. Mr. Justice Amir Ali remarked in the case of *In re Banwarilal Roy*, (1943) 48 C.W.N. 766, in regard to the difficulty of accurately distinguishing betwixt the class of cases where the writ of *Certiorari* would be available and the class of cases where it would not, in words that could hardly be improved upon:

"The law however recognizes that there are two classes of decisions, one to which the writ of *Certiorari* applies and the other to which it does not. Decisions of class I are generally referred to as judicial acts or described by some phrase in which the word 'judicial' finds a place: decisions of class II by some phrase in which 'Executive' or 'administrative' is the adjective. That there is no clear intervening gap between the two classes, that it is a matter of two ends of a scale or perhaps, different places in spectrum may be supposed. In certain cases, therefore, the question whether a particular decision or opinion formed is of one class or the other, is itself a question of opinion, of colour. To find out whether the opinion is of one class or the other, we must first of all observe the man (or men) making the decisions and then what the man is trying to decide then consider upon what materials he can decide and then ourselves decide whether it is opinion class I or opinion class II."

An Attempt at formulating a test.

But despite these difficulties of which Amir Ali J. justifiably complains, it is necessary to formulate some adequate working tests. It is, to begin with, always useful in all these cases to raise the following question: Are the conditions prescribed by the statute for the exercise of power such as may properly be regarded as evidence of an intention on the part of the Legislature to impose on the officer concerned, duty to act judicially? If in the determination of the existence or non-existence of these conditions themselves the officer has been

construction of the provisions of the statute it would be established that the Minister was required to act *judicially* Lord Thankerton referred to the forensic meaning of the word 'bias' and observed

"Its proper significance, in my opinion, is to denote a departure from the standard of even handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi judicial office, such as an arbitrator The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or *bias* towards one side or other in the dispute "

Upon the facts of that case it was held that the speeches made by the Minister were of a political nature and were not inconsistent with the intention on his part to carry out the statutory duty imposed upon him by the Parliament, and since the functions to be discharged by the Minister were not quasi judicial, the question of *bias* was not of much relevance the only question that was relevant was whether the Minister had done his statutory duty of considering any genuine objections On the materials before them, the House of Lords came to the conclusion that there was nothing to show that the issue in the mind of the Minister had been fore closed or that there was not that consideration shown by him to the report which was required of him under the law

But the principal point of interest in the above case is to grasp precisely the legal reason that prompted their Lordships to say that the Minister was not required by the statute to act judicially Here was a case in which under the statute (a) the *objections* had to be invited to the proposed scheme, (b) a *local enquiry had to be held* and (c) a report by the officer concerned had to be *considered* All these *steps* were to be taken before the Minister could make the order Surely, one way of looking at the matter was to say that all these provisions clearly showed that the Minister was required to *weigh* and *consider the objection in a judicial spirit* Nevertheless, we find the House of Lords taking a different view of the matter, and holding his duty to be merely ministerial in character

(b) The case of *King* v *Postmaster General*, (1928) 1 *K B* 291, may be regarded as representing an extreme view on the side opposite to the view taken in *Franklin* v *Minister of Town and Country Planning*, (1948) *A C* 87 In this case, under the workmen's Compensation Act, compensation was payable to an employee if the workman obtained a certificate of the Certify [illegible] (b) King v Postmaster General
cramp" A medical prac [illegible]
duties of a "certifying" [illegible]
so far as the Post Office [illegible]
exercise the duties of the "certifying" Surgeon provided he was authorised so to do The practice that prevailed in the Post Office was to refer all cases of such kind to the Chief Medical Officer of the Post Office and this practice was relied on as constituting him a substitute for the certifying Surgeon under the Act The applicant who was suffering from telegraphists' cramp was on the capitation list of the local medical officer of the Post Office but in fact had never consulted him On her claiming compensation for the disability resulting from telegraphists' cramp, the case was referred to the Chief Medical Officer who certified that the applicant was *not* suffering from such cramp The question before the court was whether under these circumstances, the giving or withholding of a certificate by such a Medical Officer could be appropriately regarded as being a matter that was amenable to being tested by a writ of *Certiorari* Lord Hewart C J rejected the contention viz that the giving or withholding of a certificate did not in any manner proceed from a duty to act judicially that could be said to have devolved on a Medical Officer He observed

which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a *lis* and *prima facie*, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

"(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

As to the validity of the first principle something would be found said in the remarks that follow, but the reference to the second principle mentioned by Das, J., is hardly a source of enlightenment to the student who wishes to know precisely how to determine whether a statute imposes a duty upon the authority to act judicially.

Additional tests suggested—but none is decisive.

Some additional tests for distinguishing between judicial and administrative acts could be suggested, although in the opinion of the present writer none of them is a decisive one.

(a) D.M. Gordon.

(a) Mr. D. M. Gordon in an article contributed to 49 L.Q.R. at p. 107 formulates the distinction between judicial and quasi-judicial bodies as follows:

> "Judicial Tribunals must treat legal rights and liabilities as pre-existing, because such tribunals declare themselves bound by a fixed objective standard; they profess not to confer rights or impose liabilities themselves but only to do what is dictated by law. But administrative tribunals which act upon policy and expediency, themselves dictate what is politic and expedient; they are not concerned with pre-existing rights and liabilities but themselves create rights and liabilities that they enforce."

The foregoing formulation of the suggested test may also be spelled out of certain observations of Lord Loreburn contained in his speech in the House of Lords reported in 1907 *A.C.* 420 (at p. 423-4) in *Lord Mayor of Leeds v. Ryder & others*, a case that reached that forum by way of appeal from *R. v. Woodhouse* (1906) 2 *K.B.* (*C.A.*) 501. It was said:

> "The justices acting under S.I. Sub-section 2 of the Act of 1904 act administratively for they are exercising a discretion which may depend upon considerations of policy and practical good sense—and they must, of course, act honestly. That is the total of their duty."

It is true that in this case the learned Law-Lord was dealing with an argument from the bar viz., that some atleast of these Justices were *biased* by their having previously taken part in certain arrangements when the Corporation offered that these public houses should be suppressed and compensation paid", but it is also clear that, the "body" in question was held to be an administrative body because it was for them to exercise a *discretion which may depend upon* 'consideration of policy and practical good sense'."

This dictum has been commented upon by *Mr. D. M. Gordon in the Canadian Bar Review for* 1932 *at p.* 198 as follows :

> "......Any Tribunal is administrative if its duty is to make decisions according to policy and practical good sense; but a tribunal is judicial if its duty is to render decision according to legal rights. If an individual can come before a Tribunal and say: the facts are so-and-so, which gives me a legal right to so-and-so, then the Tribunal must be a judicial tribunal. But if a Tribunal's functions are such that a suppliant must, in effect, say: 'the facts are so-and-so which makes it policy and practical good sense for you to grant me certain privileges', then that tribunal is merely an administrative Tribunal.

constituted as the sole judge of the situation then, so long as he says that those conditions are fulfilled, there is an end of the matter and the Superior Courts cannot interfere with such decisions But if the existence of these conditions has itself to be determined by an appeal to some "objective" standard, then they become "conditions precedent" to the exercise of power and it is for a Superior Court, in each case, to find whether the exercise of the power by the subordinate tribunal is in accordance with law

In other words, if the law permits a *subjective approach* to the determination of the conditions limiting the exercise of power, and constitutes the officer exercising the power as a sole judge as to their existence, writ of *Certiorari* will not lie, but if, on the other hand, those conditions have themselves to be determined *objectively* then they become 'conditions precedent' to the exercise of the power and their existence cannot be said to be conclusively demonstrated merely because the officer exercising the power says that such conditions exist In the latter case the court can go behind the declaration that such "conditions" have been found to exist"

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answer—and it is from the answer that one can give to this question that the further point namely whether there is imposed upon the officer concerned a duty to act judicially can be resolved successfully

T f the Judges of the Indian *Advani, AIR* (1950) *S C* 222 case reported in (1943) 48 *C W N* 766 (in re *Banwari Lal Roy*) stated his conclusion on the mode of differentiating between two classes of acts as follows

Remarks of Das J in Khushaldas case are not ***helpful***

"The two kinds of acts (that is quasi judicial act as opposed to an administrative act) have many common features Thus a person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power He has to consider facts and circumstances and to weigh *pros* and *cons* in his mind before he makes up hi

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him just as effectively as a quasi judicial act does The exercise of an administrative or executive act may well be and is frequently made dependent by the legislature upon a condition or contingency which may involve a question of fact, but the question of fulfilment of which may nevertheless be left to the subjective opinion or satisfaction of the executive authority, as was done in the several ordinances, regulations and enactments considered and construed in the several cases referred to above The first two items of the definition given by *Atkin L J* (*Rex v Electricity Commissioners*, 1924 1 K.B 171) may be equally applicable to an administrative act The real test which distinguishes a quasi judicial act from an administrative act is the 3rd item in *Atkin, L J's* definition, namely the duty to act judicially" (P 257)

Having gone so far as to merely affirm what Lord Atkin had already stated in the case of *Rex v Electricity Commissioners*, (1924) 1 *K B* 171, *Das, J* proceeded to summarise the principles deducible from the two kind of cases referred to by him in an earlier part of the judgment as follows (at p 260) —

"(1) that if a statute empowers an authority, not being a Court in the sense, to decide disputes arising out of a claim made by one party under

an objector, turns up, denies the facts or brings forward new facts, he is merely satisfying the Justices to determine what it is for them to do in the public interest. A judgment or decision against "A" is not really in favour of "B" at all. The Tribunal is not interested in the rival claims of the individuals, but in the result to the public of granting what is asked.

It is necessary for us, therefore, each time, to discriminate between the *appearance* of a *pseudo-lis* from the existence of a *real lis* before applying the above test.

Roscoe Pound.

(c) Roscoe Pound states the position, upon the general question under examination, somewhat succinctly in his "*An Introduction to the Philosophy of Law*" at pp. 52-53 as follows :

"Typically judicial treatment of a controversy is a measuring of it by a rule in order to read a universal solution for a class of causes of which the cause in hand is but an example. Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualisation whereby effect is given to its special rather than to its general features. But administration cannot ignore the universal aspects of situations without endangering the general security. Nor may judicial decision ignore this special aspect and exclude all individualisation in application without sacrificing the social interest in the individual life through making justice too wooden and mechanical."

The difference between the two then is not one of kind so much as it is of degree: that is, a preponderance of judicial characteristics may characterise the total process as being judicial in nature and *vice versa*: further that this would seem to be a question, not one of absolute compartmentalisation but merely of "a more or a less".

Exercise of discretion judicial or administrative.

(d) The administrative bodies exercise discretion in reaching the results of the administrative process, creatively; they are not bound by a pre-existing frame-work of rights and liabilities within which the judicial tribunals as a rule must work to administer justice.

The Law Officers of the Government, for instance, exercise their statutory functions of advising Government on legal questions, e.g. commencing prosecutions, filing acquittal appeals (S. 417 Cr. P.C.), giving consent to the institution of a certain type of suits (S. 92 Civil Procedure Code) etc.—but it cannot be said that they are, while so engaged, acting judicially, or quasi-judicially so as to be amenable to the writ of *Certiorari*. These actions are administrative. (See however contrary views in the case of *Abu Backer v. Advocate-General of Travancore Cochin State AIR* (1954) *Travancore Cochin* 331 *at p.* 336).

158. Discretionary Powers and the Fundamental Rules of Judicial Procedure

"In giving *judicial powers* to affect prejudially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the *power* is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance, as that which requires that, before its exercise the person sought to be prejudicially affected shall have an opportunity of defending himself. (*Bagg's case* (1616) *11 Rep.* 99, *R. vs. University of Cambridge* (1722) *Stra.* 557. *Emerson v. Newfoundland* (1854) 8 *Moo. P.C.* 157. *Ex Parte Ramshay* (1852) 21 *L.T Q B.* 238, *Thorburn v. Barnes* (1867), *L.R.* 2 *C.P.* 384; *Re. Pollard* (1886) *L. R.* 2 *P.C.* 106. Quoted from *Maxwell on 'Interpretation of Statutes'* p. 368, *9th Ed.*)

To the same effect are the words of *W. A. Robson* (*See his 'Justice and Administrative Law, p.* 400, *3rd Ed.*)

"The idea of a discretion which is to be exercised, not in a capricious and impetuous way, but in a disciplined and responsible manner, is a conception which has had a wide

Into which class do licencing tribunals fall? Obviously for the most part their functions are administrative, for by statute justices grant licence to such persons as they, in the exercise of their discretion, deem fit and proper There is no question of legal right, an applicant for a new licence has no right "

"After he gets the licence he has a legal right because the Tribunal has created it But a judicial tribunal does not create legal rights, it hears a claim that a legal right exists, it investigates a claim, and pronounces whether the claim is true or not It confers nothing, it merely gives effect to the pre existing rights of the parties—creation is not a judicial function '

(b) Dr D C Holland in his scholarly paper on ' The High Court Control Of Inferior Tribunals" [See *Current Legal Problems*, (1952)] states his conclusion on the question of formulating a test for drawing a distinction between quasi judicial and administrative function as follows (b) Dr D C. Holland

'To sum up, my conclusion is that where the case is triangular involving two parties and a third person as judge between them the courts will always regard the function as quasi judicial in nature Where however the statutory power does not involve a triangular situation analogous to that before a court of law whether the function is regarded as judicial or not depends upon the Court s view of the nature of the function If they regard it as analogous to functions conferred upon the Courts, involving for example, the condemnation of an offence and the punishment of an offender, then they will hold it to be judicial in nature It may be well of course, that in the latter case changing times mean that the Courts are now less ready to regard a function as analogous to a judicial function "

In so far as this 'test' has reference to the existence of a *lis inter partes* it is reminiscent of the observations of Lord Hershell in the case of *Boulter v Kent Justices*, (1897) *A C* 556) where what he said in effect, was that a tribunal is judicial if its business is to deal with *lis inter partes*

"When proceedings are taken by way of information or complaint which end or may end in conviction or order, there are always two parties—the person initiating the proceedings and the person against whom the proceedings are taken "

But in the case of licensing Justices, said his Lordship, it could not be said that there is any *lis inter partes* for the simple reason that the grant of licence is for all practical purposes the conferment of a privilege and the power is to be exercised in the interests of the public The applicant before the Licensing Justices seeks a privilege, and a member of the public who objects merely informs the mind of the Authority to enable it rightly to exercise its discretion whether to grant that privilege or not

"A decision that license should not be granted is a decision that it would not be for the public benefit to grant it It is not a decision that the objector has a right to have it refused It is properly speaking a determination in his favour It is I think, a fallacy to treat the refusal as necessarily induced by a particular objector Every member of the local community might object Would they all then become the other party? There is in truth no *lis*, no *controversy inter partes* and no decision in favour of one of them and against the other, unless indeed the entire public are regarded as the other party for if a license be refused on the ground that it was not needed to supply the legitimate wants of the public at large, the decision is really in favour of public at large "

Thus there is a *lis* when "A" says "B owes me Rs 500/ / " and when "B ' appears he says "I don't owe the amount claimed to "A" But there is no *lis* when "A" says facts are such and such and you ought to be pursuaded into giving me a license If "B"

definition contained in the statute and no declaration can be made except in respect of premises which are premises defined by the statute and finally no order of requisition can be made unless it is an order relating to the premises defined by the statute.

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With regard to the jurisdiction of court in *certiorari* proceedings commenced under S.45 of the Specific Relief Act to question the validity of the governmental acts performed in disregard of the conditions precedent prescribed by law for the due exercise of the power, the Bombay High court observed (at p. 471) :

"A writ of *certiorari*, it need hardly be stated, is issued only to persons or bodies discharging judicial or quasi-judicial functions and it is issued when the person or the tribunal acts in excess of its jurisdiction or fails to exercise jurisdiction which is conferred upon it or in the exercise of its jurisdiction contravenes the principles of natural justice. Mr. Seervai has rightly conceded that if a tribunal wrongly decides what might be called collateral or jurisdictional facts, the existence of which alone confers jurisdiction upon the tribunal, a Superior Court would interfere and correct the tribunal exercising judicial powers. On the other hand, if the tribunal is deciding facts in issue or facts the decision of which is within its jurisdiction and for the purpose of which it has been created, then however wrong the decision on the facts may be, because the decision is within jurisdiction of the tribunal the Superior Court will not interfere. Therefore, a clear line of demarcation is drawn, as far as writs of *certiorari* are concerned, between cases where the Court will interfere and cases where the Court will not interfere. Now, we fail to see what is there in principle, and we think there is none in authority either, why the same principle should not be applied to officers exercising the power conferred upon them by statute. If the power is *unlimited*, the court undoubtedly cannot interfere. If certain matters are left to the discretion of the officer, the Court cannot control that discretion unless the discretion is arrived at *mala fide* or is not a proper exercise of discretion. But if the power is not unlimited, but is a power conditioned by limitations, then, in our opinion, the limitations or the conditions precedent occupy the same position as collateral facts in the case of a tribunal exercising judicial or quasi-judicial functions. Just as the Court will interfere to correct collateral facts wrongly decided, the Court will also interfere when the officer exercises his power without satisfying the conditions precedent and thereby violates the mandate of the Legislature."

Take the case of those statutes which make the exercise of power contingent upon, and subject to, the satisfaction of the person charged with the duty of exercising the power in question. In the case of such a statute, expressions like "if satisfied" appearing therein no doubt are to be construed as prescribing a condition which, in effect, limits the exercise of the power conferred, and in the absence of such a condition having been complied with there would be no legal basis for the exercise of what otherwise might be regarded as an absolute and unqualified power. But it is also true that such expressions unmistakably constitute the donee of the power *the sole judge as to the existence or the non-existence of the prescribed state of mind requisite for the due exercise of that power*, and in all these cases, in the absence of evidence showing that the public functionary has acted *fraudulently* or *mala fide*, it would be difficult to say whether or not such a condition of mind at all existed. It is on this account that several judicial pronouncements have declared that when a matter is left to the subjective discretion of the authority or tribunal, it is not a matter which is amenable to being corrected by means of *certiorari* proceedings.

ishaldas 's case.

This in fact seems to be the principle in terms of which the majority decision in *Khushaldas Advani's case* (*AIR* 1950 *S.C.* 222) referred to earlier could be explained. It would be recalled that in that case too, merely on the plain construction of statute, the principal question of fact to resolve was, "Whether in the opinion of Provincial Govern-

application in English Law and Politics It really represents a compromise between the idea that people who possess power should be trusted with a free hand, and not tied down by narrow formulae, and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way Discretion in public affairs is seldom absolute, it is usually qualified It must be used 'judicially,' and hence we often hear the expression 'a judicial discretion' " (See further (1) *R vs Electricity Commissioners* (1924) 1 *K B* 171 and (2) *R v Manchester Legal Aid Committee*, (1952) 2 *Q B* 413 (1952 *All E R* 480)

159. Certiorari—and correction of erroneous determination of jurisdictional facts.

Having reviewed some of the tests or criteria by resort to which it is possible to discriminate between the Judicial and Quasi judicial acts, on the one hand and merely ministerial acts on the other, it is necessary to advert to an important aspect of the problem connected with the exercise of *Certiorari* Jurisdiction by the Superior Courts The question to be considered is How far can the exercise of power by inferior tribunals be questioned by means of *certiorari* proceedings in cases where they have determined collateral" or 'Jurisdictional facts" erroneously and have thus conferred upon themselves the authority to exercise power, that is power which, under the law, had to be exercised by them *only* upon the occurrence or happening or fulfilment of certain well defined contingencies or conditions The very *approach* which the statute prescribes for the determination of this question of finding *Jurisdictional facts* may itself suggest to the Superior Court the character of the inferior tribunal—that is whether it is a judicial or merely an administrative tribunal Whatever might be the state of law in England in regard to the scope of the controlling jurisdiction of the King's Bench Division, in the matter of issuing writs of *certiorari* for giving relief to persons aggrieved by determinations of inferior tribunal that are *not* under a duty to act judicially but which have been shown to have acted without jurisdiction, the position under the Pakistan and the Indian Constitutions can hardly admit of any dispute

In this connection we might notice the decision in the case of the *State of Bombay v Laxmidas, AIR* (1952) *Bombay* 468 This was a case in which the provisions of Bombay Land Requisition Act, 1948, came in for consideration Under that Act, the Bombay Government requisitioned a flat situated in a trust property of which the petitioners were the trustees Under sub section (4) of Section 6 of the Act, the State Government had the power to requisition premises which were *vacant*, provided they were of the kind defined in the Act and were required for the purpose of State or any other public purpose" The question that arose was whether it is possible for a court of law to go behind the declaration made in the order of the Government that the premises were vacant and that they were the premises of the kind defined in the statute The answer that the Bombay High Court gave was that the Court had the power to go behind such a declaration in certain specified category of cases The reasoning in support of this decision was that the power of the Government to requisition vacant premises under Section 6 is not in the nature of an unlimited and uncontrolled power This is a power which is conditioned by the limitation laid down in the Act itself, and before any valid order under S 6(4) can at all be made, certain conditions are to be satisfied which are "conditions precedent" to the exercise of the power by the State And these conditions are (a) that the requisition must be for a public purpose (b) that only those premises can be requisitioned to which the Act applies and (c) that the premises must be vacant No enquiry can be held under S 6(4) except with regard to the premises which are premises according to the

State of Bombay v Laxmidas

ment the premises were required for a public purpose" before the power reposed by the statute in the relevant authority to requisition those premises, could at all be deemed to be available for exercise by him It was contended that this was a condition precedent for the exercise of power and that the court could go into that question that is, determine whether or not that condition was complied with in order to be able to further determine *whether or not the* power was at *all* validly exercised Confining our attention to the judgment delivered by Chief Justice Kania it is sufficient to point out that the learned Chief Justice came to the conclusion that, to the extent that the Provincial Government had to form an opinion that it was necessary or expedient to requisition any property it was a subjectively determinable fact, but to the extent that it had to be for a public purpose, the requirement of statute could be resolved by appeal to external elements and this was not a subjectively determinable fact but an objective one The learned Chief Justice further remarked at p 227

> " If the Government erroneously decides that fact it is open to question in a Court of law in a regular suit just as its action, on its decision on the facts mentioned in the proviso to S 3 and in S 4 is open to question in a similar way

And Fazl Ali J in the same strain on page 228 observed

> " The existence of a public purpose is the foundation of the power (or jurisdiction, if that term may appropriately be used with reference to an executive body) of the Provincial Government to requisition premises under S 3, or, as it is sometimes said, it is a condition precedent to the exercise of that power '

In the case of *State of Bombay v Laxmidas, AIR* (1952) *Bombay* 468 learned Chief Justice Mr Chagla interpreted the principle of this decision of their Lordships of the Supreme Court of India in *Khushaldas case* (*AIR* (1950) *S C* 222) in relation to the power of the courts to issue prerogative writs *as being confined to the pre Constitution situation when the High Courts had no power to issue a writ against the Government* In his words (at p 473) —

> "In order to appreciate this observation of the learned Chief Justice, we must bear in mind that at the date when these observations were made the High Court had no power to issue a writ of mandamus against Government Therefore, all that the learned Chief Justice was emphasising with respect, was that public purpose was an objective fact to be administratively determined that the decision of Government was not binding and that decision could be challenged in a Court of law At that date it could only be challenged by a suit and naturally therefore, the learned Chief Justice could only refer to the particular remedy which was open to the subject We refuse to look upon this observation as even a comment of the learned Chief Justice that in a case like this, a writ of mandamus would not be issued by the High Court if the High Court had the power to issue such a writ "

The moral of the foregoing analysis of the state of case law bearing on the question of the scope of the writ of *certiorari* in regard to the powers of superior courts to interfere with orders of inferior tribunals where they have assumed jurisdiction without complying with by means of a proper determination a condition precedent laid down by statute for the due exercise of their own power might be summed up as follows **The position summed up**

Where a subordinate tribunal has an absolute and unqualified power to determine the existence of 'subjective condition' requisite for it to enter upon the exercise of its power or jurisdiction to act in a particular matter its determinations in the exercise of the authority thus conferred are sacrosanct and are not amenable to be corrected or interfered with by a superior court in the exercise of its writ jurisdiction

"But when", to quote from the observations of Justice Mr Chagla in the *Bombay case* (*AIR* (1952) *Bom* 468 *at p* 472) referred to above "the existence of an objective fact is laid

jurisdictional fact? If the legislature intended that the existence of 'reasonable grounds to believe' was to act as a check on the arbitrary exercise of power, did that device not also establish the existence of a legislative intent that the 'administrative discretion' conferred by the statute was to be exercised *judicially*? Supposing there was evidence to believe that the Controller, as a matter of fact, had no such 'reasonable grounds to believe' as were required by the enactment which gave him the power to cancel licence, would not his order have been amenable to review on the ground that there existed a defect of jurisdiction to assume the exercise of this power? Would not a *mandamus* have lain in such a case to command the Controller to act within the law before he could successfully deprive people of their rights to deal in a certain business or trade?

The impact of the case of Nakhuda Ali on the interpretation of ART. 170.

The above decision of their Lordships of the Privy Council however helps considerably in the comprehension of the scope of writ of *certiorari stricto sensu*. If the Rules relating to the English writ jurisdiction are at all to be a rigid guide, the principle of the decision of their Lordships of the Privy Council would, to a considerable extent, in parallel cases, dominate the interpretation of the scope of ART. 170 which confers writ jurisdiction upon the High Courts of this country, and would, it is submitted with respect, go a long way in delimiting it in several directions. But it cannot be forgotten that powers of our courts under ART. 22 as well as ART. 170 are not confined only to the writ of *certiorari* but they are available to "writs, including writs *in the nature of writ of certiorari etc.*", and what is more the courts can, in addition to the above power, issue *orders* and *directions* as well. The wisdom of the Constitution-makers in enlarging the scope of the powers of the courts exercising controlling jurisdiction, jurisdiction analogous to the English prerogative jurisdiction in the matter of issuing writs, can be appreciated if due regard is paid to the fact that essentially ART. 22 is designed to be an effective means for the enforcement of fundamental rights. Situations can be conceived when fundamental rights as guaranteed by Part II are abridged or taken away by either the Legislature or the executive, but the aggrieved individual would not be able to secure the enforcement of those rights by means of the conventional writs like *habeas corpus*, *mandamus*, prohibition, *certiorari* or *quo warranto*. It is on this account that the language of ART. 22 has been couched in fairly wide terms so that the Supreme Court may not feel handicapped in giving to an aggrieved person the relief which is his due if the English view, namely, the writs were available to it on the lines they were available to the King's Bench Division in England, were to prevail.

The procedure is to be a *handmaid* of justice and, in the matter of securing justice to the individual in regard to the violation of his fundamental rights, the Constitution advisedly has conferred enormous powers on the courts. If our polity is at all to be regarded as law-dominated, all manner of encroachments on the ordinary legal rights, as also the fundamental rights guaranteed by the Constitution, should be capable of being enforced by appeal to constitutional remedies.

The only limit on the power of the High Court to make available appropriate relief under the provisions of ART. 170 is the consideration that the normal work of the ordinary subordinate civil and criminal courts that have been set-up in the country for the administration of civil and criminal justice, should not come to standstill. But in all cases where it is of the *essence of the relief that it should be speedily made available and where the normal procedure would not adequately protect those rights*, ART. 170 could be effectively used for the purposes of enabling the citizen or any other aggrieved person in the realm to obtain a vindication of his legal or constitutional rights.

Enough has been said to indicate why, so far as our Costitution is concerned, distinction between judicial and quasi judicial functions of inferior bodies or tribunals in several ways becomes an academic one: if there is a *violation of law* amounting to the inva-

Secretary of State has reasonable cause to believe any person to be of hostile association or origin ..." Their Lordships of the Privy Council, however, did not adopt similar construction of the words in Regulation 62 which they were called upon to interpret in *Nakhuda Ali's case*. The point of distinction which they emphasised was that the decision of the majority in the case of *Liversidge v Anderson*, (1942) *A C* 206, was controlled by the context in which those words appeared. They observed:

"Indeed, it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words 'if AB has reasonable cause to believe', are capable of meaning 'if AB honestly thinks that he has reasonable cause to believe' and that in the context and surrounding circumstances of what after all was a Defence Regulation XVIII B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context, the circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood, and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning 'if there is in *fact* reasonable cause for AB so to believe'.

"After all, words such as these are actually found when a Legislature or law making authority confers powers on a minister or official. However read they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power, the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships, therefore, treat the words in the Regulation 62, 'Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer' as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation.

"But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of the circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his [illegible] enjoined that he [illegible] thing he can [illegible]

How are we to interpret the *ratio decidendi* of the above case? Would it be wrong to say that the existence of reasonable ground to believe that a particular person was unfit to be allowed to be continued as a dealer, though a 'condition precedent' for the valid exercise of power is nevertheless a condition as to the existence or non-existence of which the public functionary is the sole judge—as if to say that it is not a justiciable condition. One detects inconsistency in the reasoning of their Lordships: if the 'reasonable grounds to believe' *must exist* before the power to cancel a licence can be exercised, would not the process of reaching that state of mind be analogous to a judicial approach to the discovery of a

way". But the superior court has no power to substitute its own decision upon the facts or law concerned in that case. (See *Rex v. Northumberland Tribunal* (1952), 1 *All E.R.* 122). Thus, as it has been observed by textbook writers, *certiorari* remains, and cannot be anything more than a method of *review* and is on that account to be distinguished from the remedy by way of *appeal*. In an appeal there is a re-hearing on facts and law and the court of appeal is competent itself to pass an order which could have been passed by the court from where the appeal has been lodged. But in *certiorari* proceedings a superior court merely exercises its powers of *judicial* control of administrative tribunals that have a duty cast upon them to act judicially. (For a full discussion of this topic, please see *Grift and Street's Principles of Admininistrative Law*, *1952 edition, page 161 onwards*).

Certiorari—Is it a writ of right?

The next thing to remember is that in England at least it is not yet settled whether writ of *certiorari* would lie as a matter of course as though it were a writ of *right* or is it a matter which is within the *discretion* of the court. There are conflicting decisions in England upon this point. In the case of *Rex v. Manchester & Leads Railway*, (1838) 7 *L.J.* (*Q.B.*) 192; 8 *Ad. & El. page* 413, (the court presided over by Lord Denman, Lord Chief Justice) it was held that the issue of *certiorari* was a matter of *discretion* even though there may be fatal defects on the face of the proceedings that are sought to be brought up. Similarly, in the case of *Rex v. Commissioner of Income-tax for the City of London*, (1904) 91 *L. T. page* 94, the court did not allow *certiorari* to issue as all that could be pointed out was a "small mistake" that had been made by the inferior tribunal. But the court nevertheless observed that if the Commissioners had stepped outside the jurisdiction accorded to them by the Customs and Inland Revenue Act of 1890 it would have quashed the decision. In an earlier case, however, (*Arther v. Commissioner of Sewers* (1784), *Et Mod.* 331) three of the four Judges held the issue of writ to be a matter of *right*, whereas the fourth one held that it was not, and that it could be denied upon consideration of the circumstances of the case *in the discretion of the court*. (Referred to, in *R. v. Justices of Surrey*, 1870, *L.R.* 5 Q.*B.* 466 *at* 473).

Thus if a person who is not substantially aggrieved by an order cannot be allowed to bring up the order of subordinate tribunal for being quashed in *certiorari* proceedings or, similarly, if a person has suppressed facts (see *Rex v. The General Income-tax Commissioners, Kensington*, (1917) 1 *K.B.* 486 and *Indumati Devi v. Bengal Court of Wards* 42 *C.W.N.* 230: *AIR* (1938) *Calcutta* 385; *Ratan Chandra v. Adhar Biswas, AIR* (1952) *Calcutta* 72 *etc.*) or injustice and inequity appears to a person who has not fully disclosed to the court his interest in the matter, the court would be entitled to say that it would not exercise its jurisdiction. Cockburn, Chief Justice, in the case of *Foster v. Foster & Berridge* (1863), 32 *L.J.* (*Q.B.*) 312, 4 *B. & .S.* 187 *at page* 199 observed:

> "I entirely concur in the proposition that although the court will listen to a person who is stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or public grievance has been sustained, yet that is not *ex debito justitiae* a matter upon which the court may properly exercise its discretion as distinguished from the case of a party aggrieved who is entitled to relief *ex debito justitiae*, if he suffers from the usurpation of jurisdiction by another court."

As to the conduct of the person applying for *certiorari* being taken into account by the High Court for the purpose of its exercising discretionery jurisdiction see *Rex v. South Holland Drainage Committee*, (1938) 8 *L.J.* (*Q.B.*) 64; 8 *Ad. & El.* 429, as also *Rex v Sheward*, (1880) 9 *Q.B.D.* 741: 49 *L.J.* (Q.B.) 716 (C.A.). It has been authoritatively laid down in *Rex. v. Kensington Incometax Commissioners ex parte Princess Edmund de Polignac*, (1917) 1 *K.B.* 486 that the rule of the Court requiring *uberrima fides* on the part of the petitioner for an *ex parte* injunction applies equally to the case of an application for a rule *nisi* for

sion of people's rights, ordinary or fundamental, a violation which the court regards as [illegible]

J in the case of *T C Basappa v T Nagappa*, reported in *AIR* (1954) *S C* 440 *at p* 443, are apposite in this context

> "The language used in ARTs 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of '*habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari*', as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for any other purposes as well In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law"

It would be true to say about the scope of ART 170, as was said of the scope of ART 226 of the Indian Constitution by Mehrotra J in the case of *Registrar University of Allahabad v. Ishwari Prasad, AIR* (1956) *Allahabad*, 603 at p 606, that

> "ART 226 *of the Constitution is couched in very wide terms It gives power to* the Indian High Courts to interfere, under its supervisory jurisdiction, with the orders of inferior tribunals somewhat in the same manner as the Court of King's Bench in England Whatever restrictions there are, they have been placed by the Courts themselves having regard to the fact that the Article gives a discretion to superior Courts which is to be exercised on well known judicial principles"

The words of Justice Harlan uttered in *Monongahela Bridge Co v United States* (1910) 216 *U S* 177· 54 *Law Ed* 435 appear to be applicable in terms to the power of our High Courts The learned Judge there (at p 195) said that,

> "The Courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property

160. Grounds on which Certiorari would lie

Grounds on which certiorari would lie.

Having considered the types of tribunals and authorities in respect of whose proceedings writ of *certiorari* will lie, it is now necessary to consider the *grounds* on which superior courts would interfere with the orders that are liable to correction by *certiorari* Broadly speaking these grounds are

(1) absence or excess of *jurisdiction*,

(2) breach *of the rules of natural justice* committed by the tribunal during the course of the proceedings, and

(3) an error of law *apparent on the face of the record*

Meaning of Certiorari "to quash"—and the concept of appeal etc

Before we consider the nature of these grounds and determine the limits within which they are available for commencing *certiorari* writ proceedings, it is necessary to remember that the only result that can ensue upon a successful petition for a writ of *certiorari* is that the order in question would be *quashed*, or as the phrase goes, "put out of the

The Supreme Court of India in the case of *Ebrahim Aboobakr v. Custodian General of Evacuee Property*, *AIR* (1952) *S.C.* 319 *at p.* 322 pointed out that :

> " 'Want of jurisdiction may arise' from the nature of the subject-matter, so that the inferior court might not have authority to enter on the inquiry or upon some part of it. It may also arise from the absence of some essential preliminary or upon the existence of some particular facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it."

The court distinguished this class of cases from the class where a tribunal, having validly entered upon inquiry to dispose of certain questions, proceeds to exercise it, but in the course of its exercise makes mistakes and reaches incorrect decisions. The latter class of decisions cannot be denounced as being those that have been reached by the tribunal suffering from a defect of jurisdiction. But, even in respect of the former class of cases, it is wise to keep in view the observations of Lord Esher M. R. in the case of *Reg. v. Income-Tax Commissioners*, (1888) 21 *Q.B.D.* 313 *at* 319, namely,—

> "When an inferior court or tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction.
>
> " 'But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. 'In the second of the two cases I have mentioned it is erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends'; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

See further the case of *Colonial Bank of Australasia v. Willan*, *(1873) L.R. 5 P.C. 417 at* 442, where the Judicial Committee formulated the test of determining the absence of jurisdiction as follows:

> "In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that the conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge or on the nature of the subject-matter or on the absence of some essential preliminary, must obviously, in most cases depend upon matters which whether apparent on the face of the proceedings

a writ of prohibition and that where there has been a suppression of material facts, the court would refuse the writ without going into the merits of the case

In England, the writ of *certiorari* is granted as of course when motion is made by Attorney General on behalf of Crown, *R v Eaton* (1787) 2 *Term Rep* 89

The true distinction between expression '*as of course*' and '*ex debito justitiae*' has been explained by D C M Yardley, as follows

> "The former probably means that the writ would issue in a given set of circumstances, the applicant being entitled to assume that the *writ* would issue unless some facts rebutting his right should appear The latter expression, on the other hand, probably implies that the Court would make a positive effort to look for any such rebutting circumstances in the absence of which the applicant would be entitled to assume that the writ would issue "

(See Modern Law Review for 1955, p 338 at 390, as also the case of *R v The Justices of Surrey*, (1870) *L R* 5 *Q B* 466)

Enumeration of Grounds on which certiorari lies —Defect of Jurisdiction

Defect of Jurisdiction

This ground hardly needs any elaborate discussion if a tribunal acts in the total absence of jurisdiction or, having jurisdiction to decide a question, exceeds its jurisdiction in deciding a matter which is beyond its statutory competence, *certiorari* would lie (See *Bank of Australasia v Willan*, (1873) *L R* 5 *P C* 417, *Rex v Woodhouse* (1906) 2 *K B* 501)

As has been indicated earlier, if a tribunal assumes jurisdiction after the determination of a question of a fact (that is, of what in America is called jurisdictional fact) the existence of which by the statute has been made a condition precedent for the exercise of its jurisdiction, the superior court would review the finding of the fact in an attempt to see whether jurisdiction has been properly acquired by the tribunal (See (a) *White & Collins v Minister of Health*, (1949) 2 *K B* 838, (b) *Queen v Justice of Surrey* (1870) 5 *Q B* 466 and (c) *Rex v Nat Bell Liquors Ltd* , (1922) 2 *A C* 128) The principal object of *certiorari* is to confine statutory tribunals to the sphere of their allotted jurisdiction

The defect of jurisdiction may arise from plurarity of causes (a) it may have reference to the *nature* of the subject matter, or (b) it may arise from considerations such as the *time* within which such a proceedings should have begun (see *Reg v Wimbledon* (1953) 1 *All E R* 390) or (c) it may arise upon a mistaken view of the legal provisions upon which the existence of the jurisdiction to exercise power is itself contingent (See *Reg v Brighton* (1954) 2 *W L R* 441) As to the question how far the superior court would be entitled to treat total absence of evidence before the inferior tribunal as a defect of jurisdiction the student would do well to read the observations of their Lordships of the Privy Council in the case of the *King v Nat Bell Liquors Ltd* , referred to earlier, where a detailed analysis of the English and Canadian Authorities has been presented with the usual cogency and clarity which distinguish its judgment references have been made to cases like *Reg v Boulton*, (1841) 1 *Q B* 66, *Colonial Bank of Australasia v Willan*, (1873) *L R* 5 *P C* 417 etc See also *AIR* (1955) *S C p* 154, *Dhaneshwari Cotton Mills v Commissioner of Income Tax West Bengal*) In all these cases the superior court exercising *certiorari* writ jurisdiction is competent to quash orders passed by the inferior tribunal, and where it fails to exercise a jurisdiction vested in it by law it could be commanded by a *mandamus* to move forward in the exercise of the jurisdiction that it has declined to exercise

It may even be that a jurisdiction validly assumed may have been afterwards lost [illegible] (See *Ex parte Bradlaugh*, (1878) 3 *Q B D* 509, *The* [illegible] *ex v Hammersmith Profiteering Committee* (1920) [illegible] of the superior courts to enquire into the correctness of a finding of fact as to the existence of a condition precedent for the exercise of jurisdiction, see *Re Bailey*, (1854) 3 *E & B* 607)

Commission. This case, however, involved facts which were in dispute and the respondents were entitled to an impartial and unbiased trial of those facts. Furthermore the case involved in the exercise of discretion in the possible imposition of penalty at the conclusion of the proceedings . . . . in other words, even if the facts in this case had been conceded and if the only question before the Commission had been that of degree of punishment the respondents would have been entitled under our form of government and the law of land, to have that punishment fixed by a Tribunal, none of the members of which was actuated by personal prejudices, *bias* or malice."

It is submitted, with respect, that the above decision cannot be regarded as being based on any sound principle: the distinction between "controversial" questions of facts and law, and questions involving exercise of discretion by a tribunal appears to be completely irrelevant to the determination of the issue relating to *bias* that is raised before Superior Courts. It is possible, however, to look at this problem from another perspective: where the bias alleged is inherent in the very office created by the statute no exception can be taken to it. The *Sea Customs Act*, for example, makes the Collector of Customs, who is administratively interested in the collection of Revenue for the Government, as the adjudicating officer for disposing of cases relating to the commission of offences under the *Sea Customs Act*. It cannot be contended that such an officer, because he is suffering from administrative bias, is incapable of adjudging offences and imposing penalties—and it would be a sufficient answer to the challenge to say that Legislature itself has created the Tribunal with full knowledge of the existence of that type of bias and there is nothing that the Courts can do about it. The statute has itself created a biased body—and no one can be heard to complain against that situation. Of course, if there is some other ground of complaint, that is complaint unconnected with administrative bias, the matter would be governed by other principles. In the second place, a ground of challenge based on bias can be adequately met with by pleading the doctrine of *ex-necessitate*. A judge otherwise disqualified to decide a case in which he may be interested, may nevertheless be supposed to do so if his competence to decide it is exclusive and there is no legal method or procedure of having the case withdrawn from his control for being handed over to another judicial officer, as his substitute. See *Dimes v. Grand Junction Canal Co.*, (1852) 3 *H.L. Cases* 759. See also the Privy Council case from Canada, (1937) 2 *D.L.R.* 209, *Judges v. Attorney-General of Saskehehnoan*, where the decision in 1936, 4 *D.L.R.* 134 was upheld.

In the case of *Anwar v. Crown, PLD* (1955) *Federal Court page* 185, the concept of *bias* in relation to proceedings under the Criminal Procedure code was considered and conflicting opinions in regard to the character and effect in law of orders and judgments recorded by a *biased judge* were recorded:the majority view taken in that case was summed up by *Chief Justice M. Munir* as follows (pp. 210-211):

"(1) Every accused person has the right to a fair trial, namely, the right to be tried on the evidence by a judicially minded person.

(2) If the Judge is functioning under an influence brought about by his own act or by the act of another person, which has the effect of paralysing his judicial faculties, there is no fair trial.

(3) The fact that there was a paralysis of judicial faculties in a Judge cannot be proved by independent evidence but must appear from the manner in which he held the proceedings or arrived at his conclusions. Unless, therefore, it be shown that the proceedings held were not fair or impartial or that his conclusions were wrong, an allegation of paralysis of judicial faculties would be as much out of place as the allegation that the Judge was deaf when it appears from the record that he heard the evidence and prepared a true and faithful record of it.

or brought before the superior court by affidavit, are extrinsic to the adjudication impeached But an objection that the Judge has erroneously found a fact which though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter he properly entered upon the inquiry, but miscarried in the course of it The superior court cannot quash an adjudication upon such an objection without assuming the functions of the court of appeal and the power to re try a question which the Judge was competent to decide "

The defect of jurisdiction may also arise from interest, or *bias* that is, it might have reference to the defects in the very constitution of the tribunal In the case of *Frome United Breweries v Bath Justices*, (1926) *A C* 586, Viscount Cave L C held invalid a revocation of a licence by the authorities because some of the members of the Tribunal had aided the prosecution *Bias*

"If there is one principle", said his Lordship, "which forms the integral part of English Law it is that every member of a body engaged in judicial proceedings must be able to act judicially, and it has been held over and over again that if a member of such a body is subject to a *bias* (whether financial or other) in favour of or against either party to a dispute, or he is in such a position that a *Bias* must be assumed he ought not to take part in the decision or even sit upon the Tribunal This rule has been asserted not only in the case of the Courts of Justice and other judicial tribunals but in the case of authorities which though in no case could be called Courts, have to act as Judges of the rights of others From the above rule it necessarily follows that a member of such a

It is a well known maxim of law that *Nemo debet esse Judex in propria cause* (no one can be a judge in his own cause), and if it can be shown that a person taking part in the decision of a judicial or quasi judicial tribunal has a direct interest in the subject matter of adjudication the decision being a nullity, *certiorari* will lie

This is, however, not an inflexible rule and it is by now well settled that mere departmental or administrative bias in the case of a quasi judicial tribunals will not vitiate their orders The rigour of Rule against bias thus varies not only according to the type of tribunal set up to decide the case but also in relation to other circumstances of the case The rule is applied strictly to regular courts of law (see *Dimes v Grand Junction Canal Water* (1852) 3 *H L Cas* 759, *Regina v Rand*, (1866) *L R* 1 *Q B* 230, *The Queen v Huggins* (1895) 1 *Q B p* 563 *See also Rex v London Justices ex parte South Metropolitan Gas Company* (1908) 72 *J P* 137, 98 *L T p* 519, *and Rex v Farrant*, (1887) 20 *Q B D* 58)

It is difficult to discover the elements of distinction that characterise the attitude of superior courts when they are invited to consider the force and effect of challenges directed against determinations by biased inferior court Judges on the one hand, and biased presiding officers of the administrative Tribunals charged with duties of acting judicially, on the other

In America a curious doctrine has been developed to the effect that where an adminis

"If this case were one in which the facts were not in controversy and in which the Court were not required to exercise any discretion, but only the application of the principles of law to an admitted state of facts invoked, the rights of the respondents might be adequately safeguarded by a statutory right of appeal from the decision of the

with respect, that in the situation presented by the facts of that case, or a case analogous to it, the question of bias in the Sessions Judge does not at all arise. The Superior Court offers its opinion during the course of doing its duty under law and the 'Sessions' Judge does not become and cannot be regarded as being a biased judge merely on that score. It is obvious, however, that once a judge is shown to be 'biased', in the proper legal sense of that term, his judgment is a nullity, and the further requirement of showing his judgment to be wrong on merits of the case seems to be unnecessary—for if the judgment is wrong on merits, it will any how be set aside, 'bias' or 'no bias'.

Some text-book writers and decided cases lay down, that the requirement as to the absence of bias flows from the overall duty of the judicial tribunals to follow the rules of natural justice. This view is based upon the somewhat controversial position in law that 'bias' does not make the determination of the tribunal necessarily void but only voidable—so that there could be a waiver by the party with respect to it. The better view, however, is to regard 'bias' as a matter affecting jurisdiction and rendering the determination void.

The *right to object* to the competence of a person to adjudicate on the ground of *bias* may be lost by *waiver*. (See *Rex v. Williams ex-parte Philip*, (1914) 1 *K.B.* 608). In this case, by S. 15 of the Bread Act, 1836, it was provided that no person concerned in the business of a baker could act as a Justice of the Peace under the Act. Despite this, a conviction under S. 4 of that Act had been recorded by Justices, one of whom it was alleged was a person concerned in the business of a baker. The objection was not taken at the hearing. The application was rejected because:

> "A party by his conduct may preclude himself from claiming the writ *ex debito justiticae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void, it is true no conduct of his would validate them, but such considerations do not affect the principles on which the court acts in granting or refusing the writ of *certiorari*. This special remedy would not be granted to a person who fails to state in his evidence on moving for the rule *nisi* at the time of the proceedings impugned he was unaware of the facts on which he relies to impugne them. By failing so to do a party aggrieved precludes himself from the right to have the writ *ex debito justiticae* and reduces his position to that of one of the public having no particular interest in the matter. To such a one the granting of writ is discretionary."

Strictly, from the point of view of principle, it is hard to understand why the failure to raise objection, until after the hearing, be regarded as precluding the party from raising it subsequently. If the decision rendered by a Judge, who is disqualified from judging the cause because of *bias*, is a nullity and void, as has been ruled in cases like *Regina v. Hertfordshire Justices*, (1845) 6 *Q.B.* 753; *Regina v. Rand*, (1866) *L. R.* 1 *Q.B.* 230, how can failure by a person, who is aware of the facts, to raise objection could be deemed to render valid a result which anyhow is void. If the objection on the ground of bias is based on the view that the case be not heard by *unbiased Judges*, the failure to raise objection is not at all relevant to the determination of that issue. Probably, what is suggested by *Channell J.*, in the foregoing extract which is taken from his judgment, is the effect of another principle viz., that the grant of relief, by way of a writ of *certiorari*, being a matter solely within the discretion of court, failure to raise the objection could be taken as one of the factors to be considered by the Superior Court for the purpose of determining whether or not discretion to issue the writ in favour of the petitioner be exercised. Obviously, relief by way of a regular suit, cannot be denied to a person who became unsuccessful before the High Court in such a case.

The expression 'excess of jurisdiction' should be reserved for cases where a tribunal, having competently entered upon a permissible field of enquiry, transgresses

(4) Bias in a Judge, is the paralysis, complete or partial, of judicial faculties and therefore the allegation of bias against a Judge would be wholly unfounded unless it be

second trial was wrong, it could not be held that he was a biased Judge This Court's judgment in that case was restricted to showing that Mr Ahmad Khan s findings were in conformity with the observations of Mr Justice Kayani in the order of retrial and the judgments of the learned Chief Justice and of Shahabuddin and Cornelius JJ expressly proceeded on the assumption that Mr Ahmad Khan was influenced in his decision by the order of retrial and not on the finding that his judgment was in fact wrong The learned Judges did make some observations to the effect that the view of evidence taken by Mr Inayatullah Khan was not unreasonable but this cannot be said to amount

(5) Bias in judicial matters may be caused by the judgment order or observations of a superior Court or it may spring from personal, political religious communal racial commercial or economic considerations But whatever may be the cause of it it can never be held to be proved in the case of a Judge whose judgment is right because the fact that his decision was correct is a complete refutation of the allegation that his judicial faculties were paralysed A biased Judge producing a correct result is a contradiction in terms

(6) The conclusions stated above must be read subject to one important exception and that is that there is a species of bias which vitiates judicial proceedings irrespective of the correctness or otherwise of the result, but that is not because bias whatever form it may assume, avoids the result of judicial proceedings but because the Judge with that kind of bias is, on grounds of public policy, disqualified to be a Judge Thus no Judge can be a Judge in his own cause, or in a case in which he is personally interested not because his decision must invariably be in his own favour but on the principle that justice must not only be done but seem to be done, and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication and its result will be vacated by the Court of Appeal at the instance of the dissatisfied party Instances of such bias are recognised in our law in section 556 of the Code of Criminal Procedure, and will also be found in *Dimes v The Grand Junction Canal (No 1) and others* (1852, 3 H L Cas 759) *and Rex v Sussex Justices* (1924 1 K B 256) "

The minority view advanced by Cornelius, J was that the Courts have consistently declined to take *a r*

learned judge cited

Berger v U S A 65,

"To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section (i e S 21 of the Judicial Code) is directed The remedy by appeal is inadequate It comes after the trial, and if prejudice exists it has worked its evil, and a judgment of it in a reviewing tribunal is precarious It goes there fortified by presumptions and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient "

It was assumed both by the authors of majority and minority judgment in this case that the Sessions Judge, merely by reason of the fact that a retrial had been ordered by the High Court in the exercise of its power of appeal or revision after giving an expression of opinion that the prisoner was guilty, became a 'biased judge' It is submitted

executive with the intention of misusing those powers, this court would have th jurisdiction to deal with the matter."

In such cases, English courts have viewed the abuse of jurisdiction as one of tl forms of "excess of jurisdiction". As Lord Macnaughten [after referring to the remarks (Collins L. J. in the case of *Southwork and Vauxhall Water Co. and Wandsworth District Board (Works*, (1898) 2 *Ch.* 603] remarked in the Privy Council case reported in (1902) A.C. [213 (*Mayor and Councillors of East Fremantle Corpn. vs. Annois*).—

"In a word the only question is, Has the power been exceeded? Abuse is onl one form of excess . . ."

Similarly, it has been observed that "if the Legislature has given powers and tho powers are being used for the purpose of carrying out the works authorised, and it admitted that the mode in which they are being used is unreasonable, that is an abuse (power so given and is therefore *ultra vires*." (This remark is quoted by Farewell, L. in *Roberts v. Charring Cross, Enston and Hampstead Ry. Co.*, (1903) 87 *L.T.* 732 *at* 734. (See further (a) *Kewalram v. Collector of Madras*, *AIR* (1944) *Madras* 285; (b) *Prabhak Kesheo Tare & others v. Emperor*, *AIR* (1943) *Nagpur* 26 (remarks of Bose J. on the doctrin of Fraud on Power. This was a case of an application under S. 491 of the Code (Criminal Procedure. See also *Jitendra Nath Ghosh v. Chief Secretary to the Beng Government*, *AIR* (1932) *Calcutta* 753.)

Similarly, *certiorari* may be granted in cases where it appears that there has bee collusion, *corruption or fraud*. (*See Rex v. Gillyard*, (1848) 12 *Q.B.* 527, as also *R. v Recorder of Leicester, Ex parte Wood*, (1947) 1 *All E.R.* 928). These cases would come und 'abuse of jurisdiction' which is the same thing as 'defect of jurisdiction' at least for th purpose of '*certiorari*'.

(b) Ground of Failure to comply with principles of Natural Justice.

In considering whether the proceedings of an inferior tribunal, in respect of whic *certiorari* would lie, should be quashed, the principal question that arises is, whether princ ples of natural justice in the determination of the causes before it have been followec Here, the superior court is not concerned so much with notions of abstract justice as t see that certain well known forms of 'Judicial' as distinguished from 'Court' procedur are followed by lower tribunals. As pointed out in the case of *Rex v. Brighton Re Tribunal*, (1950) 2 *K. B.* 410: (1950) 1 *All. E.R.* 946 by Lord Goddard C. J., it is nc necessary that the proceedings must be conducted in accordance with the procedur known to ordinary courts of law: if the Act itself prescribes the procedure which tribunal is required to follow, it would be enough if those formalities prescribed by th Act are observed. The leading case on this subject, in England, is that of *Local Governme Board v. Arlidge*: (1915) *A.C.* 120. In this case there were three contentions put forwar on behalf of Arlidge before the Division Court where a prayer for a writ of *certiorari* t bring up and quash the impugned order was made. They were:

Arlidge's case.

(1) That he was not informed about the composition of the Board which heard th appeal.

(2) That he had not been allowed to present his case by means of an oral argume (and that the opportunity to make a representation in writing of which he took no advan age was argued on his behalf to be no adequate substitute for the right of audience), an

(3) That the Inspector's report which was an important document in the enqui was not shown to him.

The Divisional Court held (1913, 1 *K.B.* 463) that there was nothing wrong with th procedure adopted by the Board, but the Court of Appeal by a majority reversed the dec sion (See (1914) 1 *K.B.* 160—(Court of Appeal). Hamilton L.J., who dissented held tha natural justice was an expression sadly lacking in precision and took the view that Arlidg had not made out any case to the effect that principles of natural justice had not bee

its authority and trespasses into fields that are beyond its competence If the problem posed by such a situation be viewed from the standpoint of the result reached, the extent to which it has clutched at a jurisdiction to dispose of a subject matter, not within its competence, could with justification be described, with reference to the part of determination which is beyond its jurisdiction, as being the result of the tribunal having acted *in excess of its jurisdiction* *It should* be remembered that where a composite determination by a tribunal is shown to be in part valid, and in part not, the entirety of it would be quashed if the two are so inextricably blended that it is not possible to rescue one from the grip of the other As would be appreciated, this would be the result of the application of the principle of non severability discussed in another part of this book

In the case of *Dalchand Chittar Mal v Commissioner, Food and Civil Supplies Lucknow AIR* (1952) *Allahabad* 61, the Commissioner was competent to cancel the licence of a dealer, and to that extent it could be said that when he set out to exercise his power to cancel the licence he was really acting within the scope of his authority but nevertheless, the High Court of Allahabad quashed his order, because despite the requirement of the law to give reasons for cancelling a licence the Commissioner had failed to give any reasons whatever If he had given reasons, the court would hardly have concerned itself with the sufficiency of those reasons—but on finding that he had not given any reason, the High Court quashed the order Now was this *excess* of jurisdiction or was this an error apparent on the face of the record, or was it an arbitrary exercise of power because having acted contrary to the statutory mandate to furnish reasons the Commissioner, in effect, acts in the exercise of his professed power arbitrarily and fails to observe the law in the course of the exercise of his authority to cancel licence —or again, is it a case of 'defect of jurisdiction' upon the view that the law had empowered him to cancel the licence *only* upon assigning reasons, and this condition not having been complied with by the Commissioner, he was really acting out side the scope of his authority How the situation in particular would be viewed would depend upon the approach to the "problem of jurisdiction" by the court—but the present author is not aware of any clear and comprehensive attempt made by any court or a text book writer where any sharp and well defined distinction between these modes of regarding the problem may have been drawn It is difficult to draw, in several cases the boundary line between "absence" or "excess" of jurisdiction, or "violation of the principles of natural justice ' or "the making of error in the course of the exercise of jurisdiction which is apparent from the face of the record " Even the Judges of the Allahabad High Court, in the case cited above, do not deal with this aspect of the problem

Abuse of jurisdiction is indicated where, as a result of the exercise by the superior court of its power of control of inferior tribunals, it appears to it that the tribunal in the course of the exercise of its jurisdiction, has acted arbitrarily Upon analysis it would be [illegible] Abuse of Jurisdiction

[illegible]

mala fide, or (d) gravely abuses the discretion given to it by law to do certain things—a case of *abuse* of jurisdiction would be the result This is another way of saying that the tribunal must not only act within the law but act in *good faith* If the impugned order is in fact, not made in the exercise of the power conferred by or under the Act, or is made for a collateral purpose and is not passed *bona fide*, it would be struck down on the general ground that it is *not* an order under the Act and is therefore a nullity As Lord Reading said in the case of *Rex v Brixton Prison (Governor) Ex parte Sarno*, (1916) 2 K B 742

"If we were of the opinion that the powers were being misused we should be able to deal with the matter In other words, if it was clear that an act was done by the

(See *Balmokand v. Parmanand*, *AIR* (1951) *Punjab* 401; *Ravi Pratab Narain Singh v. State of Uttar Pradesh*, *AIR* (1952) *Allahabad* 99; *Cooper v. The Board of Works for the Wadsworth District*, (1863) 14 *C.B. (NS)* 180).

Similarly, Lord Haldane in *Local Government Board v. Arlidge*, (1915) *A.C.* 120 at 133 laid down that the tribunal—

"must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the cases made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice." See also *(a) in Rex v. Architects Registration Tribunal*, (1945) 2 *All E.R.* 131, (b) *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal*, *AIR* (1955) *S.C.* 65; and (c) *Sangram Singh v. Election Tribunal, Kotah*, *AIR* (1955) *S.C.* 425).

Errington v. Minister of Health.

In the case of *Errington v. Minister of Health* (1935) 1 *K.B.* 249, which was a case under the Housing Act of 1930, the local authority made a clearance order directing some houses to be demolished and this order was brought up in accordance with the provisions of law for confirmation before the Minister of Health. After the owners affected by the order had filed their objections, a public inquiry, which was required to be held, was held but it was *resumed and continued in private*. The court remarked:

"*A quasi-judicial* officer in the exercise of his powers must do it in accordance with the rules of natural justice, that is to say he must hear both sides and must not hear one side in the absence of the other."

In that very case Lord Justice Maugham observed:

"I do not think it has been proved that the statements which were made to the Minister in fact affected the decision of the Minister or of his officials and certainly I have no reason to doubt that officials were acting in what they thought to be in public interest. On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here with the result of depriving people of their property, especially if it is done without compensation, the person concerned should be satisfied that nothing unfair has been done in the matter and that *ex parte* statements have not been heard before the decision has been given any chance for the persons concerned to refute their statements. That seems to me a matter of the greatest possible public importance and if I am right in the view that I have expressed as to the functions of Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case as I understand them to be, the Court has no option but to quash the order as my brother has suggested."

To the same effect are remarks of Sir George Jessel in the case of *Russel v. Russel*, (1880) 14 *Ch. D.* 471, where too it was observed that, the rule that no man should be condemned to consequences without having the opportunity of making his defence, are applicable not only to the strictly legal tribunals but to every tribunal or body of persons invested with authority to adjudicate upon matters involving graue consequences to individuals. Lord Parmour also observed in the case of *Local Government Board v. Arlidge*, (1915) *A.C.* 120:

"Whether the order of the local Government is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance since if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit in accordance with principles of substantial justice."

Thus it is the requirement of the principles of 'substantial justice' that no order can be passed to the prejudice of another without that person being given an apportunity of

followed in his case His views were supported by all the four members of the House of Lords and the decision of the Court of Appeal was reversed (see 1915, *A C p* 120)

Lord Shaw in his speech in the House of Lords in Arlidge's case attributed to the term 'natural justice' a 'vanishing and shadowy texture'

"The words 'natural justice ", said he, "occur in arguments and sometimes in judicial pronouncements in such cases When a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means If a statute prescribes the means it must employ them If it is left without express guidance, it must still act honestly and by honest means In regard to these, certain ways and methods of judicial procedure may very likely be imitated and lawyer like methods may find especial favour from lawyers But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation, and the assumption that the methods of natural justice are *ex necessitate* those of courts of justice is wholly unfounded This is expressly applicable to steps of procedure or forms of pleading In so far as the term 'natural justice means that a result or process should be just, it is harmless though it may be a high sounding expression in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions, and in so far as it is resorted to for other purposes it is vacuous "

The speeches of their Lordships in the above case present a dismal picture of the [illegible] cision [illegible] the [illegible] en used with varying degrees of emphasis, and, in fact, there is no unanimity discernible in the several speeches delivered in the case in regard to the limits within which it could be now said that this doctrine o[illegible] Doctrin[e] of 'natural justice' [illegible] seems to be dominated by [illegible] shifting and its application seems to vary not so much with the much maligned foot of Chancellor as with the inclemencies of economico political climate that comes to surround its existence from time to time The following statement may however, be regarded as representing the best that can be said of the doctrine of natural justice in England

"Whether the standard be 'natural justice' or 'substantial justice' " remarks a recent writer, "or what is reasonable and fair, matters very little, so long as the courts are watchful that individual rights are not trampled upon by the unfettered and arbitrary exercise of powers, and that a man should not be deprived of his livelihood without recourse to a proceeding before an independent tribunal bearing some recognisable *resemblance to the proceedings of the ordinary courts " (See Natural Justice in English Law by G W Keeton in Current Legal Problem 1955 at page* 24, see also *Wade H W R on 'Twilight of Natural Justice* 1951, 67 *L Q R* 103)

Whatever may be the scope of the doctrine relating to the exercise of judicial and quasi judicial functions "*in accordance with the principles of natural justice*", one thing atleast stands out conspicuously and which for all practical purposes is a matter beyond dispute— namely, that it is the irreducible minimum requirement of the principles of natural justice *that a party be heard before any order to his prejudice could be passed*

Aud Alteram partern Rule

"The distinguishing feature of the judicial power", said *Bentham*, "is that an interested party must come to the Judge, require him to determine the matter of controversy, and the party to whom the order of the Judge may prove detrimental must have a right of *audience* Both sides should be heard and no one side should be heard in the absence of the other "

be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it". The Court, however, remarked at p. 244 :

> "This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

It is suggested, with respect, that here it is not the question so much of *apparency* of the error of law which is important as the question that it is indicated on the *face of the record*.

Rex versus Northumberland Compensation Tribunal

In the case of *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw*, (1952) 1 *All E.R.* 122, the entire case-law bearing on this question in England was surveyed and the concept of error apparent on the face of the record was set-forth with remarkable forensic clarity by Denning L. J. Among other things Denning L. J. has pointed out what the meaning of the word 'record', appearing in the expression "error apparent on the face of the record", is. He has also distinguished the scope of this ground as a basis for superior courts' jurisdiction to issue writs of *certiorari* from the scope of appeal proceedings. "This control", says he (at p. 127),

> "extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the Tribunal which, *on the face of it, offends against* the law. The King's Bench does not substitute its own views for those of the Tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so."

This was a case in which under Regulation 10 the applicant had been awarded compensation for loss of employment as a clerk and the applicant appealed against the award of the tribunal on the ground that "the compensating authority had failed to take into account his service with District Council as required by the Regulation." On his appeal having been dismissed, the applicant moved the Divisional Court for an order of *certiorari*, to be precise "for the order of the tribunal being brought up before it and quashed on the ground that the decision was erroneous on its face." The contention was that in view of the admission made by the respondent Tribunal that their decision was erroneous, "an error of law was apparent on the face of the decision of the tribunal", and the order could be quashed. The principal contention by the respondent was that although there was an error of law such an error did not *appear on the face of the record*, and the court could not interfere by way of a writ of *certiorari*.

In the Court of first instance (see *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw*, (1951) 1 *All E.R.* 268), Lord Goddard dealt with the question relating to the extent of jurisdiction exercisable by King's Bench Division in *certiorari* by showing that the view of the law laid down in the case of *Racecourse Betting Control Board v. Secretary of State for Air*, (1944) 1 *All E.R.* 60, to which the learned Law Lord was himself a party, was reached in ignorance of the decisions of the cases in *Walsall Overseers v. London and North Western Railway Co.* (1878) 4 *A.C.* 30, and *Rex v. Nat Bell Liquors Ltd.*, (1922) 2 A.C. 128. In that case Lord Greene, M. R. had observed :

> "It was said that the jurisdiction to set aside the award of an arbitrator for error of law appearing on its face is one that exists at common law independently of the Arbitration Acts. It was also said that the jurisdiction is not confined to consensual arbitra-

showing cause against the proposed order. And where it could be shown that this has not been done, *certiorari* would lie (See *R v Huntingdon Conforming Authority*, (1929) 1 K B 698)

But where the statute that creates the tribunal and invests it with jurisdiction to deal with a situation in a certain prescribed procedural way evinces an intention on the part of legislature to give freedom to the tribunal in question to modulate its procedure in any way it likes, the argument based on failure to comply with the fundamental principles of natural justice acquires a new meaning altogether (see *R v Brighton and Area Rent Tribunal*, (1950) 1 *All E R* 946) If there is a violation of these procedural safeguards, the result arrived at by the tribunal could be attacked as being *ultra vires*, but the better view is

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of the Court of Wards Act, 1879, had not heard the petitioner

"The obligation to give notice and to hear the party affected", observed learned Judge, "was recognised in the case of a Board of Works in (1863) 14 C B (N S) 180 (*Cooper v The Board of Works for the Wandsworth District*, (1863) 14 *C B (NS)* 180) which was followed in (1889) 24 Q B D 712 (*Hopkins v Smethwick Local Board*), Wills J stating at page 714

> "In condemning a man to have his house pulled down, a judicial act is as much implied as in fining him £5, and as the Local Board is the only tribunal that can make such an order, its act must be a judicial act and the party to be affected should have a notice given him and there is no notice unless notice is given of time when and place at which the party may appear and shew cause"

The learned Judge also relied on the following case in support of the same proposition (*Lapointe v L' Association de Bienfaisance et de Retraite de la Police de Montreal* (1906) *A C* 535) There was no statutory requirement as to notice before orders could be passed under S 27 of the Court of Wards Act—but nevertheless the failure to hear the person aggrieved by the order was considered sufficient for the purpose of issuing the writ of certiorari on the view that the making of such an order constituted breach of natural justice and was outside or in excess of the jurisdiction conferred by the Act

A decision reached as a consequence of steps taken in exercise of jurisdiction, without complying with the principles of natural justice, is no decision at all (*General Medical Council v Spackman* (1943) *A C* 627 (1943) 2 *All E R* 337) (For a further discussion of the operation of the rule relating to 'natural justice' see *Russell v* Duke of *Norfolk*, (1949) 1 *All E R* 109, which was however a case in which the remedy asked for was not *certiorari* but damages and declaration)

(c) Error apparent on the face of the Record.

Certiorari also lies in the case of an *apparent error*, that is error appearing on the face of the record of inferior tribunals Error need not be an error of law going to the root of jurisdiction of the tribunal but it is also true that mere formal or inconsequential

In the case of *Hari Vishnu*

Hari Vishnu Kamath's case

"What is error apparent

was observed in that case that it is difficult to formulate a test by resort to which the error of law may be regarded *as being apparent on the face of the record* One of the suggested tests was "that no error could

v. Lord Bagot (1824), 4 *Dow & Ry. K.B.* 315; 2 *L.J.O.S.K.B.* 152; 16 *Digest* 436, 2999; *and R.v. Warnford* (1825), 5 *Dow. & Ry. K.B.* 489. It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: (See Anon, (1697), 2 Salk. 479; 91 *E.R.* 412; 33 Digest 390, 1011. The record had also to set out the adjudication, but it was never necessary to set out the reasons: See *South Cadbury (Inhabitants) v. Braddon, Somerset (Inhabitanis)* (1710), 2 *Salk.* 607; 91 *E.R.* 515; 33 *Digest* 403, 1131; nor the evidence, save in the case of convictions. Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision."

The next question which was considered by Denning L. J., in the judgment was whether 'affidavit' evidence is admissible on an application for *certiorari*. On this question he observed as follows (at p. 131):—

"When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: See *R.v. Nat Bell Liquors, Ltd.* (1922) 2 *A.C.* 128; 91 *L.J.P.C.* 146: 127 *L.T.* 437; 16 *Digest* 419, 2795. Affidavits were, however, always admissible to show that the record was incomplete, as for instance, that a conviction omitted the evidence of one of the witnesses: see *Chitty's General Practice of the Law* Vol. II, p. 222, note (d), or did not set out the fact that the justices had refused to hear a competent witness for the defence: See *R. v. Anon* (1816), 2 Chit. 137, whereupon the court would either order the record to be completed, or it might quash the conviction at once."

After having considered this question, the learned Judge dealt with contentions before him as follows :—

"We have here a simple case of error of law by a tribunal, an error which they frankly acknowledge. It is an error which deprives the applicant of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay him the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such a case there were no means of correcting the error. The authorities to which I have referred amply show that the King's Bench can correct it by *certiorari*. It is true that the record which has been sent up to the court does not distinctly disclose the error, but that is only because the record itself is incomplete. The tribunal has sent up its decision, but it has not sent up the claim lodged with the compensating authority or the order made by them on it or the notice of appeal to the tribunal. Those documents would, I think, properly be part of the record. They would, I understand, have disclosed the error. If it had been necessary, the court could have ordered the record to be completed. But that is unnecessary, having regard to the fact that it was admitted in open court by all concerned that the decision was erroneous. I am clearly of opinion that an error admitted openly in the face of the court can be corrected by *certiorari* as well as an error that appears on the face of the record. The decision must be quashed, and the tribunal will then be able to hear the

tions, but extends to arbitrations under statutes Both these propositions are unquestionably correct see as to the former, *Hodgkinson v Fernie*, (1857), 3 *C B N S* 189, 27 *L J C P* 66, 140 *E R* 712, 2 *Digest* 527, 1645, and as to the latter Re Jones and Carter, (1922) 2 Ch 599, 91 L J Ch 824, 127 L T 622, Digest Supp The next and vital proposition is, however, one which, in my opinion cannot be supported either on principle or on authority It was that the jurisdiction is not confined to the case of awards of arbitrators, but extends to the decisions of every form of inferior tribunal, and, accordingly, when the legislature establishes a special tribunal, whether or not it can be described as an arbitration tribunal, the court can set aside a decision given by it if an error of law appears on its face This jurisdiction was said to exist quite independently of the old procedure by way of writ of error No authority was quoted in support of this proposition and, in my opinion, it is wrong on principle In the case of an inferior court, if it acts beyond its jurisdiction, the remedy is by certiorari

as in the present case, no right of appeal is given, their decisions are not appealable"

of stare decisis laid down by the Court of Appeal itself in *Young v Bristol Aeroplane Co Ltd* (1944) 2 *All E R* 293, that decision (in Race Course Betting Case) would be deemed as not binding

In the case before the Divisional Court of the Queen's Bench (1951 1 *All E R* p 268, at 277) his Lordship remarked

> "The tribunal has told us what they have taken into account, what they have disregarded, and the contentions which they accepted They have told us their view of the law, and for the reasons which I gave at the beginning of my judgment this court is of opinion that the construction which they placed on this very complicated set of regulations was wrong"

His Lordship affirmed the jurisdiction to correct such an error and remarked (at p 278)

> "I think that the decision to which we are now coming will be very beneficial because so many tribunals are now set up, all of whom, I am certain, desire to do their duty in the best possible way, but they are often given very difficult sets of regulations and statutes to construe It must be for their benefit, and I have no doubt they will welcome it, that this court should be able to give them guidance"

In the Court of Appeal, after observing that writ of *certiorari* was available for correcting errors of law appearing on the face of the record, Denning, L J proceeded to answer the question "What, then, is "record"? (See 1952, 1 *All E R* 122 at 130)

> "It has been said to consist of all those documents which are kept by the tribunal for a parmanent memorial and testimony of their proceedings see *Blackstone's Commentaries*, Vol III, p 24 But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it It did it in this way When the tribunal sent their record to the King's Bench in answer to the writ of *certiorari*, this return was examined, and, if it was defective or incomplete, it was quashed see *Apsley's case*, (1671), *Sty* 85, 82 *E R* 549, *R v Levermore*, (1700), *1 Salk* 146, 91 *E R* 135, 16 *Digest* 471, 3511, *and Ashley's case* (1697), 2 *Salk*, 479 91 *E R* 412, 16 *Digest* 470, 3494. Alternatively, the tribunal might be ordered to complete it *Williams*

precedent. Once the *apparency* of the error is regarded as an attribute of the error itself in the sense that the error should be glaringly apparent to the percipient consciousness, the administration of law would be irretrievably handed over to the subjective attitude of the judicial mind—for what is *apparent* to one judicial mind at first glance may require an elaborate analysis and argument for another judicial mind to perceive. That would be committing the administration of law to the evil of judicial solipsism.

The entire system of our judicial administration is based upon the view that it is possible to rescue from the subjective approach of the judicial mind, determination of cases by constraining it to be controlled in the determination of cases by objective criteria: and there is no good reason to suppose that the "error" to be corrected by means of *certiorari* must be defined in terms of the perceptive power of the Judges of the High Courts.

This view of the law as to what is meant by error apparent on the face of the record, would be found stated in the case of *Registrar, University of Allahabad v. Ishwari Prasad, AIR* (1956) *Allahabad* 603 *at p.* 607 where it was stated :

> "It was contended by the Advocate General that the words 'error apparent on the face of the record' occur in Order 47 of the Code of Civil Procedure and it may be useful to refer to cases where the courts have determined the scope and ambit of the words 'error apparent on the face of the record' in Order 47, Rule 1 of the Code of Civil Procedure. In our opinion, it is not a safe guide to rely upon the cases interpreting the words 'error apparent on the face of the record' in Order 47, Rule 1, Civil P.C., in order to determine the scope of these words in connection with the power of this Court to issue a writ of *certiorari* under ART. 226 of the Constitution.
>
> "When a court is asked to review its own order, it may not be a valid ground for the court to say that, as it finds on the reconsideration of its order that it is illegal, it should be set aside as it is an error apparent on the face of the record. It may be different where a superior tribunal is called upon to decide whether any erroneous decision of an inferior tribunal is illegal on the face of it."

This view has also found favour with the Division Bench of West Pakistan High Court in the case of *Muhammad Mohsin Siddiqi v. Chief Judge, Karachi, Small Causes Court, PLD* (1956) *Karachi* 203, where M.R. Kayani J. delivering the judgment observed (at p. 210):

> "The next question is whether *certiorari* lies in a case like the present one. In *R. v. Northumberland Compensation Appeal Tribunal* (1952) 1 All E.R. 122, it was held that *certiorari* to quash the decision of the tribunal lay, not only where the tribunal had exceeded its jurisdiction, but also where an error of law appeared on the face of the record. This seems to be the latest view in England and it has been confirmed by the Court of Appeal. It was followed by the Supreme Court of India in *Hari Vishnu Kamaih v. Ahmad Ishaque*, AIR (1955) S.C. 233: PLD (1956) S.C. (Ind.) 1. What is an error of law apparent on the face of the record is a matter for opinion on the facts of each case. In the English case it was observed that 'a striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where *certiorari* was used to determine the validity of a sewer's rate imposed by the commissioners of sewers'."

A perusal of this case would show that the error in this case was anything but apparent and had to be discovered upon an intricate argument at the bar, after a close judicial examination of the facts of the case in the light of the principles of election law. The error was not glaringly apparent—but it was apparent from the record.

Illustration from Criminal Procedure Code.

The requirement of law that error must appear from the record, stated negatively, means that no extraneous material not duly certified by the tribunal in response to the rule *nisi* issued to it, could be made the basis of establishing such error. Under the Code of

case again and give the correct decision In my opinion, the appeal should be dismissed "

Historical Reasons for Error apparent on the face of record

The expression 'error apparent on the face of the record has emerged as a consequence of reasons that are more of historical interest and importance than those that have reference to the principles of analytic jurisprudence It is altogether fallacious to interpret the import of this expression by resort to decisions given by the Privy Council and the Indian courts of the identical expression occurring in Order 47, Rule 1 of the Code of Civil Procedure It would be recalled that Order 47, Rule 1 mentions the grounds upon which application for review of judgments could be entertained by our civil courts and among the grounds are the following

Order 47 Rule 1 of the Code of Civil Procedure

(1) The discovery of new and important matter or evidence which after the exercise of due diligence was not within his (petitioner's) knowledge or could not be produced by him at the time when the decree was passed or order was made, or

(2) on account of some mistake or *error apparent* on the face of the record or

(3) any other sufficient reason "

Since the jurisdiction in review proceedings is confined to agitating questions that have been previously decided by the same court, it has necessarily to be confined to a restricted category of cases The rule which the courts have invariably applied in construing this expression is to say that it is only the *evident or manifest error or omission* that is the ground for review, as, for instance, failure to apply the law of limitation to the facts found by the court or failure to consider a particular section of an Act or part thereof but in each case the point of law must be one that may admit of no controversy It is not enough for successfully obtaining the review of a judgment delivered by court to show to that court that its determination is based on mere incorrect or untenable exposition of law (*Chhajju Ram v Neki*, (1922) 49 *I A* 144)

Concept of error apparent under Certiorari and Review proceedings analysed

But there are a few points that ought to be noted before the case law having a bearing on the interpretation of the Rule relating to the scope of review could be *mutis mutandis*, applied in the matter of determining the scope of *certiorari* proceedings when confined to quashing orders that show "error apparent on the face of the record In the *first* place, the application of the principles that govern review proceedings to the sphere of constitutional jurisdiction to issue writs is itself opposed to the first principles of jurisprudence in that, the two species of jurisdictions, that is, review and *certiorari* exercised by the courts are of different import altogether, and in the *second* place even the Crown practice in England with regard to the issue of *certiorari* is manifestly in the professed exercise of power inherent in the King's Bench Division to correct the course of judicial administration in the country The court of the King's Bench Division in England, when issuing high prerogative writs like that of certiorari, exercises supervisory jurisdiction, a jurisdiction which is designed to confine inferior tribunals, having the duty to act judicially, to the sphere of the legitimate exercise of their powers and authorities In asking for a review, one is asking for reconsideration of the case before the very court that has rendered a decision, but in invoking writ jurisdiction of the High Court one is approaching another court and a higher court As was observed in the case of *Walsall Overseers v London and North Western Railway Co*, (1878) 4 *A C* 30, the extent of this jurisdiction is measurable in two different directions

"The supervision of the court in the exercise of writ jurisdiction goes to two points one is the area of inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise "

To say that the expression 'error apparent on the face of the record' implies that the error must necessarily be *obvious* in the sense that its discovery or detection does not require an elaborate argument, is, it is submitted with respect, not a correct approach, and one for which there is to be found no support either in principle or in any

act or conclusion is something that exists outside and apart from the decision of an inferior tribunal.

"It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is 'vis a vis' all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under ARTs. 226 and 136. Therefore, the jurisdiction of the High Courts under ART. 226 with that of the Supreme Court above them remains to its fullest extent despite S. 105."

Having made this observation, the learned Judge proceeded to say that this large and controlling jurisdiction will not be exercised merely because there is an error of law (at p. 429).

"The High Courts do not, and should not, act as Courts of appeal under ART. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of cases."

(Consult further *de Smith's "Certiorari and Speaking Orders"* 1951, 14 *Modern Law Review pp.* 207—210; *Schmithoff's "Growing Ambit of the Common Law"*, 29 *Canadian Bar Review p.* 469).

Are Certiorari Proceedings civil or criminal.

Whether proceedings under the remedy of writ of *certiorari* are civil or criminal would depend upon the character of the proceedings out of which the *order* sought to be quashed before the superior court emanates. The position under the English law might be taken to be the one stated by Lord Summer in the case of *In re Clioffrd v. O'Sullivan*, (1921) 2 *A.C.* 570 (*House of Lords*) where he said :

"An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject-matter dealt with on the application. The same is true of *certiorari* [*Reg. v. Fletcher* (1876), 2 Q.B.D. 43] and habeas corpus (Ex parte Woodhall (1888) 20 Q.B.D. 832))..I think the real test is the character of the proceedings themselves which are the subject-matter of the particular application whatever it be.."

No implied ouster of Constitution Jurisdiction.

Before we conclude our study of the nature and scope of the writ of *certiorari*, it is necessary to emphasise an important aspect of the jurisdiction of the High Court in relation to that writ: before the jurisdiction of the High Court to issue writ of *certiorari* could at all be affected by reason of anything contained in the statute creating the inferior tribunal, it should be clearly borne in mind that the jurisdiction having been conferred by the Constitution can only be taken away by process of constitutional amendment.

Further, to quote the words of Denning L. J. in the case of *Taylor (formerly Kraupl) v. National Assistance Board*, (1957) 2 *W.L.R.* 189: (1957) 1 *All E.R.* 183:

"The remedy is not excluded by the fact that the determination of the board is by statute made 'final'. Parliament gives the impress of finality to the decisions of the board only on the condition that they are reached in accordance with the law."

Criminal Procedure, for instance, (see its 263rd Section) the record of cases tried summarily where no appeal lies is confined to furnishing the particulars mentioned therein, and where appeal lies, under its 264th Section, the requirement is that the magistrate before passing the sentence should record judgment embodying the substance of the evidence and also the particulars mentioned under S 263 The Code enjoins that such *judgment* shall be the only *record* in cases coming within the Section [164(2)] Here then we have a case of what the statute itself lays down to be the nature and extent of the record, and in such a situation before the superior court no additional evidence could be laid to controvert, or supplement this 'record' But where the statute does not itself lay down the requirement of record, the superior court would examine the return to scrutinise whether the record that has been sent up is complete—and if it is not, it would direct the tribunal to complete it The record thus prepared constitutes the premises upon which error must be shown to the superior court Of course, the parties might agree to place some relevant material, in addition to the certified record, in order to obtain an order from the superior court, but then that would be a rare case indeed, and for the purpose of general statement such a situation could well be kept out of consideration

Error should not be trivial but weighty

The 'error' must be sufficiently *weighty* before it could be regarded a valid ground for interference It must be shown that the error committed by the inferior tribunal has resulted in a failure of justice In the case of *Sangram Singh v Election Tribunal Kotah AIR* (1955) *S C* 425, the Supreme Court of India were concerned with the effect of S 105 of the Representation of People Act, 1951, (Act 43 of 1951) which had provided that "every order of the tribunal made under this Act shall be final and conclusive" upon the jurisdiction of High Court under ART 226 to correct errors of law apparent on the face of the record of the inferior tribunals by means of a writ of *certiorari* The argument was (at p 428)

> "that the legislature intended the decision of these tribunals to be final on all matters, whether of fact or of law, accordingly, they cannot be said to commit an error of law when, acting within the ambit of their jurisdiction, they decide and lay down what the law is, for in that sphere their decisions are aboslute, as absolute as the decisions of the Supreme Court in its own sphere "

But this argument was repelled The Court said,

> "But this, also, is no longer open to question The point has been decided by three Constitution Benches of this Court In *Hari Vishu Kamath v Ahmad Ishaque* AIR (1955) S C 233 the effect of S 105, Representation of the People Act was not considered but the Court laid down in general terms that the jurisdiction under ART 226 having been conferred by the Constitution, limitations cannot be placed on it except by the Constitution, itself see pp 238 and 242 Section 105 was, however, considered in *Durga Shankar Mehta v Raghuraj Singh, AIR* (1954) *SC* 520 *at p* 522 and it was held that that section cannot cut down or affect the overriding powers of this Court under ART 136 The same rule was applied to ART 226 in *Raj Krushna Bose v Binod Kanungo, AIR* (1954) *SC* 202 *at p* 204 and it was decided that S 105 cannot take away or whittle down the powers of the High Court under ART 226 Following those decisions we hold that the jurisdiction of the High Court under ART 226 is not taken away or curtailed by S 105
>
> "The jurisdiction which ARTs 226 and 136 confer entitles the High Courts and this *Court to examine the* decisions of all Tribunals to see whether they have acted illegally That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal The legality

"that the Original Civil Jurisdiction which the Supreme Court of Calcutta possessed over certain classes of persons outside the territorial limits of that jurisdiction has not been inherited by the High Court, that the power to grant an infoımation in the nature of *quo warranto* arises in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, that such jurisdiction is confined to the town of Calcutta and that, as the appellant does not reside and the office which he is alleged to have usurped is not situate within those limits, the Court had no power to grant information in this case . . . "

Quo Warranto —Civil Proceedings.

The information in the nature of *quo warranto* is in the nature of civil proceding [see *Rex v. Francis* (1788) 2 *Term. Rep.* 484; and *Hamid Hasan v. Banwari Lal Roy* (1947) *Privy Council* 90].

Rex versus Speyer.

The leading case on the subject of *quo warranto* is that of *Rex. v. Speyer,* (1916) 1 *K.B.* 595, a case in which Lord Reading summed up the law relating to information in the nature of *quo warranto* as it obtains in England. The case was affirmed in (1916) 2 *K.B.* 858. Lord Reading observed :

"In early times the writ of *quo warranto* was in the nature of a writ of right for the King against any subject who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim in order to determine the right: Blackstone's Commentaries, 8th Edn., vol. 3, p. 262. It was a civil writ at the suit of the Crown: *Rex v. Marsden* (1765) 3 *Burr* 1812. Originally the writ had to be returned before the King's justices at Westminster, but afterwards only before the justices in lyre by virtue of the statutes of *quo warranto,* 6 Edw. I (Statute of Gloucester) and 18 Edw. 1, Statute 2." "The writ of *quo warranto,* however, fell into disuse and led to the substitution of proceedings by way of information in the nature of *quo warranto.* Whatever the immediate cause of the change or whenever it was brought about is not ascertainable: Tancred on *Quo Warranto,* p. 2; but the practice of filing informations by the Attorney-General in lieu of these writs is very ancient: *Darley v. Queen* (1846) 12 *Ci and F* 520 *at p.* 537. At a later period the King's Coroner commenced the practice of exhibiting information of *quo warranto* at the instance of private persons, but this power of the King's cooner was much restrained by the Statute 4 and 5 Will. & Mar. c. 18, which was passed to prevent malicious information at the suit of private persons being filed by the King's coroner. In *Rex v. Hertford Corporation,* 1 *Ld. Raym,* 426, it was decided that informations in the nature of *quo warranto* were within the purview of this statute, and thereafter the King's coroner did not file informations without the order of the Court. Subsequently the statute of 9 Anne, c. 20, was passed to render informations in the nature of *quo warranto* more speedy and effectural and for the more easy trial of the rights of offices and franchises in corporations and boroughs. Since that time there has been a tendency to extend the remedy, subject to the discretion of the Court to grant or refuse informations to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions as was pointed out by Lord Brougham in *Darley v. The Queen* (1846) 12 *Cl & F* 520: 8 *E R* 1513".

The essential thing in the words of Lord Reading is,

Limits upon the issue of this writ.

"Whether there has been usurpation of an office of a public nature and an office substantive in character that is an office independent of title".

(a) Will not lie in respect of an office of a private nature.

The writ of *quo warranto* will not lie in respect of an office of a private nature. [See *Amarendra Chandra v. Narendra Kumar Basu* (1952) *C.W.N. vol.* 56, *p.* 449: *AIR* (1953) *Calcutta* 114; see also *Rex v. Mousley,* (1846) 8 *Q.B.* 946, where it was held that the office of a member of the Managing Committee of a private school which is constituted according to certain rules which have no statutory force but are of purely domestic

In England in order that *certiorari* be taken away, the rule is that there must exist in the statute *express* words to that effect

Some of the statutes passed in England between 1680 and 1848 contained the expressions to the effect that the decision of the *tribunal shall not be removed by certiorari* But despite these express words having been used, courts never allowed those statutes to be used as a cover for the wrongs done by tribunal Despite the express words taking away *certiorari*, the courts intervened if it could be shown that (a) some of the members of the tribunal were disqualified from acting (*Regina v Cheltenham Commissioners* (1841) 1 Q B 467) [illegible]
3 Q [illegible]
12 C [illegible]
Council (1956) *A C* 736 (1956) 1 *All E R* 855 (*H L*) where the question related to "bad faith"] The student is also referred to the discussion of this principle contained in the case of *Regina v Medical Appeal Tribunal Ex parte Gilmore in* (1957) 2 *W L R page* 498 where it has been ruled by Denning L J that the expression ' any decision of a claim or question shall be final" meant only that the decisions specified could not be subject of appeal or review on facts, they did not suffice to prohibit applications for *certiorari*, whether on ground of error on the face of the record or excess or lack of jurisdiction It was also observed that a long line of authority shows that the remedy by *certiorari* is not to be taken away save by clear and express words to that effect occurring in an Act of Parliament

Under our Constitution, of course, neither the Parliament nor the Provincial Legislature can take away the jurisdiction of the High Court to issue writ of *certiorari* Nor, again, can expressions to the effect that the decision of the tribunal shall be final, occurring in statutes creating them, be regarded anything more than an intimation by the Legislature that a decision is final only by way of appeal etc and not *that a tribunal can commit errors of law with impunity* or that High Court is precluded from the exercise of its power to see that justice is done according to law

161. Writ of Quo Warranto

Write of Quo Warranto—

Writ of *quo warranto* is issued upon an information which may be lodged against a person who claims or usurps "office, franchise or liberty", and upon such information being laid the court will inquire by what *authority* the person who claims or has usurped the office, supports his claim The proceedings are commenced in appropriate cases to have the right to the office or franchise determined (*Halsbury's Laws of England, 2nd Ed Vol* 9, *para* 1373, *p* 804) In the case of *Hamid Hasan Nomani v Banwarilal Roy, AIR* (1947) *P C* 90 *at p* 91, Sir Beaumont, delivering the judgment on behalf of Judicial Committee, observed

> "An information in the nature of *quo warranto* is the modern procedure replacing the obsolete High Prerogative Writ of *quo warranto* It is used to try the civil right to a public office "

This case which was a decision on appeal from the judgment of Calcutta High Court (1944) (48) *C W N* 766, contains a useful discussion of the jurisdiction of the High Court of Calcutta to issue this writ, a jurisdiction which it inherited from the personal jurisdiction of Supreme Court of Calcutta exercised on its original civil side and is an important decision for the purpose of understanding the constitutional history of the powers and jurisdictions of various High Courts in relation to the exercise of writ jurisdiction Their Lordships felt no doubt, on the construction of S 9, High Courts Act, 1861, and Letters Patent of 1865 (at p 93) ·

election tribunal that it was illegal and without jurisdiction. The Indian Article 329(b) is in the following terms :—

"Notwithstanding anything in this Constitution no election to either House of Parliament or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

"Now, the question", said the Supreme Court at pp. 238 and 239, "is whether a writ is a proceeding in which an election can properly be said to be called in question within the meaning of Article 329(b). On a plain reading of the Article, what is prohibited therein is the 'initiation' of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as is provided therein. A suit for setting aside an election would be barred under this provision.

"In *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency, AIR* (1952) *Supreme Court* 64, it was held by this Court that the word 'election' in Article 329(b) was used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate, and that an application under Article 226 challenging the validity of any of the acts forming part of that process would be barred. These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329 (b).

"But when once proceedings have been instituted in accordance with Article 329(b) by presentation of an election petition, the requirements of that Article are fully satisfied. Thereafter, when the election petition is in due course heard by a Tribunal and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. There being no dispute that they are subject to the supervisory jurisdiction of the High Courts under Article 226, a writ of '*certiorari*' under that Article will be competent against decisions of the Election Tribunals also".

The essential point of purpose in the interpretation of ART. 146, (as even Indian ART. 329(b)) is to give effect to the intention of the framers of the Constitution. If by presentation of a petition under ART. 170 or 226 an attempt is made to call in question any election of the kind mentioned in the two prohibitory Articles (that is under ART. 146 of our own and 329 of the Indian Constitution), would it not be said that thereby we were defying the prohibitions contained in these two Articles. These two Articles do not say that the election shall not *in the first instance* be called in question except by an election petition. The intention clearly is to confer finality on the determination of election disputes by the election tribunals, and this for the simple reason that elections are an important element in the democratic process and their course must be kept as much uninterfered with as it may be practicable. Election law, as has been said, is a harsh law and a hard law but nevertheless it has to be given effect to for what it is worth. And to permit in writ proceedings to re-open and resurrect the questions that have been concluded by election tribunals would be to reduce ART. 146 of our Constitution to a state of non-existence.

In the Indian Supreme Court case, referred to above, the argument that prevailed with their Lordships appears to be that if ART. 329(b) is not to be limited in its operation to the initiation of proceedings for setting aside an election, certain anomalous results would come to prevail when we consider the question of interpretation with reference to the rights of a candidate whose election has been set aside by the tribunal. In the words of the court:

"If he applies under Article 226 for a writ to set aside the order of the Tribunal, he cannot in any sense be said to call in question the election; on the other hand, he seeks to

character governing the internal affairs of the school, do not make the office of a public character so as to make it amenable to correction by means of *quo warranto*]

The mere fact that the office is held at pleasure is not by itself sufficient to regard that office as not being substantive in character [*G D Karkare v T L Sherde, AIR* (1952) *Nagpur* 330] To the same effect are remarks of Lord Reading in the case of *Rex v Speyer* (1916) 1 *K B* 595

"I have found it difficult to understand", says the learned Judge, "why in principle an office held at pleasure should not equally with an office of permanent character, be subject to this remedy provided the office held at pleasure is often in effect of a permanent character. After considering the authorities since *Darley v The Queen* (1846) 8 *E R*, 1513, it appears to me that they rest upon the principle formulated in that case and require only the application of it to the particular facts"

Tindall, Chief Justice, when using the language under consideration while testing the substantive office, held that it should be an office independent of title, not merely the function or employment of a deputy or servant (Darley v Queen (1846) 18 E R 1513)

(b) Quo-Warranto will not issue if it will be futile to do so

Similarly, *quo warranto* will not issue where on the facts and circumstances of a particular case it will appear to the court to be futile If the appointment to office which is challenged by means of *quo warranto* is capable of being cured by immediate re appointment, the Court would not, in the exercise of its discretion, allow the writ to issue This principle was established in *Rex v Speyer* and was also referred to in the case of *Ex parte*

[illegible]

dismissed by the same authority afterwards would be sufficient in support of the refusal t exercise a discretionary jurisdiction given to Court exercising *quo warranto* powers

Impact of ART 146 on the writ of quo-warranto

Under our Constitution we have in ART 146 a prohibition which enjoins that n election to the National Assembly or Provincial Assembly shall be called in question except by an election petition presented to such authority and in such manner as may be provid l by an Act of Parliament The scope of jurisdiction in *quo warranto* proceedings under our Constitution will have to reckon with what is contained in ART 146, which Article as its wording shows, expressly excludes elections to the National Assembly or a Provincial Assembly from being called in question by any other means *except by election petition* Any illegality committed during the course of election can only be tested by means of an election petition, and all other forms of procedure, including the one relating to questioning the validity of elections by means of *quo warranto*, are necessarily excluded by the express prohibition contained in ART 146 It is submitted that considering that *quo warranto* [illegible] be ordin[illegible] *ailable* to [illegible] the law

Care must be taken to remember that what ART 146 expressly provides for is the procedure by resort to which election to the National or Provincial Assembly could be called in question It does not prohibit the determinations of the issue whether an election tribunal has exceeded its jurisdiction or has acted in the absence of a jurisdiction validly conferred upon it by law There is no ground for thinking however that the proceedings of election tribunal cannot be attacked on the ground of jurisdiction Very different was the principle on which the Supreme Court of India dealt with a matter arising [illegible] *Hari Vishnu Kamath v Ahmad Ishaque* [illegible] rpreted the scope of the Indian [illegible] relation to a prayer before them for the issue of a writ of *certiorari* or other order or direction for quashing the order of the

a judicial tribunal and his orders become appealable to the Supreme Court under ART. 160, even though such orders be passed as a result of an investigation conducted by the Election Petitions Tribunal" (*p.* 98).

Chief Justice Muhammad Munir, on this view of law, felt no difficulty in holding that the Election Petitions Tribunal and the Governor together constituted a Tribunal for the purposes of ART. 160 of the Constitution provided, of course, it be assumed that the Governor had no discretionary power to deal with the report submitted by the members of the Tribunal.

It is pointed out with respect, that the above stated conclusion even if tenable, has to encounter yet another procedural difficulty contained in the Constitution if it is to hold the field,—namely, that since "no process of a Court can reach either the Governor or the President for the exercise of powers and performances of duties of their office or for any act done or purported to be done in the exercise of those powers and performance of those duties (see ART. 213)" the order of Governor cannot be questioned in appeal by the Supreme Court. The only way out of this difficulty is to proceed by means of the writ of *quo warranto* and to call upon the person, who is duly elected as a result of the findings of the Tribunal, to show cause why his claim to the office steming from the decision of the Tribunal be not annulled. But there would be *no* way out of the difficulty if the Tribunal *records* the finding that the election is void for the simple reason that such *a result cannot validly be attacked in any forum without the authors of the result*, namely the *Governor* and the *members of the Tribunal* being called upon to plead to any order that the Court might wish to pass contrary to their determination. Since the Governor cannot be summoned, what he does officially is sacrosanct. This difficulty appears not to have been noticed, much less considered in the judgment of the Supreme Court. Besides all this, the argument based upon the prohibition contained in ART. 146 of our Constitution received scant attention, at the hands of the Court: at page 99 Chief Justice Munir observed:

"Article 146 of the Constitution on which reliance was placed by the learned Attorney-General in a vigorous endeavour to establish the ouster of this Court's jurisdiction, has nothing to do with the matter. That Article provides that no election to the National Assembly or a Provincial Assembly shall be called in question except by an election petition presented to such authority and in such manner as may be provided by Act of Parliament. The corresponding provision in the Indian Constitution has been construed by the Supreme Court of India as having no bearing on the question of the Supreme Court's jurisdiction to interfere on appeal, by special leave, with the order of an election tribunal, and that undoubtedly is the true construction of Article 160 of our Constitution which is worded exactly as the Indian Article. The Report of the Tribunal being a judgment, in entertaining an appeal from that judgment we are not functioning otherwise than as an appellate authority in the proceedings taken on the election petition; nor is the validity of the election being called in question otherwise than by an election petition."

It is submitted with respect, that this view of the law overlooks the difficulty of having to entertain appeals by way of special leave to appeal in cases where the Election Tribunal has found the election challenged before it to be valid, and the person aggrieved by its order, seeks to renew an effort at the appellate stage before the Supreme Court to obtain the same result from the court of appeal under ART. 160. Should such a situation arise, would not the court of appeal, in effect, be made to question the validity of election and thus reach the very result which it is left exclusively to Election Tribunal to reach under ART. 146? It would be anomalous in the extreme to entertain petitions by way of appeal under ART. 160 if only *a certain type of result followed from the determinations of the Election Tribunal*. For that would be saying that a petitioner who challenges the elec-

of one party and not the other Learned counsel for the first respondent was unable to give any reason why this differentiation should be made We cannot accept a construction which leads to results so anomalous " (p 239)

With all respects to the learned Judge of the Supreme Court, consideration such as the one which seems to have tilted their judgment in favour of the decision they have recorded, appears to be hardly relevant The essential thing is to give effect to ART 329(b) of the Constitution read with ART 226 It is clear that the *validity of the election* can only be called in question by means of an election petition After the election tribunal gives a decision, the purpose of ART 146 is over, and if High Court proceeds thereafter to exercise its jurisdiction under ART 226, to disturb the finding of the election tribunal the finality of its determination is necessarily interfered with In the case of a person whose election is set aside and who, in the case visualised by their Lordships of the Supreme Court is approaching the High Court under ART 226, there is an implied bar resulting from that *finality* which must be enforced in respect of the orders passed by the election tribunal The person whose election has been set aside has also been heard before the election tribunal that declared the election as one which merited to be set aside and he cannot be permitted in the total absence of any specific provision in regard to appeal etc , to approach the High Court for the reconsideration of his case under ART 226

We are here concerned with a constitutional prohibition, and as ART 146 is specific as to what it prohibits, no construction on ART 170 could be imposed which would undo

It remains now to enquire into the question whether there is jurisdiction vested in the Supreme Court of Pakistan under ART 160 to entertain appeals from the determinations reached by Election Tribunals constituted by an Act of Parliament within the meaning of ART 146 In the case of *Muhammad Saeed v Election Petitions Tribunal, West Pakistan PLD* (1957) *S C* 91, Supreme Court of Pakistan declared that under *ART* 160 it has the jurisdiction to entertain appeals from the determinations of the Election Tribunal The report of the Election Tribunal, according to the judgment of the learned Chief Justice (at p 97), has ARTs 146 & 160 Jurisdiction of Supreme Court

"the effect of declaring (1) an election void or not void, (2) that a person has been duly elected, and (3) that a person from the date of the Report is disqualified to be a member of the Provincial legislature or a voter for that legislature because these results follow either from the expression of the Commissioners' opinion in the Report or from the date of the Report without any Order by the Governor "

According to our Supreme Court, therefore, the *Report* of the Tribunal is in every sense of the term a *declaratory judgment* because it finally determines the validity or invalidity of the election and also the disqualification that a person may have incurred It has been held that the Governor was not competent (at p 98)

"to deprive the Report of this legal effect, his duty under each of the provisions just mentioned [S 12 of the Establishment of West Pakistan Act, 1955, clause (3) of paragraph 8 of Part III of the Corrupt Practices Order, Article 225(5)(c)) being to pass orders in accordance with or in order to give effect to the Report "

But even "If it be assumed that the Governor in passing orders on the Report (of the Tribunal) has some *discretion* and thus exercises judicial functions, *he himself becomes*

the burden of determining these "Election Disputes" has been transferred under several Acts to judicial tribunals. But, nevertheless, despite this change, it would appear that controverted elections continued to be treated as essentially being within the competence of Parliament to settle, though to begin with, they had to be dealt with in an appropriate domestic forum specially created for the purpose, a forum which was not amenable to being in any manner interfered with by any law courts. It is this same principle which is embodied under ART. 146, and if any effect is at all to be given to that Article it must, from the nature of the case be to interdict all attempts by courts, no matter how low or how high they be, to question the validity of elections and thus assume to themselves the function which has been constitutionally delegated to the Exclusive Jurisdiction of Election Tribunal.

It would be another matter if the Act of Parliament had not provided within the scope of ART. 146 for a forum where elections to the National Assembly or Provincial Assembly shall be called in question. If there be a total absence of any legislative enactment of this type, the burden of determining the validity of election would not lie with the courts but would, it is submitted with respect, continue to rest upon the shoulders of the relevant legislature with regard to whose membership, the contentions regarding the validity of a given election is sought to be raised. After all the privileges of the National Assembly are the same as those of the Parliament of United Kingdom (see S. 4 (5) of the Privileges of the Constituent Assembly Act, 1955, read with ARTs. 56, 223 and 224 of the Constitution), and the privilege of determining the disputes concerning validity of election must, in the absence of a statutory provision to the contrary, vest in the National Assembly.

It is the force of this principle more than anything else that has constrained the present writer to respectfully differ from the view that was taken by the Supreme Court in the case referred to above. ART. 146 is, as has been pointed out earlier, a special Article dealing with the question of the validity of elections being determined in a certain way and ART. 160 must therefore be read subject to its specific content that prohibits the questioning of elections in any other way.

If, however, the logic of the Supreme Court decision is accepted, as it has anyhow to be accepted, (that Court being the sole judge of its own jurisdiction) even the High Courts would acquire jurisdiction under ART. 170 to issue writs of *Quo Warranto*, *certiorari* and prohibition, to question the validity of election—for if ART. 146 is no bar upon the jurisdiction of Supreme Court neither will it be a bar upon that of the High Court. It would however be noticed that the scope of *certiorari* proceedings would be limited to agitating questions of (a) either the defect of jurisdiction, (b) the excess of it, (c) violations of the principles of natural justice, (d) the mala fides of the tribunal and (e) the consideration of error apparent on the face of the proceedings. It would only be able to quash the proceedings. And the High Courts would of course *not* be entitled to pass any specific order of the sort which the original forum, that is the Election Tribunal, whose decisions are sought to be corrected by *certiorari* by it, could have passed. Supreme Court, in the enjoyment of its power under ART. 160, however becomes a full fledged Court of Appeal, that is, it becomes a judge both of *fact* and *law* and could substitute any order for the one passed by the Election Tribunal,—that is, of course, it can only pass the sort of orders that the Election Tribunal could, itself under the law, have been competent to pass.

e reach of warranto.

The writ of *quo warranto* reaches the person who has usurped office and it is no defence on his part to say that an intermediary process as a result of which he claims to exercise office having been declared as sacrosanct by law, that factor by itself should be deemed to operate as a bar to the exercise of jurisdiction. This point arose specifically in the case of *Rex v. Speyer*, (1916) 1 *K.B.* 595 where the relator, who filed information in the nature of *quo warranto*

tion of another before the Election Tribunal, is precluded from raising the same issue in appeal whereas should he become successful his opponent can go under ART 160 and have the result annulled by the Supreme Court

It is true that the principle of ART 146 is not *expressly* referred to in the very able and scholarly judgment delivered by Cornelius J but it is also true, so at least it seems to the present writer, that throughout his analysis of the Privy Council practice in regard to its consistent refusal to entertain appeals from the determinations recorded by Election Tribunals, he has *in fact* been circumnavigating this very same principle With respect it is pointed out that the Privy Council refused to grant special leave to appeal from the decisions of Election Tribunals fundamentally because to quote the words of Lord Cairns in the case of *Theberge v Laudry* (1876 7) 2 *A C* 102

> "In the opinion of their Lordships, adverting to these considerations the 90th section which says that a judgment shall not be susceptible of appeal is an enactment which indicates clearly the intention of the legislature under this Act—an Act which is assented to on the part of Crown, and to which the Crown, therefore is a party to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes and not annex to it the incident of its judgment being reviewed by the Crown under its prerogative "

The origin of jurisdiction to resolve "disputes and doubts with regard to the validity of election is to be traced to the practice of Imperial Parliament in England which has exclusive jurisdiction to decide these questions There never was, down the entire course of the history of English Law, a common law right to agitate questions affecting validity of elections which had to be decided only by the Parliament

Before 1770 all controversies with regard to elections were determined by the whole House of Commons and treated as though they were party questions and decided in accordance with the measure of strength of contending parties As the working of the system was found unsatisfactory, the exercise of what, after all, was its own privilege was partially transferred by the Parliament to a tribunal constituted by law To begin with this tribunal used to consist of members of the House but they had to take oath to do justice according to the law of the land But the principle of the several Acts passed upon this subject was the 'selection by *lot*,' of the members of the committees for the trial of election petitions Even this system was found defective and then by a series of gradual

the trial of election disputes is confided to 'Election Court' presided over by the judges who are selected from judiciary from the appropriate parts of the United Kingdom Reports of the "election courts" thus constituted are communicated to the House by the Speaker and are treated very much like the reports of the election committees under the former system "They are entered in the journals, and orders are made for carrying the determinations of the judges into execution " Thus the full effect to the report by the election court is still given by the Parliament The reports submitted by the election courts are to all intents and purposes final and the proceedings before the election courts are not treated as proceedings before the House in England It would not be possible to question the validity of the determinations of disputes rendered by an election court by any means whatever—whether it be by way of a suit, or a writ, or by means of a further appeal to a higher forum

The foregoing statement of the law which has been freely adopted from *May's Parliamentary Practice*, (*pp* 184 6) would show us the emergence of the present method

the burden of determining these "Election Disputes" has been transferred under several Acts to judicial tribunals. But, nevertheless, despite this change, it would appear that controverted elections continued to be treated as essentially being within the competence of Parliament to settle, though to begin with, they had to be dealt with in an appropriate domestic forum specially created for the purpose, a forum which was not amenable to being in any manner interfered with by any law courts. It is this same principle which is embodied under ART. 146, and if any effect is at all to be given to that Article it must, from the nature of the case be to interdict all attempts by courts, no matter how low or how high they be, to question the validity of elections and thus assume to themselves the function which has been constitutionally delegated to the Exclusive Jurisdiction of Election Tribunal.

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The reach of Quo warranto.

The writ of *quo warranto* reaches the person who has usurped office and it is no defence on his part to say that an intermediary process as a result of which he claims to exercise office having been declared as sacrosanct by law, that factor by itself should be deemed to operate as a bar to the exercise of jurisdiction. This point arose specifically in the case of *Rex v. Speyer*, (1916) 1 *K.B.* 595 where the relator, who filed information in the nature of *quo warranto*

in regard to the impugned appointment of a Privy Councillor that had been made by the Queen, was virtually questioning the validity of the order passed by the Sovereign It was contended before the Court that by the issue of the writ of *quo warranto* virtually the Court would be passing an order upon the Sovereign, a thing which no Court can do in England As to this argument, Lord Reading made the following reply

> "The second ground proceeds upon the assumption that if the Court were to pronounce a judgment of ouster in this case we should be making an order upon the Sovereign If that were the true view [illegible] this Court could not make an order [illegible] *burn, C J, in Reg v Lords Commissic* [illegible] questionable principle that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown, the thing is out of the question Over the Sovereign we can have no power '

> "But a judgment against the respondents would have effect against them only it would be an order upon the subject, not upon the Crown It is then argued that this Court [illegible] that we could not orc [illegible] remove the names [illegible] immediate reinstatement of the names if the King thought fit to alter it It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the Attorney General none of them would in truth occur *This is the King's Court we sit here to administer justice and to interpret the laws of the realm in the King's name* It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown "

See the case of *Pir Illahi Bakhsh v M A Khuhro PLD*, (1956) *Sind* 101 and *Muhammad Akbar v Dr Khan Sahib Chief Minister of West Pakistan PLD* (1957) *Karachi* 387 for the circumstances in which *quo warranto* would issue It has been held in the last mentioned of these two cases that (p 391)

> ' The Rule that no person may invoke the Court's aid in respect of a wrongful act of a public nature, not affecting prejudicially the real and special interest or a specific legal right of the relator is true only so far as the issue of writs of *mandamus* and *certiorari* are concerned In respect of writ of *quo warranto* there is no such restriction and a member of the public may challenge a public act of the state provided that he does *not* do so *mala fide* as an instrument of others '

162. Writ Jurisdiction as a means of securing an overall "Judicial Control" of Administrative Action

We have in the preceding pages reviewed the nature of writ jurisdiction and have commented briefly upon the scope of the several writs that have been mentioned by name in ARTs 22 and 170 We have also drawn attention to the fact that the exercise of jurisdiction by the superior courts of our country to issue these writs is of a transcendent character and is in the nature of a power which by no means is solely confined to the issuing of the kind of writs that have been specifically mentioned in these Articles The power of the High Courts is very wide indeed and extends to the issuing of not only the writs but also

"orders" and "directions" for the enforcement of any of the rights conferred by Part II and for any other purpose.

It is proposed, in what follows, to look at this constitutional power of the superior courts in this country in so far as its exercise may be regarded as a means for securing the overall judicial control of administrative action. For the purpose of present argument under the term "administrative action" we ought to include *all* action directed by the administration to give effect to the *Constitution* and the *law* so as to cover within its fold even *legislative* action—but not the exercise of "judicial" function or power. We have seen that 'administrative action' thus broadly defined is of the following species, and its exercise takes the following forms :

(a) power to *make* laws under the Constitution,

(b) power of the executive to *administer* the Constitution and the laws made by the legislature.

We have already noticed that the power to make laws is a mode of administering the Constitution. After all it is the Constitution that gives to the legislature in this country the *power* to make laws within certain limits.

Two broad features of the limitations imposed on legislative power by our Constitution have been noticed by us already, and all that is required in this context is to briefly refer to them. Because our polity is federal in character, the first type of legislative restraint has reference to the exercise of legislative powers reserved to the Federation and the Provinces within the bounds prescribed by ARTs. 105, 106 and 110 of our Constitution. If any of the two rival legislatures invades the field reserved to the other, its enactment would be void. The second type of legislative restraint has reference to the *competence* of the legislatures, Federal and Provincial, to pass laws in such a way as not to *abridge or take away the fundamental rights that have been guaranteed under Part II of our Constitution.* Any trespass into the arena or the sphere of fundamental rights is a transgression beyond the permissible range of legislative power and is a usurpation, and the laws passed in this forbidden field will be struck down by judicial power on the theory that it is "unconstitutional exercise of legislative power".

After the law is validly made the question of "the administration" of the law *stricto sensu* arises. The Executive, Federal or Provincial, has its extent or range of power defined by the Constitution: it is, as we have seen, coextensive with the power of the relevant legislature to pass laws. We have already commented on the nature of executive power and the limits within which it can be exercised.

A person may be aggrieved if he finds that his rights, fundamental or ordinary, have been violated by public functionaries either because they have acted outside the law or acted in the absence of any law that might have covered their acts. In such a case he can appeal to the judicial power for the vindication of his rights by means of commencing appropriate proceedings. He may contend :

(a) that the public functionary claiming to act under a law has *in fact not acted* under any valid law,

(b) that although the law a public functionary has acted under, is constitutional, he has, while professing to act *pursuant* to it, as a matter of fact, acted in a *manner* that is not permitted by the general law of the country—that is, he has acted *mala fide*, in excess of his jurisdiction, in utter violation of the fundamental rules of judicial procedure, etc.

The power may have been exercised under a colourable excuse that it was covered by law but the court may discover that in fact it was an exercise of power that was completely

in regard to the impugned appointment of a Privy Councillor that had been made by the Queen, was virtually questioning the validity of the order passed by the Sovereign It was contended before the Court that by the issue of the writ of *quo warranto* virtually the Court would be passing an order upon the Sovereign, a thing which no Court can do in England As to this argument, Lord Reading made the following reply

"The second ground proceeds upon the assumption that if the Court were to pronounce a judgment of ouster in this case we should be making an order upon the Sovereign If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign To use the words of Cockburn, C J, in *Reg v Lords Commissioners of the Treasury*, 'We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown, the thing is out of the question Over the Sovereign we can have no power '

"But a judgment against the respondents would have effect against them only it would be an order upon the subject, not upon the Crown It is then argued that this Court would be powerless to enforce a judgment of ouster in this case that we could not order the Clerk to the Privy Council who is the servant of the King to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the Attorney General, none of them would in truth occur *This is the King's Court we sit here to administer justice and to interpret the laws of the realm in the King's name* It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown "

See the case of *Pir Illahi Bakhsh v M A Khuhro, PLD,* (1956) *Sind* 101 and *Muhammad Akbar v Dr Khan Sahib, Chief Minister of West Pakistan, PLD,* (1957) *Karachi* 387 for the circumstances in which *quo warranto* would issue It has been held in the last mentioned of these two cases that (p 391)

"The Rule that no person may invoke the Court's aid in respect of a wrongful act of a public nature, not affecting prejudicially the real and special interest or a specific legal right of the relator is true only so far as the issue of writs of *mandamus* and *certiorari* are concerned In respect of writ of *quo warranto* there is no such restriction and a member of the public may challenge a public act of the state provided that he does *not* do so *mala fide* as an instrument of others "

162 Writ Jurisdiction as a means of securing an overall "Judicial Control" of Administrative Action

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whole I put my faith not in declaration of Rights (though I see their point) but in th writs and the general procedure and the general judgment of the lawyers''.
(*Canadian Bar Review for 1942, at p. 510*).

If a power is exercised *mala fide*, for *collateral purposes*, that is for purposes other tha those for which the power has been conferred by the legislature upon public functionarie the result is one which cannot at all be defended as being in any manner *authorised* by law And if such a result comes in conflict with the rights of anyone in the realm, the perso aggrieved would be entitled to invoke the aid of the judicial power for getting relief again the mischief caused by such an unauthorised interference with his rights.

All through our study of the constitutional scope of the several writs we wer concerned with the task of comprehending the theory and practice of English law upo that subject. And we did all that advisedly for the judicial wisdom embodied in the rulin practice of the English courts, more particularly at a point of time when our Constitutio came to be enacted, is of considerable assistance to us in the matter of interpreting the re scope of the judicial power that has been reserved to the superior courts of this countr under ARTs. 22 and 170. But having said all that, it is wise to remember that there one fundamental difference between the system of English jurisprudence and our own whic has to be given its due effect—and this has reference to the comparative supremacy of th judicial power vested in the High Courts of our country. We have a written Constitutio with guaranteed rights and this has made, in the opinion of the present writer, considerab difference to the theory and practice of the controlling jurisdiction of the superior cour in this country. English jurisprudence is based upon the constitutional theory that ther are no guaranteed rights, whereas our own, after the establishment of the Constitution, founded upon the theory that there are constitutionally guaranteed rights. The Englis courts have evolved rules of interpretation of statutes based on the assumptions that right t life, liberty and property cannot be thrown in jeopardy except by an express legislati decree. But whatever might be said about the sanctity or force of this rule, it cannot b forgotten that, it is a rule of interpretation, pure and simple, and not a constitution principle that has been expressly declared as is the case with us under our Constitution With us the foundation of our law is a written Constitution which guarantees certai rights and prohibits Executive and Legislature from abridging or taking away those right In view of this radical difference between the two systems of jurisprudence the exerci of controlling jurisdiction of the High Court with us is anchored in a safer soil.

In our case, when a public functionary acts outside the law he could be shown to b acting contrary to an expressly guaranteed constitutional right or a right flowing from th general law of the land, the continuance of which has been constitutionally sanctioned b ART. 224 of our Constitution. The exercise of writ jurisdiction therefore acquires a added importance in a system of a written Constitution that is crowned with the stars guaranteed rights than it does in a system of jurisprudence where these rights are left to b inferred by appeal to the principles of the common law of the land.

The importance of this controlling jurisdiction of the High Courts cannot be ove estimated. In our day, when the State has come to play the role, by reason of which lays claim to being regarded "a welfare State" the power of the Executive has increased an enormous extent indeed, and what is more in the words of Sir Hartley Shaw Cross, th Attorney General of England, "Administrative law has come to stay". The only way preserve the basic rights of people is to exercise judicial control, be it even so of limited kind, upon the conduct of these tribunals. Nor again is the exercise of this contr in any sense 'interference' with the administrative functions of the officers of the State, which any exception can be taken. Chief Justice Chagla in the case of *State of Bombay*

damus, *quo-warranto* or equity injunction (see on this subject generally *Willoughby's Constitution of the United States*, 1929 Ed. pp. 1655—1660).

We will now proceed to comment on the constitutional significance of this power of judicial review of administrative action and the limits within which it is available in America.

In the first place, it is necessary to remember that considerable bulk of case-law of the United States Supreme Court vis-a-vis its controlling jurisdiction has reference to the scrupulous care with which it deals with challenges directed against the unconstitutional delegation of legislative power. The theory of separation of powers has brought about judicial recognition of the necessity of vigilantly guarding against certain questionable forms in which the exercise of delegated power by the administrative tribunals takes place, that is, forms which may be regarded as in reality the exercise of legislative power.

We have already commented in another part of this work upon the trends noticeable in the history of the development of the doctrine of unconstitutional delegation of legislative power in United States, and have observed that with the increasing complexities of governmental functions the attitude of United States Supreme Court has decidedly undergone a radical change: it no longer takes a doctrinaire approach to the theory of separation of powers which it now concedes after all is a political maxim and not a technical rule of law. The power of the judicial review exercised by the Supreme Court is now confined more or less to observing whether or not *in fact* the grant of power by the legislature is inordinate or excessive and with this perspective in view it endeavours to see whether or not such power as has been delegated by the Congress is regulated by some *well defined standards with reference to which its exercise by administrative authorities could be adjudged as being within the permissible field.* As was observed in the case of *A.L.A. Schechter Poultry Corporation v. United States of America*, (1935) 295 *U.S.* 495: 79 *Law Ed.* 1570 :

> "So long as a policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply".

In England, of course, the question of unconstitutional delegation of legislative power does not so much as arise for the consideration of courts for the simple reason that there the parliamentary enactment is immune from judicial scrutiny on any score whatever.

Secondly, where the exercise of administrative power in America is challenged on the grounds that it offends against the 'due process' clause of the 5th and the 14th Amendments, the courts examine that ground of challenge with a view to ascertaining whether or not the minimum procedural safeguards that have been secured by the constitutional 'due process' guarantee have been complied with. Broadly considered, these procedural safeguards may be viewed as being the counterparts of the content of the doctrine of natural justice upon the premises of which determinations of inferior tribunals are corrected by the King's Bench Division in England. Despite the extreme vigilance of the American courts to insist upon the conformity of administrative processes with the procedural safeguards embodied in the 'due process' clause, of late in America, there has been a demand made by the people of that country that the power of interference by the courts of that country should be rendered more extensive than the one which is exercised by them under the aegis of 'due process' clause. A student interested in following up these highly significant developments would do well to read the case of *Wong Yang Sung v. M Grath reported in* (1950) 94 *Lawyers Edition* 616 where Mr. Justice Jackson, speaking on behalf of the majority court, has reviewed the history of those steps that have culminated in the passing of the Administrative Procedure Act of 1946. By means of this Act, the Congress has laid down the minimum requirements which must be fulfilled by administrative tribunals and commis-

Laxmidas AIR (1952) *Bombay* 468, *at p* 475, while dealing with the contention of Advocate General of Bombay that "it is impossible for a State to function if there is a constant interference by the High Court in the executive acts performed by the officers of the State", remarked

"It may be that interference by the High Court may result in inconvenience or difficulty in administration But what we have to guard against is a much greater evil When we find in the modern State wide powers entrusted to Government powers which affect the property and person of the citizen it is the duty of the Courts to see that those wide powers are exercised in conformity with what the Legislature has prescribed We are not oblivious of the fact that in order that the modren State should function the Government must be armed with very large powers But the High Court does not interfere with the exercise of those powers The High Court only interferes when it finds that those powers are not exercised in accordance with the mandate of the Legislature Therefore, far from interfering with the good governance of the State the Court helps the good governance by constantly reminding Government and its officers that they should act within the four corners of the statute and not contravene any of the conditions laid down as a limitation upon their undoubtedly wide powers Therefore even from a practical point of view, even from the point of view of the good governance of the State, we think that the High Court should not be reluctant to issue its prerogative writ whenever it finds that the sovereign Legislature has not been obeyed and powers have been assumed which the Legislature never conferred upon the executive

163. Comparison with the judicial review power of the United States Supreme Court

We have reviewed the mechanism of judicial control of the administrative action as one sees it reflected in the theory and practice of the system of jurisprudence of the commonwealth countries We have on purpose, avoided so far making any reference to the American experience upon this subject, and that was for the reason that although the American Courts are steeped in the tradition of common law, which they have inherited from their cousins across the Atlantic they have developed the doctrine of judicial review which in its present form exhibits numerous distinguishing features when it is viewed side by side [illegible] w jurisprudence— [illegible] h countries It is [illegible] ve statement of the law on the subject, so that the student is helped to understand the peculiar logic of the American doctrine of judicial review' as it is applied by the United States Supreme Court to the problems of administrative law

The judicial review of administrative decisions in America may be grounded on any one of the following considerations

1 Is the decision based on law which is consistent with the supreme law of the land, that is the Constitution?

2 Has the administrator acted within the limits of his authority?

3 Has the administrator followed the rules of natural justice in reaching his decision?

4 Is the decision of the administrator based on evidence of "rational probative force", the test being not whether the decision is *right* but whether it is *reasonable*"

The means of enforcing or exerting judicial power of review of administrative action in this regard may be either by way of a statutory remedy, as an *appeal* [illegible] or by way of non statutory remedies like the writs of *certiorari*, prohibition, *habeas corpus*, [illegible]

this branch line was not exempt by reason of ART. 1(22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

"This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Mr. Justice Frankfurter dissented and was joined in by Mr. Reed and Mr. Jackson. Mr. Justice Frankfurter viewed the problem from a different angle altogether. He felt that there was no defect in the foundation of Commission's order.

"No doubt" he remarked (at p. 694), "the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable 'an express finding,' an express finding is imperative........But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. ....But courts have also spoken of the need of findings as the basis of validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review."

Such findings, however, according to Mr. Justice Frankfurter should not be described as jurisdictional (at p. 695).

"Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not furthered by speaking of such findings as 'jurisdictional' and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls. The opinions in *Crowell v. Benson*, 285 *U.S.* 22 and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction."

Mr. Justice Frankfurter thus declined to interfere holding that the non-mention of the express finding was not material in the circumstances of that case.

It would appear from the foregoing account that both in England and Commonwealth countries on the one hand, and United States on the other, the balance is sought to be struck between the vesting of administrative discretion and due regard to the legal security of the individual by means of the exercise of jurisdiction by ordinary court's power of review of the determination of inferior tribunals. Whether it is appeal to due process clause or to the Administrative Procedure Act, 1946, the American Supreme Court endeavours to reach the very results that are being attempted by King's Bench Division and other Supreme Courts working in Commonwealth countries by resort to their controlling authority over the inferior tribunals. Thus it is that the rule of law is reconciled with the necessity of giving large measure of powers to administrative tribunals by securing the control of administrative action by the ordinary courts of the country. Thus are the liberties and rights of private citizens duly safeguarded against the assaults that are increasingly being

sions—safeguards, as for instance, that the officer conducting the hearing shall not be responsible to or subject to the supervision of investigating and prosecuting officers and shall not have performed investigating or prosecuting function in the pending or a factually related case In other words, this Act sets out in detail, the basic pattern to which admin istrative process must conform in order to meet the requirements of uniformity, impartia lity and fairness, the alleged lack of which gave rise to its enactment The Act was framed against a background of rapid expansion of the administrative process, as a measure of check upon administrators whose zeal might otherwise have carried them to excesses not contemplated by the legislatures creating their offices It created safeguards even more stringent than the constitutional ones, against arbitrary official encroachment on private rights, (see page 632 of 94 Lawyers Edition) The importance of the legislation embodied in the Administrative Procedure Act of 1946 cannot be over estimated and one would wish that some such legislation were passed in our country where too the menace of administrative powers, the exercise of which increasingly impinges gravely upon private rights, is reaching unbearable proportions

Thirdly, at one time the American courts allowed the ' jurisdictional facts to be re opened with a view to seeing whether or not those facts have been correctly deter mined This power of judicial review was on par with the parallel power of the superior courts in the Commonwealth countries exercised under the aegis of prerogative writs As has been remarked earlier, inferior tribunals cannot be suffered to confer jurisdiction upon themselves by wrongly deciding those questions of facts upon the establishment of which facts the very availability of their authority to deal with certain situations is itself contin gent (See *White and Collins v Minister of Health* (1939) 2 K B 838 as reflecting the English view upon the subject, and *Crowell v Benson* (1932) 285 *U S* 22 76 *Law Ed* 598 as representing the American view In the latter case the Supreme Court had to deal with an enactment which had provided for compensation in respect of disability or death of em

administrative authority to determine the facts finally so as to preclude the superior courts in appropriate proceedings to re determine that fact for the purpose of enforcing a constitutional right that is properly asserted) In subsequent cases however Supreme Court has veered away from this view and in several cases has refused to re open the decisions on jurisdictional fact rendered by administrative tribunals See *National Labor Relations Board v Hearst Publications* (1944) 322 *U S* 111 88 *Law Ed* 1170 and *City of Yonkers v United States* (1944) 320 *U S* 685 88 *Law Ed* 400 In the last mentioned case the Court came to the conclusion that there were no requisite jurisdictional findings recorded by the Interstate Commerce Commission and without deciding the controversy on merits they set aside the order of the Commission Mr Justice Douglas observed

> ' The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears
> The insistence that the Commission make these jurisdictional findings before it under takes to act not only gives added assurance that the local interests for which Congress
> the
>
> rity,
> considered this jurisdictional question and decided to act because of its conviction that

"Forward-looking judges, experienced administrators, and many progressive and public-spirited lawyers have recognized that American jurisprudence must advance along two lines:

"First, the cheapening, expediting, and amplifying of the judicial process itself. This cause has been greatly advanced through the adoption by the Supreme Court of simplified rules governing civil proceedings under an authorization made upon my recommendation. Revision of the rules of criminal practice has now also been authorized, upon my recommendation.

"Secondly, the reservation of the judicial process for cases appropriate to its exercise and protection of the courts from being overwhelmed with masses of controversies, growing out of regulatory and remedial statutes. For this purpose the judicial process requires to be supplemented by the administrative tribunal wherever there is a necessity for deciding issues on a quantity production basis.

"Notwithstanding recognition of the necessity by many lawyers, jurists, educators, administrators, and the more progressive bar associations, a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in. Many of the lawyers prefer that decisions be influenced by a shrewd play upon technical rules of evidence in which the lawyers are the only experts, although they always disagree. Many of the lawyers still prefer to distinguish precedent and to juggle leading cases rather than to get down to the merits of the efforts in which their clients are engaged. For years, such lawyers have led a persistent fight against the administrative tribunal.

"In addition to the lawyers who see the administrative tribunal encroaching upon their exclusive prerogatives there are powerful interests which are opposed to reforms that can only be made effective through the use of the administrative tribunal. Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.

"Individual shippers could not cope in the courts with great railroad corporations over excessive charges that were small in single cases but important in the aggregate. So the Interstate Commerce Commission was created. Power consumers could not deal with electric light rates, nor could individual security holders pit their strength against the concentrated power of brokerage interests, nor could individual laborers bargain on equality with the concentrated power of employers. The very heart of modern reform administration is the administrative tribunal. A 'truth in securities' act without an administrative tribunal to enforce it, or a labour relations act without an administrative tribunal to administer it, or rate regulation without a commission to supervise rates would be sterile and useless. Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterlizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself.

"The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulations. The effort was made in the recent New York constitutional convention by this same combination of influences to deprive state tribunals of their authority. That effort was wisely rejected by the people at the polls.

made upon them by the exercise of administrative power which under the exigencies of highly intricate economic problems with which the Modern State is confronted it has become absolutely necessary to vest in administrative tribunals

We have so far stressed the need of securing an effective control of administrative action and have emphasized the supreme importance of the superior courts of our country vigilantly exercising their powers of superintendence and control of administrative tribunals Having said that, it becomes necessary to point out to the reader the *value of letting administrative tribunals function without much interference from ordinary courts* The case can best be stated in the words used by *President Roosevelt in his message to Congress when he vetoed the Logan Walter Bill*, which was a piece of legislative measure passed by the Congress with a view to securing the widest possible scope for the judicial review of the work of the administrative tribunals in the United States The present writer has no doubt that the reader would be impressed by the reasoning contained in the message And in order to appreciate the force of the remarks made by the President the reader would do well to remember that the legislation which the President was vetoing in this message had the blessing of American Bar Association, and further that it was due to the very Select Committee that had been set up by the President, as mentioned in the last paragraph of the following extract from the message, that the Administrative Procedure Act of 1946 to which a reference has been made earlier, saw the light of the day

"The objective of the bill is professedly the assurance of fairness in administrative proceedings With that objective there will be universal agreement The promotion of expeditious, orderly, and sensible procedure in the conduct of public affairs is a purpose which commends itself not only to the Congress and the courts but to the executive departments and administrative agencies themselves

"I am convinced however, that in reality the effect of this bill would be to reverse and to a large extent cancel one of the most significant and useful trends of the twentieth century in legal administration

"That movement has its origin in the recognition even by courts themselves that the conventional processes of the court are not adapted to handling controversies in the mass Court procedure is adapted to the intensive investigation of individual controversies But it is impossible to subject the daily routine of fact finding in many of our agencies to court procedure Litigation has become costly beyond the ability of the average person to bear Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded as adequate for any business decision The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never ending lawsuits

"The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes It is characteristic of these tribunals that simple and non technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backwards to precedent and to the leading case

"Substantial justice remains a higher aim for our civilization than technical legalism

The effort was continued on a national scale to destroy the administrative tribunals which enforce the nation's import laws It is from this background that this bill has emerged

"While I could not conscientiously approve any bill which would turn the clock backwards and place the entire functioning of the government at the mercy of never-ending lawsuits and subject all administrative acts and processes to the control of the judiciary, I am of course not unaware that improvement in the administrative process is as much the duty of those concerned with it as the improvement of the court procedure ought to be a duty of the legal profession

"Recognizing this, more than a year ago I directed the Attorney General to select a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive government and to recommend improvements, including the suggestion of any needed legislation

In conclusion, it remains to be stressed that both in England and in America the expert opinion increasingly inclines on the side of establishing "Administrative Tribunals on the lines of the *Conseil d' Etat* in France so as to be able to bring in a wide range of administrative acts within the scrutiny of courts This tribunal combines a number of distinct judicial functions it hears the claims of the subject that a given administrative department has acted *ultra vires* and also hears cases where he seeks *annulation* of some administrative decision It also decides *contentieux de pleine jurisdiction* and gives in suitable cases redress against damage caused by an administrative decision In France as a result of the existence of separate systems of courts, *Ordinary* and *Administrative*, the subject has to seek the redress of his grievances against administrative action in administrative courts But this is no disadvantage to him for under the *Droit Administratif*, virtually for every administrative wrong there is a remedy and the Judges who preside the Administrative Courts are, if at all, pro-subject They are, on all evidence, men of vision and above all courageous It is true that here you have not the sentimental satisfaction of living under that Rule of Law of which Dicey speaks with such a romantic fervour and sings such idolatrous hymns of praise but even the Conservative English Jurists are now beginning to realize the limits within which they could justifiably praise their own system of living under the Rule of Law

"We seem to have fallen between two stools anxious to maintain a theoretically universal rule of law, we preserve merely the fiction of a formal legalism and in fact abandon the executive to its own unattractive instincts" (See Mr C J Hamson's article in the Times for February 20, 1951 and February 21, 1951)

I take leave to say that I am not conscious of the vulgar desire to elevate myself or the court of which I may be member, by grasping after a pre-eminence which does not belong to me, and that I will endeavour to be valiant in preserving and handing down those powers to do justice and to maintain truth, which, for common good, the law has entrusted to the judges.

per *Wiles, J.* (*in ex parte Farnandez*) 1861,10 *C.B.* (*N.S.*) 3, *at* 56.

The first submission put forward by counsel for the defendants was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law, and it has nearly always been rejected. If one reads Ashby v. White, [(1703) 2 Ld. Baraym. 2938; 92 E.R. 126; revsd. (1704), 1 Bro. Parl. Cas.62; 1 E.R. 417; 36 Digest 289, 376], Pasley v. Freeman, [(1789) 3 Term. Rep. 51; 100 E.R. 450; 35 Digest 25,163], and Donoghue v. Stevenson [(1932) A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.] *one finds that in each of them the Judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by* Pratt, C. J. *nearly two hundred years ago in* Chapaman v. Pickersgill [(1762) 2 Wils. 145; 95 E.R. 734; 1 Digest 24, 193] *when he said* (2 Wils. 146):

> *"I wish never to hear this objection again. This action is for a tort: torts are infintely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief. . . ."*

The same answer was given by Lord Macmillan in Donoghue v. Stevenson *when he said*:

> *"The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."*

It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.

—per *Denning,* L. J. *while delivering minority judgment in Candler v. Crane Christman & Co.* 1951, 1 *All. E. R.* 426,432.

In the same case Asquith, L. J. after reviewing the case law applicable, said:

"I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face the consequence with such fortitude as I can command."

CHAPTER VII

THE NATURE, STRUCTURE AND REACH OF JUDICIAL POWER

(In four Sections)

SECTION I	GENERAL NATURE AND SCOPE OF JUDICIAL POWER
SECTION II	CONSTITUTIONAL LIMITS ON JUDICIAL POWER IN SPECIFIED MATTERS
SECTION III	JURISDICTIONAL ASPECTS OF THE SUPERIOR COURTS OF OUR COUNTRY
SECTION IV	OUTLINE OF THE GENERAL SYSTEM OF LAW AND COURTS OF OUR COUNTRY

Court" was preserved and ostensibly the proviso to Indian ART. 225 is calculated to remove the restriction on its general jurisdiction imposed by section 226 of the *Government of India Act*, 1935, wherein it was provided, "Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the Revenue or concerning any act ordered or done in collection thereof according to the usage and practice of the country or the law for the time being in force."

165. Scope of present study of the provisions relating to Judiciary

It will be useful for the proper study of the provisions of our Constitution relating to judiciary to deal with the jurisdictional aspects of the two species of the superior Courts of Pakistan, that is the Supreme Court of Pakistan and of the High Courts, separately from the appreciation of those provisions that deal with questions like the appointment, tenure, and the guarantees and safeguards calculated to secure the independence of the Judges who constitute the personnel of these Courts. But before we proceed to deal with these constitutional questions it is necessary to state, by way of a general introduction to the study of the relevant provisions of our Constitution, some essential features of the nature and scope of judicial power that has been established under our Constitution. We will, understand the provisions of the Constitution better if we could grasp the *essential nature of the judicial power* before we set out to analyse the jurisdiction of the Supreme Court and the High Courts established under the Constitution.

166. Nature and Scope of Judicial Power

Judiciary defined.

"Judiciary" may be broadly defined as that organ of sovereign power which is entrusted with the duty of "administering justice according to Constitution and the law". It is, what may be called, the law-applying organ of the State.

Judicial Power—No vesting provision in our Constitution corresponding to the U.S. and Australian Constitutions.

It is true that in our Constitution there is no Article corresponding to ART. III, S.1, of the *Constitution of the U.S.A.*, which, as has been pointed earlier, provides that the *judicial power* of the United States shall be *vested* in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. Nor again have we a provision like S.71 of the *Australian Constitution* which provides, "The *Judicial power* of the Commonwealth shall be *vested* in a Federal Supreme Court, to be called the *High Court of Australia*, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction . . ." (See analysis of the scheme of Australian Constitution Act in *Attorney General of Australia v. Reginam* (1957) 2 All E.R. p. 45). There is, however, in our Constitution a provision for the *establishment* of the Supreme Court of Pakistan, a definition of its powers and jurisdiction, and also a provision for the establishment of the two High Courts of East and West Pakistan and, in a limited way, a description of their powers and jurisdictions. But it is not possible to understand the nature and extent of the jurisdiction of these two superior Courts, as also of other subordinate Courts, established under several laws that have been continued in existence after the "constitution day" under ART. 224, without clearly grasping the *nature of the judicial process itself* and the role which our Courts play in the orderly working of the State machinery.

Some definitions of Judicial Powers stated

Huddart's case

Shell Co. of Australia vs. Federal Commissioners

"Judicial power" as used in S.71 of the *Australian Constitution*", said *Griffith, C.J.*, in *Huddart's case* (8. *C.L.R. p.* 330 at 357), "means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." This statement was approved by the *Judicial Committee* in *Shell Co. of Australia v. Federal Com-*

SECTION—I

General Nature & Scope of Judicial Power

164. Consideration of ARTs. 148—172

Part IX of our Constitution describes the Constitution and Jurisdiction of the Supreme Court (ARTs 148-164), and of the High Courts (ARTs 165 172) and mentions some general provisions which are applicable to both the Supreme Court and the High Courts (ARTs 173-178) The provisions of this Part are to be read along with the provisions of Third Schedule, a schedule which also deals with judiciary and amplifies in several respects the provisions of Part IX of our Constitution (See ARTs 159 and 177)

In so far as the constitution, jurisdiction and powers of the Supreme Court of Pakistan are concerned, the provisions contained in our Constitution are sufficiently comprehensive and may be taken by themselves as constituting a consolidated code within the *limits whereof that Court is to function, but in so far as the two High Courts (that is the* High Courts of East and West Pakistan), are concerned the provisions contained in our Constitution set forth matters like the appointment and the tenure of the office of the Judges of the High Courts in our country etc , but in regard to their jurisdiction that is their legal competence to act as High Courts, the constitution says very little indeed Beyond ART 170, which mentions their "writ jurisdiction", and ART 171 which describes their power to transfer to their own respective files cases pending in a Court subordinate to them, involving "a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case the scope of a High Court's general jurisdiction is left to be inferred from the state of pre existing law and for this reference will have to be made to ART 227(5) and ART 224 (1) which in general terms provide for the continuance in force of the existing laws and their adaptations According to explanation 1 to clause (1) of ART 224 the expression *laws* occurring in this Article is to be construed as including Letters Patent constituting a High Court

The jurisdiction of Supreme Court completely—but of High Courts only partially set forth in our Constitution

There is however no provision in our Constitution analogous to the one which is to be found in the Indian Constitution where in Article 225 it is expressly provided

"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution the jurisdiction of, and the law administered in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts shall be the same as immediately before the commencement of this Constitution

"Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction"

This provision corresponds to section 223 of the *Government of India Act*, 1935, where too the previous jurisdiction enjoyed by, and the law administered in, any "existing High

it to be discovered the "reason for the decision", the *ratio decidendi* as it is called, which in its turn acquires, within limits, a binding value as a source of law for the same, co-ordinate or subordinate courts. Thus it is that law is made in the process of reaching a judicial decision.

"The English jurisprudence", said Burke, "hath not any other sure foundation, nor consequently the lives and property of the subject any sure hold, but in the maxims, rules, and the principles, and the judicial traditionary line of decision contained in the notes taken, and from time to time published, called Reports. To give judgment privately is to put an end to Reports; and to put an end to Reports is to put an end to the law of England." The point of these remarks is not without some meaning for our system of law which has undoubtedly been greatly influenced by the Institutes of English Law. The solution of legal problems, as they arise in the course of litigation in our Courts, very largely depends upon (a) correct interpretation of the Statute Law, (b) the recognition and enforcement of such customary law as may be deemed binding upon Courts in the light of those principles which have been evolved by the Courts themselves as determining the legal validity of custom, as also upon (c) the correct analysis and application of the judicial precedents.

A judicial precedent is an important source of law and is invariably of considerable assistance in the determination of controversies that arise in our Courts.

The legal history of our country presents to us an ever-growing stream of case law, a stream, which keeps up swelling with the passage of time. It keeps up moving forward with a steadily increasing momentum. This stream has been fed, among other things, by a current of legal decisions in so far as they have evolved legal principles, defined juristic concepts and made them applicable to the problems that have been presented to the Courts during the course of day-to-day litigation. The judicial power has reference to this *competence* and *capacity* of the law-applying organs of the State to take cognizance of the law as it exists and subject to the limitations within which the exercise of that power is itself controlled by the very law that creates and defines their jurisdiction, to settle the rights of people, to fix their obligations and to impose liabilities that may have been incurred by them. Strange to say, in professing to apply the law, the Courts virtually create the law.

Courts in Pakistan are creatures of the Constitution and the Law and they are to apply *law* in the settlement of disputes and controversies that are brought before them. If following *Sir John Salmond*, we were to define law "as a body of principles recognised and applied by State in the administration of justice", then our Courts can well be described as constituting the principal forum in which this activity of *administering justice* is to be carried on.

167. Are our Courts, Courts of Law or Courts of Justice?

Are our Courts "Courts of Justice", or are they "Courts of Law"? The *disparity* between what is done by Courts in obedience to law and what may be regarded as a "just decision", has provoked a great deal of criticism from those who are sensitive to the appeal which the ideal of justice makes and is often the foundation of that oft-asserted jibe against the proverbial Judge of whom the *English Doggerel* has it:

"There he sits like a *Jack daw*

And if you cannot get justice out of him,

Be sure you'll get plenty of law."

Our Judges disavow the power to countenance "judicial legislation", and, in theory at least observe Bacon's admonition, and confine themselves to the office of claiming *jus dicere but not jus dare*—of *declaring* the law and not *making* it.

missioners of Taxation, (1931) *A C* 275 *and* again in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* (1949) *P C* 129) (See also *New South Wales and another v Commonwealth & others*, (1915) 20 *C L R* 54, for the statement by *Isaacs, J*, of the *Australian High Court* as to what the idea of Judicial Power connotes The question there was whether the use of the word 'Adjudication' in S 101 of the Constitution is sufficient to empower the Commonwealth Parliament to create Inter State Commission a Court of Justice that is a Federal Court in strict sense and to invest it with judicial power on that basis The learned Judge has there reviewed some leading cases on the subject)

"Judicial power" according to the definition given by *Miller J*, is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision (See *Miller*, on *Constitution* p 314 *New York* 1891) Dictum of Miller J cited

"The Court", says *Mr Eaton Drone*, "has authority to expound the Constitution only in cases presented to it for adjudication Its Judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise a State asserting rights denied to it The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law " (Quoted by *Marriott* from Forum, February 1890, in his *English Political Institutions* p 293 (1938 *Edn*)

It is the hallmark of judicial power (statutory exceptions apart), that it cannot initiate anything it decides controversies only when its authority is invoked When invoked, by means of appropriate proceedings, Judicial Power is exercised by means of a certain process and the best description of this 'process' is the one given by *Professor William A Robson* who remarks in his book" Justice and Administrative Law at p 36 (3rd Edition) as follows "The process involves the application of a body of rules or principles by the technique of a particular psychological method, the whole decision taking place within a frame-work possessing recognisable institutional features The body of rules or principles is the law, the psychological method consists in the application of what may be called the judicial mind, and the institutional frame work is the Court system The entire process, in which the three are used in combination is denoted by the expression, 'justice according to law' "

166. Heirarchy of Courts

The entire realm of law presupposes for its recognition and enforcement a set up of Courts, indeed a veritable heirarchy of Courts with the Supreme Court at the apex of the pyramid of the judicial system These Courts reflect the structure of the judicial power, and a considerable bulk of the law of our country defines the jurisdictional aspects of the different law applying organs of the State Different component parts of our legal system have reference to the establishment of the different Courts in our country and the definition of their jurisdiction The theory of our law is that every judicial authority has itself to have [illegible] fore it, on being its authority to ad Heirarchy of Courts

A great bulk of what are known as legal principles, have themselves been evolved by the Courts of law, and our law, in a highly significant sense, is daily being made in the very process in which Courts apply the law to the new situations that are being presented to them from time to time for their adjudication It is the Courts that interpret and apply the law, and although the theory of our jurisprudence is that in thus interpreting and applying the law they merely *recognise* and *enforce* the law such as is already in existence, nevertheless, the fact remains that, after the decision is rendered, there is in the statement of Authority of Courts to evolve legal principles

115 the question before the Court of Appeal was whether a hydroplane was a vessel or not. The argument was: if the question is whether it should be subject to admiralty's judicial jurisdiction while afloat its resemblance to a vessel is more important than the fact that it can also fly. But if the question is whether the representative of a passenger, drowned while the hydroplane was afloat on the water, can claim reward under an insurance policy which accepted the peril of flying, the answer is 'No'—for the fact that it was afloat at the moment, did not lessen the risk since the hydroplane is more likely to capsize than an ordinary vessel. Hence in one case analogy was applied and in the other it was not. Similarly, a bicycle has been subsumed under the word 'Carriage' occurring in the *Highway Act of* 1835, though at the time the Act was passed bicycle had not even been invented. (See *Taylor v. Goodwin*, 1879, 4 *Q.B.D.* 228. (See also *Attorney-General v. Edison Telephone Co.* 1880, 6 *Q.B.D. page* 228.).

In the case *Collingwood v. Home and Colonial Stores*, 1936, 3 *All E.R.* 200, the principle that analogy can furnish only a guide and not decisive answer is amply illustrated: the Court of Appeal in the case of *Musgrove v. Pandelis* (1919, 2 *K.B.* 43) had ruled that fire spreading to the Plaintiffs' premises as a result of petrol in the carburettor of the car parked in the defendants' garage catching fire was within the rule laid down by the *House of Lords* in *Ryland vs. Fletcher* (1868), 3 H.L. 330 in that motor car was dangerous within the principle laid down in the case. But Lord Wright, M.R., in a later case, when pressed to apply the principle to the situation where fire spread to the plaintiffs' premises due to defective electric wiring on the defendants' premises refused to do so because electric wiring is something which "every body or most people, nowadays have in the houses which they occupy whether for domestic use or for purposes of trade as the defendants did. There is nothing in the installation of such wiring which to my mind, brings the case within the principle of *Ryland vs. Fletcher*. It is perfectly true that electricity like gas or water may be regarded from one point of view as a dangerous thing and the principle of *Ryland v. Fletcher* has been applied to persons who carry, in their property or in their mains gas, water or electricity. . .*But in all these cases there was nothing comparable to the* ordinary domestic installation of electric wiring for the ordinary comforts and conveniences of life. In all these cases these dangerous things were being handled in bulk and in large quantities; they were being carried in mains and constituted an extra-ordinary danger created by the appellants for their own purposes."

Relevance of Pursuasive Precedents from Foreign System of Jurisprudence

In drawing inferences and deductions from cases decided in other systems of law it is essential to realise that what is expedient for the community concerned is :

"The secret root from which the law draws all the juices of life . . . every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure . . . the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." (See *Holme's Common Law, pp.* 35-36.

Public Policy to Ethical Considerations.

It is these "instinctive preferences and inarticulate convictions" that form the "inarticulate major premise" and which ultimately control the approach of judges in the matter of deciding cases. And so Lord Macmillan says:

"In almost every case, except the plainest, it would be possible to decide the issue either way with reasonable legal justification and that in such cases ethical consideration operates and ought to operate." (*Law and Other Things, p.* 148).

But care should be taken to avoid going to the other extreme: Burroughs J. in 1824 in the case of *Richardson v. Millish*, 2 *Bing.* 229 *at* 252, remarked, "I for one protest, as my Lord has done, against arguing too strongly upon public policy—it is a very unruly

The Judges are often heard in our Courts of law declaring their helplessness in the face of law to be able "to do justice" How often do we not hear it said

> "We must take law as we find it The result we have reached is one which we could not very well have avoided We are only concerned with what law *is* and not with what it *ought to be* If this leads to an unjust result it is a matter for the Parliament, not for us"

These and such other observations that one discovers in the judicial pronouncements of our Courts serve to point out what is really at stake

It is undoubtedly true that a Judge has no unfettered power to do 'justice in accordance with *his* notions of what a just decision in a given case before him should be There is no power of administering justice without restraint conferred upon a Court "That restraint", says Broomfild in his "*Legal Maxims*", has been imposed from the earliest times And, although instances are constantly occuring where the courts might profitably be employed in doing simple justice between the parties, unfettered by precedent or by technical rules, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice [*Barton v Muir, L R 6 P C* 134, *Tooth v Power*, (1891) *A C* 284 *at p* 292] (See *Broom s Legal Maxims, p* 47)

That system of law is the best, which leaves least to the discretion of the Judge—and that Judge the best, who relies least on *his* own opinion And although, in cases where discretion is by law left to a Judge, he is to a great extent unfettered in its exercise, it is ever true that "[illegible]e, means sound discretion guided by law [illegible] must not be arbitrary, vague and fancifu[illegible] 4 Burr 2527 at 2539 [illegible]

[illegible]tion of judicial method, considers is the meaning of the statute or the authority of the decision of a superior court

Which way is the Judge to turn if neither statute nor precedent furnished to him the rule of decision

The way in which the judicial method operates in the matter of giving effect to relevant statutes and decisions would be dealt with in the sequel, but at present it is necessary to raise the question as to *what the Judge is to do in a case where there is neither legislative provision nor any judicial precedent which in his judgment furnishes an answer to the problem raised before him in the course of litigation* There are some codes that lay down specifically what [illegible]

[illegible] for the time being the statutorily conferred power that the courts are in certain cases to apply rules of equity and good conscience), and one is entitled to suppose that all they could do under the circumstances is either to turn to *persuasive precedents* available to them from other civilised systems of law or to turn to the feeble light that is furnished by text book writers

Analogical Reasoning

In some cases resort could be had to "Analogical Reasoning," and wisely used, this method of tackling legal problems would always be found to be a useful weapon in the matter of deciding cases that come up before the courts, for the determination of which there is neither clear statutory provision nor any guidance to be derived from the judicial precedents [illegible] to [illegible] of [illegible] *Y*

close or discuss openly the ideological assumptions underlying the administration of the law.

(2) The acceptance of separation of powers and the consequent reluctance to compete with the legislator in the application of legal policy."

And he adds :

"That the danger of competing or conflicting competences is very real, is shown by the different position of the American Supreme Court which, as guardian of the Constitution, has decisively influenced American social policy for almost a century, but in a purely negative, restraining way, and without the responsibility which the Parliamentary Law-maker has towards the electorate." (See p. 334 of his Legal Theory).

Professor Friedmann has cited numerous instances which tend to show that the determination of the cases by the judges has been governed by moral, social or political principles. (See this *Author's statement of law* in his *Legal Theory*, *3rd Edition*, particularly at *pages* 335 *to* 343.) The following cases may be studied with profit for comprehending the role of public policy in the development of law:

(1) *Bowman v. Secular Society* (1917), *A.C. page* 406,
(2) *Egerton v. Brownlow* (1853), 4 *HLC* 1,
(3) *Beresford v. Royal Insurance* (1937) 2 *KB, page* 197, *and* (1938), *A.C. p.* 586),
(4) *Fender v. Mildmay* (1938), *A.C. p.* 1,
(5) *Russell v. Duke of Norfolk* (1948), 65 *T.L.R. p.* 225, *and*
(6) *Rodriguez v. Speyer Brothers* (1919), *A.C.* 116.

Justice according to law. View of Denning, J. quoted.

In a recent book *Road to Justice*, Sir Alfred Denning has challenged the fascile assumption—namely, that if in the administration of law an unjust result is reached it is a matter for Parliament and not for the Judges—contending that the lawyers and Judges cannot be heard to dissociate themselves from the burden of responsibility which lies heavily upon them to secure administration of justice. He commences his first lecture by recalling the words of William Temple uttered by him when he addressed the Association of Lawyers in the Inns of Courts. He had said :—

"I cannot say that I know much about the law, having been far more interested in justice."

Justice Denning, to the question, "What is justice", makes the following answer:—

"All I would suggest is that justice is not a something you can see. It is not *temporal* but *eternal*. How does man know what is justice? It is not the product of his intellect but of his spirit. The nearest we can get to defining justice is to say that it is what the right-minded members of the community—those who have the right spirit within them—believe to be fair." (See p. 4 of his book).

From this statement, Justice Denning draws the important deduction as to the responsibility which falls upon the lawyers:—

"They represent the right-minded members of the community in seeking to do what is fair between man and man and between man and the State; and they can only do this by means of just laws justly administered."

Then he exhorts the Lawyers in the manner of Socratic Discourse to be loyal to the Call of Duty:

"May I ask you also in your own progress in the law, not to rely over much on legality—on the technical rules of law—but ever to seek those things which are right and true; for there alone will you find the road to justice. When you set out on this road you must remember that there are two great objects to be achieved; one is to see

horse and when once you get astride it you never know where it will carry you" So also A L Smith, M R said in *Deicfontion Consolidated Mines Ltd Gaison* (1901) 17 *T L R* 604, "This public policy is a high horse to mount and is difficult to ride when you have mounted it"

Public Policy and the growth of law

That brings us to the consideration of the role that the "Unruly Horse" namely, the *Doctrine of Public Policy*, plays in the system of our jurisprudence and to notice the extent to which it has influenced and continues to influence the administration of justice

According to Professor Friedmann, this "unruly horse" of public policy, may be described as the fundamental agent of legal development It has conciously or unconsciously dominated the thinking of those who are put in charge of the duty of administraing justice According to Lord Wright (*Fender v Mildmay*, 1937, 3 *ALL, E R* 402 at 424 (1938) *A C* 1, *at page* 38), 'public policy', as a technical term and instrument in the hand of the lawyer, must be restricted to a narrower sense

"In one sense, every rule of law, either Common Law or Equity, which has been laid down by the courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy In that sense, Sir George Jessel, M R, referred to the paramount public policy that people should fulfill their contracts But public policy in the narrower sense means that there are considerations of public interest which require the courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them Public policy in this sense is disabling"

The unconscious or half conscious influence of the public policy in the broader sense is responsible for the creative development of case law, or the application of the general policy of equity

The two sharply contrasted attitudes to the judicial function in so far as it his a bearing upon the question of giving effect to the doctrine of public policy would be found stated in the case of *Egerton v Brownlow (Earl)* (1853), 4 *H L Cas* 1 The statement offered by Parke, B runs thus

"It is the province of the judge to expound the law only, the written from the statutes, the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference, not to speculate upon what is best, in his opinion, for the advantage of the community Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good, for instance, the illegality of covenants in restraint of marriage or trade *They have become a part of the recognised law, and we are therefore bound by them* but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise"

And as contrasted from this is to be found the statement of Pollock, C B, in the same case at page 151, which runs as follows

"It may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community, but that is no reason for their refusing to entertain the question, and declining to decide upon it"

According to Professor Friedmann the restricted scope of public policy in this professed sense as defined by Lord Wright in *Fender v Mildmay* (1937), 3 *All England Reports* 402) is due to two parammount reasons

"(1) The traditional reluctance of judges, and of English Judges in particular, to

judge the judge's judgments. We make a valuation of them, and justice is our standard of valuation. We may properly describe it as a sliding scale. To speak strictly, it is we who apply it just as it is we who seek to predict the judge's judgments. We not only wish them to be just, but every now and then—as in some state constitutions—we order them to be just. And without such statutory commands, we expect them to be and are very honestly shocked if they are not.

"But we are not the only ones who are shocked. The judges too are shocked. Whether they are ordered to or not, they also very much desire to render just judgments. In part they desire to do so because they know it is expected of them. We cannot suppose they wish to flout or antagonise the rest of their fellow citizens. But in an even larger part, they desire to judge justly because, in such training as they have had, they have absorbed enough of the history of their profession to know that it was the desire for justice which created them. Judges make law. Justice makes Judges."

Expression "Equity" and "Good Conscience".

Paragraph 19 of the Charter of High Court of Calcutta issued under the provisions of the *Charter and High Courts Act of* 1861, which *inter alia* provides that "the *law* to be administered by the High Court shall be *the law* and *equity* which would have been applied by the said High Court if these Letters Patent had not been issued", gives us precious little information as to *what* is to be understood by the term *equity* appearing in the context of that provision. Presumably this has reference to the 27th clause of an ancient enactment, *Regulation* 11 *of* 1772, to the effect that where no specific statutory mandate existed which would help in the disposal of a case, the *Tribunals* of the *East India Company* should apply rules based on justice, equity and good conscience. This expression "justice, equity and good conscience" trails along the path of innumerable statutes and has been the corner-stone upon which the super-structure of the application of the principles of English Common Law to the Indian situation has been supported. Some of the Common Law doctrines were absorbed in the statute law as the codification of the law relating to principal branches of our substantive and procedural law took place later on—but, by and large, it was under the aegis of "Justice, equity and good conscience" that highly fanciful, vague, pompous and fussy phrase that the Stock-in-Trade of the English Common Law Doctrines was inducted into office and action, in the *Corpus Juris* of India.

Meaning of the term "Equity".

The term *Equity*, however, has been judicially interpreted as being synonymous with what is demanded by justice and right, and the larger and the more ponderous expression 'justice', 'equity' and 'good conscience', means exactly the same thing. The term 'equity' in this context has not reference merely to the system of rules and maxims evolved by the Court of Equity at one time presided over by the *Lord Chancellor in England* to mitigate the rigour and formalism of the rules of English common law, but also to that penumbra of a 'vague' jurisprudence which is often invoked by judges to enforce their nebulous notions of 'justice in the abstract'.

In fact the Charters of the Earlier High Courts established during the days of East India Company or soon thereafter, have not been construed as applying the English law in India in its entirety but only as nearly as the circumstances of the place and the inhabitants admit. [see the *Advocate-General of Bengal v. Ranee Surnomoyee Dosee* (1863), 9 *M.I.A.* 387: 9 L.T. 843]. Even the English precedents and procedure which was deemed to be "against 'justice and right' or 'justice, equity and good conscience' " was not to be followed by courts in the Indo-Pakistan sub-continent.

The plea to apply rules of equity in our courts means no more and no less than an appeal to the court of law "to reduce the harsh effects of a logical application of *strictum jus*, to individualize the general rule, to harmonize the administration of law". (See Paton's Jurisprudence, p. 172, Oxford 1946). It is true that a Court of Law has not to be arbitrary

that the laws are just· the other that they are justly administered Both are important, but of the two, the more important is that the law should be justly administered It is no use having just laws if they are administered unfairly by bad judges or corrupt laywers A country can put up with laws that are harsh or unjust so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness But a country cannot long tolerate a legal system which does not give a fair trial " (See his Book, *The Road to Justice*, pp 6 7)

168. Some Observations on the Development of "Judicial Method"

The judicial method has been steadily improved across these many centuries that the courts, all over the civilised world, have been administering justice, and such progress as has actually been made in this field, is ultimately due not so much to the impact of abstract ideal of justice as to the rules of judicial procedure that have been evolved with a view to leaving the least to the discretion of the judge

If by 'law' is to be understood that which will help us to predict what the judges [illegible]

the end, tell us in his 'judgment' how he has reached a particular conclusion We must insist on his letting his judgment be controlled by the operation of those factors in the total judicial process that make for, if not certainty, at least probability, so that our prediction as to what he will decide will be not a vain one

A judge has to consider what the legislature has enacted He is also bound to consider what other judges of Co ordinate or Superior courts have decided on a point which [illegible]

judicial endeavour is to render decisions on objective criteria and to state as fully as may be practicable, the reasons that have led the judges to the conclusions they have stated in their opinions This requirement applies as much to the determinations by a court of ultimate jurisdiction as it applies to one from where an appeal lies to a higher court

Three Important Factors in the Development of Judicial Method

There are three important indicia that go to define the outlook of the judicial mind and these may well, in their turn, be regarded as constituting important factors in the development of the judicial method These, according to Professor William A Robson, are (a) the principle of consistency, (b) ideal of equality, and (c) the quest of certainty (See Justice and Administrative Law, Chapt 5) A few words by way of elucidation of these factors may not be out of place

Principle of Consistency

First A Judge must be *consistent* in the sense that he must endeavour to abide by the rule which has been previously laid down either by himself or some one else having the authority to judge What is suggested in this context is that the progress of law takes place by the very act of judging, and this movement is from initial elasticity to relative rigidity, precisely because of the desire to be consistent with a previous decision When reflection upon the previously decided cases or controversies takes place, we invariably search for the principles in terms of which those decisions could be understood and explained, and this we do in order that we might consistently with those principles decide the fresh cases that actually have or might hereafter come up before us And it is this

able that the living should be so governed. The past gives us our vocabulary and fixes the limit of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity." [Collected Legal Papers (1920) p. 138].

Choice of Principles

Society is ruled both by the forces of conservatism and change. The progress in law is made by the judge under our system when he sets out to evaluate the relative merits of contending principles that are striving to secure recognition at his hands. Whenever he is called upon to render a decision, he must choose one out of the several principles in terms of which the decision in the case could be rendered. In the matter of making choice he has a wide discretion indeed given to him by the law, and it is for him to choose out of the several rival legal principles the one which ought, in his opinion, to control his decision. Justice Cardozo illustrated the need for a judicious exercise of this discretion to choose between principles in the words that follow:

"One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of *Riggs v. Palmer*, 115 *N.Y.* 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will . . . That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own iniquity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. . . One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice . . . . . In the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight." (*The Nature of the Judicial Process*, pp. 40-42).

Legal Fictions and their relevance

Why courts of law frequently resort to legal fictions and make reference to non-existing entities such as the 'reasonable man', 'the prudent man', 'the man-in-the-street' for the purpose of deciding upon the norms in relation to which, the acts and omissions of persons litigating before them are to be judged with a view to fixing their rights and determining their obligations? The only rational answer that could be made to this problem is to say that by so doing they reduce those vague and neblous intuitions of a moral causistry into a system of well-defined rules that have every appearance of being acclaimed and accepted as embodying impersonal tests. After all, every decision must conform to some rule that can be stated in the abstract and applied to all future cases. The search for the rule, and, where none exists, the creation of one are matters of constant pre-occupation with the judicial mind. Lord Macmillan in the case of *Glasgow Corporation v. Muir* (1943) 2 *All E.R. p.* 44: (1943) *A.C. at p.* 448, gives the *rationale* of the dogma of the reasonable man precisely from this point of view.

Glasgow Corporation vs. Muir.

"The standard of foresight of the reasonable man is, in one sense, an impersonal

and capricious in the matter of applying the principles of equity jurisprudence, for this would render the administration of justice continually dependent upon the length of the Chancellor's foot And this charge even the court of equity in England was anxious to avoid Did not Lord Eldon, Lord Chancellor, say

"Nothing would inflict upon me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot " [*Geo v Pritchard* (1818) 2 *Swans p* 402]

The development of principles of equity, both under the *Roman Law* as well as under the *English Law*, was brisk in the beginning, but later on, that development had to encounter the obstruction of the petrified rules which courts of equity themselves had evolved and applied to combat the rigours of the formalism of common law The Romans separated [illegible] Impact of Equity on the growth of Roman and English Law

that in the event of conflict between rules of common law and the rules of equity, the latter were to prevail Although the Courts of law and of equity have ceased to exist as separate entities, the two streams, that is of equity and common law now, to borrow the wise words of Snell, run into the same channel but their waters do not mix And it is this tradition that was handed over to the Indian courts when the British rule got firmly established in India and under the several Charters the various High Courts were set up "to administer law in accordance with the principles of justice, equity and good conscience" (See the Charter Act, 1861, and Ss 19, 20, 21 of the Letters Patent issued to High Court of Judicature at Fort William in Bengal) Principles of Natural Law and Justice

To day appeal to equity is really appeal to principles of natural law and justice

The expressions like 'benefit of reasonable doubt', 'the standard of care required of a reasonable man', 'the exercise of discretion should be made in a just, fair and reasonable manner' etc , are reflections of the persistence of the doctrine of natural justice which continues to haunt lawyers and law courts One can, with this background, well understand the protest of the Judge who in the case of *Ba Lis v Bishop of London* (1913) 1 *Ch* 127, observed, "Whatever may have been the case 146 years ago we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled, "justice as between man and man" Ba Lis v Bishop of London

[illegible] her it can translate [illegible] se if its application [illegible] al difficulty of law is that, while it must translate its broad purpose into rules that can be easily applied, it must [illegible] Views of Professor Paton.

conditions Economic conditions change, social philosophies develop, and 'an expanding society demands an expanding common law' ". (See his Jurisprudence p. [illegible]).

This orderly expansion of the common law takes place in what may be regarded as a "no man's land" Both the legislature and judicature serve, each in its own sphere, to secure mastery in this domain But the growth of law, as pointed out by Mr. Justice Holmes must have within limits, of course, "historical continuity" about it. Justice Holmes quoted.

"The law, so far as it depends on learning is indeed, as it has been called, the Government of the living by the dead To a very considerable extent no doubt it is inevit-

truths' contained in 'the laws of Nature and of Nature's God'; and popular resistance was used to enforce the appeal to these truths. But a law (or laws) which operates only in revolutionary times, and operates then to overturn the State, can hardly be law in any real sense of the word. Real law must be constantly operative, and it must at once sustain the State and be sustained by the State.

"We may therefore put the question which confronts us in a different form. Instead of asking whether there are two laws, 'one against another', we may begin by assuming that there is only one law, in any real sense of the word, and that this is the positive law which is actually imposed upon us, as members of a State, by the definite declaration and specific recognition of the organs of that State, legislative and judicial, and by the process of continuous enforcement which they apply. But having made that assumption we may then proceed to ask whether there are not two sources of this one law—(1) the personal source of a human authority (which may, in the last analysis, be the authority of the community itself, acting through organs evolved by it for the purpose of declaring, recognizing, and enforcing its own sense of the necessary rules of its common life), and (2) the impersonal source of an inherent rightness or justice, which adds to a law proceeding from the personal source of a human authority the further strength of a sense that it is right and just in itself, apart from, and over and above, the fact of its being declared to be law. If we make this distinction, we may say that authority gives validity to law, and justice gives it value. A law has validity, and I am legally obliged to obey it, if it is declared, recognized, and enforced as law by the authority of the legally organized community, acting in its capacity of a State. A law has value, and I am bound to obey it not only legally, and not only by an outward compulsion, but also morally and by an inward force, if it has the inherent quality of justice. Ideally law ought to have both validity and value. We may even say that it is only because law, *as a whole and in its general nature*, possesses both attributes, that it actually operates and is actually effective. At the same time we must recognize that, for the purposes of the legal association, it is sufficient that a law has validity, and we are legally bound to obey it if only it has that attribute. Though law as a whole, and in its general nature, has both validity and value, any particular law may have only validity. But that is enough to involve an absolute *legal* obligation." (See his Principles of Social and Political Theory, p. 100).

Conclusion stated.

From the foregoing discussion it would be clear that our courts are charged with the duty of administering *justice in accordance with the law*. It is true that abstract notions of justice cannot be allowed to stand in opposition to law for even the doctrine of public policy upon which judges more properly could be said to legislate judicially, is itself a part and parcel of the common law. Public policy as a concept of our jurisprudence is related to the interest of the community rather than to the parties before the court. It does not consist of any universal or immutable body of rules, but it is something elastic and its actual configuration depends on the logic of the changing conditions of the Society.

It was precisely this approach to the problem of administering justice according to law that made Mackinnon, L. J., say in the case of *Ellerman Lines Ltd. v. Read*, (1928) 2 *K.B.* 144 *at p.* 152. "I freely avow that, in-as-much as in common sense and decency (the plaintiff) ought to be able to recover against some body, and in the circumstances of this case and having regard to the correspondence which has taken place, in common sense and decency he ought to recover against the defendants if law allows it, my only concern is to see whether upon the cases the Law does allow him to recover." This extract, in the present writer's opinion, shows the real *nature of judicial process*—a process of administering justice according to law.

test It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question Some persons are by nature unduly timorous and imagine every path beset with lions others, of more robust temperament, fail to foresee or non chalantly disregard even the most obvious dangers The reasonable man is presumed to be free both from over apprehension and from over confidence "

Having said that, Lord Macmillan is cautious enough to add

"But there is a sense in which the standard of care of the reasonable man involves in its application a subjective element It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen Here there is room for diversity of view, as, indeed is well illustrated in the present case What to one judge may seem far fetched may seem to another both natural and probable "

The conflict between 'Law' and 'Justice' has its historic origins in the hoary past of Humanity Side by side with the Positive Law has existed the Law of Nature, of Reason, and, in fact, the former has been interpreted and applied under the sometime overt and, sometime, covert influence of the latter With the Romans too side by side with the *Jus Civile*, existed for the Roman Jurists and the Courts of *Romana*, *Jus Naturale*, which was, in the words of Ernest Barker, regarded as some sort of a 'law' imposed on mankind by common human nature, that is, by reason in response to human needs and instincts But it was not *imposed* in the sense that it is an actual body of law, recognised as such and enforced as such in the Roman Courts of Law It is a spirit rather than a letter a spirit of humane interpretation present in the minds of Jurists and Judges, which affects the law that is actually enforced, but does so without being actual law in the strict sense of that word

Conflict between Law and Justice—views of Ernest Barker

"The Romans' adds Ernest Barker, "regarded this law as universal, because it came from man's common nature and extended its range to all mankind "

But are there really two separate laws and is one of them 'against the other'? That is the question to which Sir Ernest Barker makes the following answer

"To put the question in that way, and to attempt to think in those terms, is to run at once into heavy weather and to steer a difficult course If the State is a legal association, it must have one law as the condition of being one legal association or State If there were two laws, there would be two States, or at any rate every member of the State would be torn in two by the question, 'which law am I to obey?' Any theory of two separate laws is at once face to face with the possibility of a conflict between the two, and is thus confronted by the problem of finding a solution of the conflict Theorists who gave their adhesion to the school of natural law were ready with their answer in any case of conflict, natural law carried the day Blackstone himself, in a passage of the Introduction to his *Commentaries* in which he is following, and even copying, a contemporary Swiss theorist of the School of Natural Law, can lay it down that the 'law of nature is of course superior in obligation to any other no human laws are of any validity if contrary to this' The difficulty of such an answer was that there was no certain and known body of natural law, and even if there had been, there was no established system of courts to give it recognition and enforcement In practice two things happened, which themselves conflicted with one another In normal times it was allowed that positive law, as being known and enforceable, must necessarily prevail. In revolutionary times, as for instance during the *American Revolution* and the issue of the Declaration of Independence, an appeal was made from positive law to the 'evident

(a) Court

(a) The word '*court*' as understaood in law has nowhere been precisely defined. But whatever may be the original meaning of the word 'court', there can be no dispute about the meaning that it has by now acquired in jurisprudence; it is a place where justice is administered and the word refers not only to the *place* but also to the *person* who exercises judicial functions. It is true that not all places where justice is administered are necessarily courts in law. There are many tribunals who render a *final decision* between the parties, after hearing witnesses on oath, and their decisions are subject-matter of an appeal to a Court. But these tribunals are not necessarily Courts of Law although they undoubtedly exert judicial power. In the case of *Royal Aquarium, Etc Ltd. v. Parkinson*, (1892) 1 *Q.B.* 431, *Fry L. J.* drew the distinction between a Court and other tribunals exercising judicial or quasi judicial functions. His Lordship said:

> "I do not desire to attempt any definition of a 'court'. It is obvious that, according to our law, a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not Courts of Justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of *justice*, but whether it is a *Court in law*. Wherever you find a Court of law, to that the law attaches certain privileges, among which is the immunity in question.
>
> "But this argument was used on behalf of the defendant. It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not."

Similarly Lord Sankey, L.C. in the case of *Shell Company of Australia Ltd. v. Federal Commissioner of Taxation, reported in* (1931) *A.C.* 275 (*P.C.*) observed

"that a tribunal is not necessarily a court in the strict sense of exercising judicial power, because:

(1) it gives final decisions,
(2) hears witnesses on oath,
(3) two or more contending parties appear before it between whom it has to decide,
(4) it gives decisions which affect the rights of subject,
(5) there is an appeal to a court, and
(6) it is body to which a matter is referred by another body."

Thus there are Tribunals with many of the "trappings of a court" which, neverthe-

the law

that it is a deduction from principles of ethics, or admitted axioms or what not, which may or may not coincide with the decisions But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the axioms or deductions but he does want to know what the Massachusettes or the English Courts are likely to do in fact I am much of his mind *The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law* "

It would be perfectly plain from the foregoing extract, that Justice Mr Holmes is giving full scope to the play of such factors as the pre dispositions and prejudices of the judges who administer law in the determination of cases that come up before them The utmost that one can claim for a conscientious judge is that as far as possible he will make himself aware of his prejudices and by that very self knowledge nullify their effect

"Much harm", says Judge Jerome, "is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine The concealment of the human element in the judicial process allows that element to operate Views of Judge Jerome stated

surging emotions , the parties are keyed up to the contest, often in open defiance, and the topics at issue are often calculated to stir up the sympathy, prejudice, or ridicule of the tribunal ' The judge's decision turns, often, on what he believes to be the facts of the case As a fact finder, he is himself a witness—a witness of the witnesses, he should, therefore, learn to avoid the errors which, because of prejudice, often affect those witnesses

"But, just because his fact finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them He must do his best to ascertain their motives, t
judge of the acc
of the opposing
He must cannily penetrate through the surface of their remarks to their real purposes
and mc
iality i
judge c
he could never render decisions His findings of fact may be erroneous, for, being human, he is not infallible, indeed, a judge who purports to be super human is likely to be dominated by improper prejudices " (See Preface to the Sixth printing of "Law and the Modern Mind", page XX, by Jerome Franks)

170. Some terms defined

Before proceeding any further it is necessary to set forth the forensic meaning of terms like 'Court' and 'Jurisdiction of Courts', and 'Law' —

nullity. The jurisdiction cannot be conferred by consent if none exists in the Court seeking to exercise it. (See *Hinde v. Hinde* (1953) *1 All E. R. p. 171 C.A.*; See also *Re Aylmer ex-Parte Bischoffsheim* (1887) 20 *Q.B.D. page* 258, *and British Wagon Co. Ltd. v. Gray* (1896) 1 *Q. B.* 35).

(c) "LAW".

(c) What precisely is to be understood by the term *Law*?

Commenting on the history and etymology of the term *Law*, Ernest Barker in his recent book, *Principles of Social and Political Theory*, remarks as follows:—

> "The term appears to have been borrowed by the English about the year 1000 from their Scandinavian invaders, it came to them not from Latin (the Latin terms *lex* and *legalis* are not cognate in origin or connotion) but from Teutonic root, meaning to 'lay', to place or to set. Law is thus etymologically something *positum* or as we should say 'imposed', it is something laid down or set as one sets a task or lays down a rule and it is accordingly defined in the Oxford Dictionary as 'a rule of conduct imposed by authority.' (See page 92).

But we are not so much concerned with the etymology of the term here as with the meaning that can be predicated of that term under a system of analytical jurisprudence. And for our purposes it would be conducive to a better understanding of the subject of law if we, following *Blackstone*, were to say:

> "Municipal Law is properly defined to be a rule of civil conduct prescribed by a Superior Power in the State, commanding what is right and prohibiting what is wrong. (See p. 44 of his first book on *Commentaries on the Laws of England*).

This definition itself raises controversial issues. But the essential question is, "Must we define 'Law' in terms of the source whence it emanates, namely, the '*legislature*', which term according to *Blackstone* is convertible with the word 'sovereign'?"

So very important is this question of approach to 'Law' that its theoretical foundations should be clearly kept in view, for, upon the answer that we give to it, must depend our general outlook on the system of law and its practice as it obtains in the country.

It is undoubtedly true that in some sense Legislature makes the law, but it is equally true that there is a distinction between 'law' and 'the sources from where it is derived'. In the opinion of the present writer, it is the judiciary that has a last say as to what is and what is not law. This is so because:

"Whoever hath an absolute authority to interpret any written or spoken laws", says Bishop Hoadly, "it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."

It is for this reason that Professor Chipman Gray in his book, *The Nature and Sources of the Law*, candidly defines law as "being composed of the rules which the courts, that is the judicial organs (of State or any organised body of men) lay down for the determination of the legal rights and duties." He calls attention to the distinction between the *law* and the *sources of the law*. It is the failure to keep this distinction in view that leads to anomalies: that is, on the one hand, to affirm the existence of law which courts do not follow and, on the other, to say that the law of a nation means "the opinion of half a dozen old gentlemen, some of them, conceivably, of a very limited intelligence." In Mr. Gray's words :—

> "The truth is, each party is looking at but one side of the shield. If those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in that country. However desirable, for instance, it may be that a man should be obliged to make gifts which he has promised to make, yet if the courts of a country will not compel him to keep his promise, it is not the Law of that country that promises to make a gift are binding. On the other hand, those

less are not courts in the strict sense of exercising judicial power The views expressed in the *Shell case* have been referred to in the case of *Labour Relations Board of Saskatchewan v John East Ironworks Ltd* (1949) *A C p* 134 *at p* 149 It was remarked in this last mentioned case that there are many positive features which are essential to the existence of judicial power, yet they are not to be regarded as being in the nature of conclusive indicia of it "Any combination of such features will fail to establish a judicial power if, as is a common characteristic of so called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considera tions of policy also Whether in the present case the power exercised by appellant Board is a judicial power their Lordships do not decide For the elements in its constitu tions and functions which at least make it doubtful whether it is in the strict sense a court exercising judicial power at all appears to lead conclusively to the opinion that it is not a superior, district or county court or a court analogous thereto "

It would be noticed that one of the hall marks of judicial power is the requirement djudication based on considerations of policy basic requirements to be fulfilled before a

(1) It should be required by law to give a public hearing to the parties to the case (subject of course to the proper exercise of power to exclude the public in proper cases), See *Scott v Scott*, (1913) *A C* 417, and Re Agricultural Industries Ltd (1952) *1 All E R. page.* 1188, where Sir Raymond Evershed, M R , observed

"To justify this court closing its doors and thereby making an exception to what is funda mental in the administration of justice in this country, viz , that it should not be done behind closed doors, it must be shown that, as laid down by the House of Lords in *Scott v. Scott*, (1913) *A C* 417, the ends of justice would otherwise be liable to be defeated, '

(2) that the presiding officer of the Court shall not take part in any decision in which he is *personally interested* (See *Co opartnership Farms v Harvey Smith*, (1918) 2 *K B* 405 *at p* 411 *etc*

(3) Every litigant has a right to be confronted with the case against him by his

ance with this rule, that is, to determine rights and liabilities of parties after they have been heard by it in a public forum Even a quasi-judicial body is under a duty to hear the party before it could pass any order that might adversely affect his civil rights (See discussions of this topic under "Writ of Certiorari" in Chapter VI of this Book)

(b) The term *jurisdiction* is not infrequently employed to refer to the legal compet ence of a Court or Tribunal to decide matters that are litigated before it or to take cognizance of matters presented to it by means of appropriate proceedings In each case, as it would seem, it is a question of legal construction whether, and if so, within what limits, the authority to decide matters is conferred upon a Court or Tribunal The limitation on the authority to decide a given question may have reference to — (b) Jurisdiction

(i) the subject matter,
(ii) territorial extent,
(iii) pecuniary value of the claim involved,
(iv) nature of the dispute, and
(v) the amenability of the parties to the process of the Court etc

It is a cardinal principle of law that jurisdiction must be acquired before judgment is given, and a judgment rendered by a Court which has not the jurisdiction to give it is a

we are able to understand precisely the point of the remark made by Bishop Hoadly quoted above. And so Gray says, "Whoever hath an absolute authority not only to interpret law but to say what law is, is truly the law-giver." In defence of this thesis advanced by Professor Gray and which has been since supported by several jurists of repute, we have the following argument:

"There seems to be nothing gained by seeking to discover the sources, purposes, and relations of a mysterious entity called 'The Law', and then to say this Law is exactly expressed in the rules by which the courts decide cases. It is better to consider directly the sources, purposes, and relations of the rules themselves, and to call the rules 'The Law'.

"There is a feeling", says Professor Gray, "that makes one hesitate to accept the theory that the rules followed by the courts constitute the Law, in that it seems to be approaching the Law from the clinical or therapeutic side; that it is as if one were to define medicine as the science of the rules by which physicians diagnose and treat diseases; but the difference lies in this, that the physicians have not received from the ruler of the world any commission to decide what diseases are, to kill or to cure according to their opinion whether a sickness is mortal; whereas, this is exactly what the judges do with regard to the cases brought before them. If the judges of a country decide that it is Law that a man whose reservoir bursts must pay the damage, Law it is; but all the doctors in town may declare that a man has the yellow fever, and yet he may have only the German measles. If when a board of physicians pronounced that Titius had the colic, *ipso facto* Titius did have the colic, then I conceive the suggested definition of medicine would be unobjectionable." (p. 102-103).

The above theory which is a paraphrase of the thesis of Professor Gray has been set forth in some detail, only for the reason that it paves the way for a proper understanding of the precise role which judges play in the making of law. From this point of view we are also in a position to deal with that important branch of jurisprudence which has reference to the interpretation of the statutes by the judges.

171. Theory of Interpretation of statutes

(a) Statutes as an important source of law

Statutes are undoubtedly an important source of law, but their effectualness as law has a great deal to do with the way they are regarded by the judges of any country. The brute fact remains that the statutes do not interpret themselves. Their meaning, their import and their application to the concrete situations of life, must await the sanction of the court and, to borrow the felicitious phrase of Gray "it is with the meaning declared by the courts, and no other meaning, that they are imposed upon the community as Law."

"A statute", says the same learned writer, "is the expressed will of the legislative organ of a society; but until the dealers in psychic forces succeed in making of thought transference a working controllable force (and the psychic transference of the thought of an artificial body must stagger the most advanced of the ghost hunters), the will of the legislature has to be expressed by words, spoken or written; that is, by causing sounds to be made, or by causing black marks to be impressed on white paper . . . A judge puts before himself the printed page of the statute book; it is mirrored on the retina of his eye and from this impression he has to reproduce the thought of the law-giving body. The process is far from being merely mechanical; it is obvious how the character of the judge and the cast of his mind must affect the operation, and what a different shape the thought when reproduced in the mind of the judge may have from that which it bore in the mind of the law-giver. This is true even if the function of the judge be deemed only that of attempting to reproduce in his own mind the thought of the law-giver; but as we

six men seek the rules which they follow not in their own whims, but they derive them from sources often of the most general and permanent character, to which they are directed, by the organised body to which they belong, to apply themselves" [See pp 84 85 of his book]

Austin Theory of law as command examined—Views of Professor Gray supported

It is true that *Austin* defined law as being made up of the commands of the sovereign but, as is well known, *Austin* was dominated in his thinking by the peculiarity of *English Constitutional Jurisprudence*—the legislative supremacy of the parliament—and he ranked 'legislation' as the superior most source of law making It is true that the State can by legislation restrain its courts from following this or that rule, but it often leaves them free to follow what they think right, and, according to Professor Gray, "it is certainly a forced expression to say that one commands things to be done, because he has power (which he does not exercise) to forbid their being done' Then Professor Gray proceeds to substantiate his contention by appeal to various analogies in which the normal command of the Superior, as to the performance of certain acts and omissions, in practical parlance, borders on the vanishing point, because the agent has cast upon him the duty of deciding the methodology, the technique, nay the very result of the activity that he is formally commanded to achieve Says he "When an agent, servant, or official does acts as to which he has received no express orders from his principal, he may aim or may be expected to aim, *directly* at the satisfaction of the principal, or he may not Take an instance of the first,—a cook, in roasting meat or boiling eggs, has, or at any rate the ideal cook is expected to have, *directly* in view the wishes and tastes of her master On the other hand, when a great painter is employed to cover a church wall with a picture, he is not expected to keep constantly in mind what will please the wardens and vestry, they are not to be in all his thoughts, if they are men of ordinary sense, they will not wish to be, he is to seek his inspiration elsewhere, and the picture when done is not the 'creature', of the wardens and vestry, whereas, if the painter had adopted an opposite course, and had bent his whole energies to divining what he thought would please them best, he would have been their 'tool', and the picture might not unfairly be described as their creature

"Now it is clear into which of these classes a judge falls Where he has not received direct commands from the State, he does not consider, he is not expected to consider, *directly* what would please the State, his thoughts are directed to the questions—What have other judges held? What does Ulpian or Lord Coke say about the matter? What decision does *elegantia juris* or sound morals require?

"Austin's statement that the Law is entirely made up of commands directly or indirectly imposed by the State is correct, therefore, only on the theory that everything which the State does not forbid its judges to do, and which they in fact do, the State commands, although the judges are not animated by a direct desire to carry out the State's wishes, but by entirely different ones" (P 86—of his book)

Professor Gray then invokes the authority of Sir Henry Maine and quotes him as pointing out that Austin's theory "is founded on a mere artifice of speech, and that it assumes courts of justice to act in a way and from motives of which they are quite unconscious Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language It is carried out by taking words and propositions altogether out of the sphere of the ideas habitually associated with them" (p 88)

If then it be true that the hall mark, the distinctive feature of the law, consists in its being enforced and applied by our courts, and that in the applying and enforcing of the rules of conduct that are binding on the community the courts derive their inspiration and their guidance and their mandate from legislation and judicial precedent, custom, etc,

assent to a general proposition contained in a statute, they do not thereby show any *awareness of the extent* to which the application of those general propositions to specific instances would be available. It is a psychological monstrosity to defend the thesis, that when a *Bill* leaves the legislative chamber it carries any imprint of the 'combined intentions' of those who have voted upon it. The Judge whose duty it is to apply the law has not to decipher this sum-total of the often-times conflicting intentions of the several legislators, for the simple reason that he is concerned more with the *meaning* of the words actually used in the Statute—and not with that nebulous something called the 'legislative intent' which is said to arise phoenixwise, thanks to the miracle wrought by Judicial mind, from the ashes of the individual intentions of the Legislators.

The question herein raised is of fundamental importance. Is a judge a *diviner* of 'legislative intent' in the 'historical sense', that is, of the existence of Legislative intent as an event which actually occurred in history, or is he concerned merely with construing the meaning of the language used in the statute ?

(d) The Judge is not a diviner of Legislative intent—His role is creative.

The Judge, it is submitted, has to act as a sort of *legislator* within the frame-work of general statement of the law attempted by the legislature. The declaratory theory of judicial interpretative functions is plainly opposed to the principles of elementary psychology, and its persistence in forensic literature is more in the nature of a homage to the humility of judicial mind than a realistic appraisal of what actually happens. The Judge would not like to assume openly the creative role of filling in the *interstices* left by the Legislature in the warp and woof of the general statement of the law it has framed for his guidance. The legislative language merely fixes the outer frontiers beyond which the Judge in his decision of cases would not go—but within the amplitude of those limits the Judge is free to make law. The judicial enforcement of law is thus another species of delegated legislation. As one recent writer has put it, the Judge is in reality "a junior partner" in the legislative process. (See *Douglas Payne* on *The Intention of Legislature in the Interpretation of Statutes*, *Current Legal Problems*, 1956).

American jurists have exposed the fallacious character of the approach which the English Common Law has prescribed for the Judges to adopt to the statute law: so very supreme is Parliament in England that the Judges must ever in awe stand before its portals and give effect to its decrees by declaring in each case that comes before them what the pleasure of Parliament has ordained and established. But no Legislature, however omnipotent or omniscient, can overcome the natural infirmities of Human Mind, to say nothing of the peculiar difficulty of articulating its ordinances in a language which, considered as an apparatus of communication of general ideas, even according to the findings of epistemologists, is hopelessly inadequate for the purpose for which it is sought to be exploited.

(e) Views of Professor Pound re-iterated.

The Judge, it is submitted, is not merely burdened with the responsibility of exercising discretionery powers that have been expressly conferred upon him by the legislature, but has also the *discretion to create the rule of decision in those vast variety of cases where the legislature, by attempting a general statement of the law, has left it to him to exercise the power of law-making within the limits of the hard core of agreed meanings of the flexible, vague and unprecise language used by it.* The view taken here of the judicial function is in accord with the one advanced by Roscoe Pound who in his "*An Introduction to the Philosophy of Law*", at page 51, says :

> " . . . . genuine interpretation of law-making under the guise of interpretation run into one another. In other words, the Judicial Function and the Legislative Function run into the one another. It is the function of legislative organ to make laws. But from the nature of the case it cannot make laws so complete and all embracing that the Judicial organ will not be obliged to exercise a certain law-making function also. The latter will

shall see in a moment, a judge, starting from the words of a statute, is often led to results which he applies as if they had been the thought of the legislature, while yet he does not believe, and has no reason to believe, that his present thought is the same as any thought which the legislature really had " (pp 170 171)

(b) The Theory of the Interpretativ Function of *Judiciary*

When judges interpret statutes, the judicial process is confined to the professed purpose of discovering what the meaning of the legislature is but, in a vast variety of cases, it is doubtful if what the intention ultimately discovered by the courts is the intention which animated the legislature More often than not, a problem of interpretation is no more and no less than this what meaning to impute to a legislative provision when none is found to have animated its authors

"The fact is", says Professor Gray, "that the difficulties of so called interpretation arise when the Legislature has had no meaning at all, when the question which is raised on the statute never occurred to it, when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present If there are any lawyers among those who honour me with their attention let them consider any dozen cases of the interpretation of statutes, as they have occurred consecutively in their reading or practice, and they will, I venture to say find that in almost all of them it is probable, and that in most of them it is perfectly evident, that the makers of the statutes had no real intention, one way or another, on the point in question, that if they had they would have made their meaning clear and that when the judges are professing to declare what the Legislature meant, they are in truth them selves legislating to fill up *casus omissi* " (p 173)

And further:

[illegible]

tion Moreover, legislative ambiguity may at times not be wholly unintentional It is not to be forgotten that important legislation sometimes shows the effect of compro mises which have been induced by exigencies in its progress, and phrases with a conven ient vagueness are referred to the courts for appropriate definition, each group interested in the measure claiming that the language adopted embodies its views " [*Mr Justice Hughes, in* 1 *Mass Law Quarterly (No* 2), *pages* 13 *and* 15]

(c) Intention of Legislature is at best a useful fiction

[illegible]

said and done, a little reflection would show that, in a vast majority of cases, the search for the intention of Legislature is a vain attempt to get at a thing that is not there There are, to begin with, different members of the Legislature who, by either voting for or against a proposed measure, only indicate their preference for or against the principle of the Bill The Bill as it comes to be voted upon is couched in general terms and no one could be said to be completely aware of the specific instances to which the general terms used in the statute are likely to be applied All conceptual thinking proceeds upon some sort of vague imaginative symbolism and there is hardly any explicit attempt at abstraction And although human mind feels at home in dealing with general terms by which these vague abstractions are hypostasised, it is only a pointer to an obvious aspect of our experience, when we assert that we are not often enough even aware of more than 2 or 3 specific instances of the particular cases to which the general terms with which we negotiate the thought currency might have application When, therefore, the legislators give their

(b) The better view is to candidly acknowledge the creative role that the judge admittedly plays in deciding cases by evolving a rule of decision within the limits of the language that has been used by the legislators. "The fact is", to quote Professor Gray again, "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it, when what the Judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to *guess* what it would have intended on a point not presented to its mind, if the point had been present."

What Professor Gray calls 'guessing' is yet another mode of re-constructing legislative intent—an operation which is hardly distinguishable from 'legislating' in the sense stressed by the present writer.

(Consult further—*A Better Theory of Legal Interpretation by Charles P. Curtis, in Jurisprudence in Action*, p. 133, who would have the Judges regard themselves as the addressees—that is, as persons to whom Legislature has addressed a request as to what is to be done when a case comes up before them and whom it expects to act reasonably to comply with its behests. Says he, 'And meaning of words (used by the legislature) is to be sought not in the *author* but in the person addressed....Words are but the delegation of the right to interpret them . . . .").

(g) Frederick Pollock's views advocated.

What then should be the attitude of Judges to the problem of 'Judicial Interpretation'? The answer to this question has been attempted by that eminent *Jurist Frederick Pollock*, ". . . . it is to hold a just middle way between excess of valour and excess of caution."

"A too daring expounder", continues he, "is in danger of laying down sweeping rules without attending to the probable variations in the circumstances to which they will be applied; and then the application of his rule may have to be confined within tolerable bounds by a series of qualifications which leave it, to use a classical description, well nigh eaten up by exceptions. On the other hand, the pedestrian timidity that shrinks from hazarding any general conclusion will only land us in a still less desirable state, that of having no principle at all, but a heap of unrelated instances which those who come after may or may not find to be consistent with one another. Doubtless it is very true that the more valiant Judge runs the risk of his exposition being sooner or later disapproved by superior authority; while the more cautious one avoids that risk, but at the price of falling under a censure now familiar. Those who make no mistakes, it has been said, will never make anything; and the Judge who is afraid of committing himself may be called sound and safe in his own generation, but will leave no mark on the law. Doubtless, also, caution has its proper place in resisting temptations to rash and premature definition, and especially to borrowing conceptions of foreign origin without adequately considering whether they are in harmony with the spirit of our own law. In short, discretion is very good and necessary, but without valour the law would have no vitality at all." (See *Judicial Caution and Valour*, an address delivered by the afore-mentioned author in the *University of London in* 1929).

Any student wishing to understand the recent trends in the forensic thought on this subject is advised to read the Address delivered by learned Hand on *Spirit of Liberty*, 1952, and the address delivered by *Zechariah Chafee, Jr.* of the *Harvard Law School* on January 27, 1940, before the Judicial Section of the *New York State Bar Association* on "The disorderly conduct of words" (Canadian Bar Review for 1942 at p. 752). The latter address contains a philosophical analysis of the Function of Language and reviews the contributions that have been made to that science by writers like (1) *C. K. Ogden* and (2) *I. A. Richard (the Authors of Meaning of Meaning*, 1936, and *The Tyranny of Words*, 1938), and the student would

rightly consider this a subordinate function also It would take it one of supplementing, developing and shaping given materials by means of a given technique None the less it is a necessary part of Judicial Power Pushed to the extreme that regards all judicial law-making as unconstitutional usurpation, our political theory, a philosophical classification made over by imperfect generalisation from the British Constitution as it was in the 17th Century, has served merely to intrench in the professional mind the dogma of the Historical School, that legislative law making is a subordinate function and exists only to supplement the traditional element of the legal system here and there and to set the judicial or juristic tradition now and then in the right path as to some particular item where it has gone astray "

After explaining the historical factors that have conditioned the growth of belief in the judicial function being regarded as merely declaratory of the legislative intent, the learned Jurist goes on to point out

"Hence it has been easy for us to assume that courts did no more than genuinely interpret legislative texts and deduce the logical content of authoritatively established traditional principles It has been easy to accept a political theory, proceeding on the ... rpret and apply, ... take the law as ... been easy also to accept a juristic theory that law cannot be made, that it can only be found and that the power of finding it is merely a matter of observation and logic, involving no creative element If we really believed this pious fiction it would argue little faith in the logical power of the Bench in view of diversity of judicially asserted doctrines on the same point which so frequently exist in our case law and the widely different opinions of our best judges with respect to them As interpretation is difficult, when it is difficult just because the Legislature had no actual intention to ascertain, so the finding of common law on a new point is difficult just because there is no rule of law to find The judicial and legislative functions run together also in the judicial ascertainment of the common law by the analogical application of decided cases " (p 52)

We might sum up the theoretical basis of the approach to the judicial function outlined above as follows — (f) Approach to Judicial Function a Summary Statement

(a) The orthodox view of the judicial function in relation to the duty of interpreting an enactment is search for the intention of the Legislature from the words used This absurd view is often rendered plausible by saying the Judge is not to discover

"defence of the last ditches" from *Vaughan Hawkin's Preliminary Treatise on Evidence* (1860)

"It is to be observed, that there may be cases where intention can and must be inferred although, in fact, there may have been *none* The interpreter cannot certainly know whether the intent existed, it is the *indicia* of intent, the marks or signs which afford reasonable presumption of *its existence*, which he can alone regard, and these he is bound to regard, although, in spite of such indication, *there may have been no actual intention* "

indicia of intent the

" is, to say the least

an instrument like a deed or will, or of the words used by the Legislatu preting its enactments, and thereby, in effect, to replace the document tion with one of his own making.

The parties or the Legislature must be taken to have intended to sa in fact said and not what the court thinks they have said or wanted to say. parte Chick, (1879) 11 Ch. D. 731. See also *Lumsden v. Inland Revenue Con* A.C. 877. However irreverential it may look, the present writer cannot from remarking upon the utter uselessness of some of the rules (such as t to above) that have been laid down by Courts on statutory construction. Judges must give effect to *what* the Legislature has *in fact* said, and not " thinks they have said", but one might legitimately ask: 'How can courts gi the Legislature *in fact* has said without *thinking* what they have said or wa long as it is the Judge who must find "what the Legislature has said", he *think* about what they have *in fact* said. Search for meaning is not a proc the one that is involved in visual perception. One does not merely hav eyes to see the meaning of words used as one does to see the morning Su ever so true, as was observed in *Ellerman Lines v. Murray*, (1931) *A.C.* 126. agree that the meaning is plain, but may differ as to what that plain meani *Richards v. McBride*, (1881), 8 *Q.B.D.* 119, remarks of *Lord Blackburn in Ca v. North British Railway*, (1881) 6 *App. Cases*, 114.)

That statutory construction would be adopted which is in accord wit object of the statute, provided, however, that the "policy and object" itself ed from the statutory language without any attempt being made by court to sp ture or surmise what the objection or policy of legislation in question is. (*N uring Co. v. Marrables*, (1931) 2 *K.B.* 297; *Williams v. Ellis*, (1880) 49, *L.J.M.* 175. As *Tindal, C.J.* in the *Sussex Peerage case* (1844) 11 *Cl. & F.* 85 said at p. 1

"The only rule for the construction of Acts of Parliament is that construed according to the intent of the Parliament which passed the Act. the statute are in themselves precise and unambiguous then no more c than to expound those words in their natural and ordinary sense. The w alone do, in such case, best declare the intention of the law giver."

"In a Court of Law or Equity", said *Lord Watson in* (1897) *A.C.* 22 the legislature intended to be done or not to be done can only be leg tained from that which it has chosen to enact, either in express words o and necessary implication." (The same idea is felicitously expressed in the English Law officers, *Sir Roundell Palmers* and *Sir Robert Colker* cited his dissenting judgment in *James v. Cowan*, (43, *C.L.R.* 386, *at* 409) which upheld by the Privy Council in 1932, 47 *C.L.R.* 386.—"It must be legislative body intends that which is the necessary effect of its enactme the *purpose*, and the *intention* of the enactment is the same." The same added: "By the 'necessary effect', it needs scarcely be said, those maintain, the *legal* effect, not the ulterior effect economically or socia may be accepted that the Privy Council on appeal regarded that view (1920) *A.C. p.* 691. See also the remarks of *Lord Doster* in *Commonwe v. Bank of New Southwales*, (1949) 79 *C.L.R. p.* 497 *at p.* 624: (1950) *A.*

When it is said that Courts must give effect to the intention of t it is not the intention of the Legislature, as a historical fact which is impli ment, but only the intention which could be gathered from the words used used may take on their meanings from the context in which they are loc as in ordinary conversation one encounters in life, dictionary is a feeble h

find in it some thought provoking suggestions for the proper understanding of the interpretative role of the judicial mind In England, a book of considerable importance on the subject entitled, "Jurisprudence" has appeared as recently as 1957 It is significant that the book has been dedicated by the co authors—Dias and Hughes—to the authors of "Meaning of Meaning" The book has been based on the "semantic" analysis of the meaning of meaning and takes more or less a view of the judicial function involved in the interpretation of law which has been advocated in this study

172. Rules of Statutory Construction

Professor Gray defines legislation as "the formal utterances of the legislative organs of the Society " It is as we have seen an important source of law and in the modern times, at any rate, legislation has become an all prevading and a highly important state activity

(a) Judge's duty to give effect to legislative intent

There are some statutes which are *simple* and require very little of interpretation but there are certain others that are couched in a somewhat *ambiguous language* and their precise effect it is difficult to assess The court will then "interpret" the statute and by that is meant nothing more than this that it will endeavour to ascertain the meaning as it can be discovered from the words used

The rules of interpretation of the enacted law have been evolved by the judges with which certain interpretation iclusions upon nents in their turn, have themselves become matters of judicial interpretation—for every rule evolved by judges to interpret a given statute has itself become a "binding precedent for the same court as also for the courts of inferior jurisdiction

The basic rule upon the subject of statutory interpretation is that if the words are clear, the problem of interpretation does not so much as arise no more in such a case is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature (See *Income Tax Commissioners v Pemsel*, (1891) *A C* 531) "The object of all interpretation of a statue , says *Maxwell*, "is to determine what intention is conveyed, either expressly or impliedly by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it When the intention is express, the task is one of verbal construction only, but when the statute expresses no intention on a question to which it gives rise, and yet some intention must necessarily be imputed to the Legislature regarding it, the interpreter has to determine it by inference grounded on certain legal principles ' Then he goes on to say "The subject of the interpretation of a statue seems thus to fall under two heads What are the principles which govern the construction of the language of an *Act of Parliament*? And, what are those which guide the interpreter in gathering the intention on those incidental points on which the Legislature is necessarily presumed to have entertained an opinion, but on which it has not expressed any?" (*Interpretation of Statutes, pp* 2 & 3, *Ninth Edition*) The most important rule for the judges to follow is that the words and phrases used by the legislature, if they are plain and capable of one meaning must be given due effect, even though, that course may be found to lead to absurd or mischievous results (*Rex v City of London Court Judge* (1892) 1 Q B 273, 290) However, unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect It is the duty of the judge to give effect to the clear and unambiguous words of legislative enactments and leave the matter there It is for the Legislature to rectify the enactment if it is found to be absurd It is not the function of the judge to *conjecture* or guess at the meaning of the parties if he is construing

Ltd. v. Graham (1950) 1 *All E.R.* 780 *and Marczuk v. Marczuk* (1956) 1 *All. E.R.* 657. But this maxim would not be pressed to a point where its application would cause inconsistency or injustice, as sometimes the cause of the omission might be due to thoughtlessness or accidental slip of the draftsman. [See *Colquhoun v. Brooks* (1887) 14 *A.C.* 493; 19 *Q.B.D.* 400]. As was observed in the case of *Colquhoun v. Brooks* (1888), 21 *Q.B.D.* 52 (65) by Lopes L. J. in respect of this maxim that "it is often a valuable servant but a dangerous master to follow in the construction of statutes and documents. The *exclusio* is often the result of inadvertance, accident, and the maxim ought not to be applied when its application having regard to the subject-matter to which it is applied would lead to inconsistency or injustice".

(3) The *ejusdem generis* rule which enjoins that the scope of general words used in the statute immediately following the enumeration of specific particular or concrete terms may be restrained by reference to the subject-matter indicated by the particular or specific expressions used. (See *Powell v. Kempton Parke Racecourse Co.* (1897) 2 Q.B. 242: (1899), *A.C.* 143; and *J. H. Tucker v. Board of Trade* (1955) 2 *All E.R.* 522. See also 1950 *Chancery p.* 540, as also (1953) 2 *All E.R. p.* 559 *CA*). Regarded in the abstract, the general words like all others receive their full and natural meaning, but where these general words follow one or more less general terms, the *ejusdem generis* rule would be invoked by the courts to limit the generality of the full scope of the general words, as though it were confined to the universe of discourse indicated by prior less general terms. The essential consideration is to see, whether in the enumeration of less general words, followed by more general words at the end of such enumeration, there is a genus or category under which all specific terms can be subsumed. If no such genus or category is discovered, the *ejusdem generis* rule would not apply. [*Tillmanns & Co. v. Knutsford* (1908), 2 *K.B. p.* 385. See also *Chandris v. Isbrandtsen Moller Co. Inc.* (1951), 1 *K.B. at* 244; *Municipal Corporation Rangoon v. Saw Willie* (1942), *Rangoon* 70, *and in William Lawrence Allen v. Emmerson* (1944) 1 *All E. R. p.* 344; 1944, *K.B.* 362]. The *ejusdem generis* rule was held not to apply to a case where particular words used were, "disposition", "trusts and convenants": a disposition is a transfer, but a covenant is not. A trust and covenant both create an obligation but a disposition need not. As no common class or category or genus could be made out, the rule was not said to apply. [See *Hood-Barrs v. Commissioners of Inland Revenue* (1946) 2 *All E. R.* 768 *at p.* 773 *(CA)*]. The tendency of the more modern authorities is to attenuate the application of *ejusdem generis* rule. (See *Anderson versus Anderson*, (1895) 1 Q.B. 749).

(4) The words used in statute would have the meaning that could have been predicated of them contemporaneously with the passing of the statute, and any semantic development as to the meaning of the term used in the statute which has taken place later would not be given effect to. This rule is based on the maxim *contemporana expostio est optima et futessima lege*. [See *Gaslight & Coke Company v. Hardy* (1886), 17 *Q.B.D.*, 619 *at p.* 621; *Sharp v. Wakefield* (1889), 22 *Q.B.D. p.* 224, *and Reid v. Lincoln* (1892) *A.C.* 644].

(5) Statute must be read as a whole. All its component parts should be seen as being internally consistent. Attempt should be made to give that meaning to the several parts of the statute, that makes for consistency and harmony. The presumption underlying every statute is that it is free from internal contradictions and one sure way of discovering the intention of the legislature is to read the enactment as a whole, and that is best done by giving to each section a meaning which makes for consistency. (*Leader v. Duffey* (1888), 13 *A.C. p.* 294].

out the meaning of those words If the plain meaning of the words used involves a result which is absurd or inconvenient, the Golden Rule of Interpretation comes in for application—the rule which says that if the words of a statute in their ordinary sense lead to absurd or inconvenient result the Courts will depart from that meaning to avoid that result The presumption is that such an absurd or inconvenient result was not, and could not be intended by Parliament (See *Francis Jacks Development Ltd v Hall* (1951) 2 *K B* 488, *at* 495)

With regard to the interpretation of Acts of special kind, like the penal fiscal or criminal statutes, one often comes across a plea that they be strictly construed and in favour of the subject This raises the question of strict and beneficial construction of particular statutes and the present author can do no better than cite the following passage from *Maxwell's* celebrated work on the Interpretation of Statutes in an effort to state the accepted principles that courts apply in these days

"The tendency of modern decisions," says the learned author upon the whole is to narrow materially the difference between what is called *a strict and a beneficial construction* All statutes are now construed with a more attentive regard to the language and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty and this tendency is still evinced in a certain reluctance to supply the defects of language or eke out the meaning of an obscure passage by strained or doubtful inferences The effect [illegible]

paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischief aimed at are, if the language permits, to be held to fall within its remedial influence Statutes which encroach on the rights of the subjects whether as regards person or property, are similarly subject to a strict construction in the sense before explained It is a recognised rule that they should be interpreted, if possible, so as to respect such rights It is presumed where the objects of the Act do not obviously imply such an intention that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore, expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt (See *Maxwell s Interpretation of Statutes*, Ninth Ed p 288)

The rules that have been evolved by courts of law in the construction of *deeds* and *wills* apply to the construction of the statutes

(b) Some technical Rules on Statutory Construct stated

Some of these rules are —

(1) The words of the statute must be construed so as to give a sensible meaning to them If possible, they should be construed *ut res magis valeat quam pereat* (that is, a provision will be interpreted so as to give it a sensible effect) (See 22 *Q B D* 513, *Curtis v Stoven of the year* 1889 See also *Attorney General v Beauchamp* (1920) 1 *K B* 650, *Pye v Minister for Lands for New South Wales* (1954) 3 *All E R* 514, *Bogettes Ltd v G P Estates and Co* (1955) 3 *All E R* 451)

(2) Express repeal of some statutes would be interpreted to mean that othe mentioned are not repealed (*Garnett v Bradley* (1878) 3 *A C* 944) This maxim *expressio unius est exclusio alterius*, for which see *North Central W*

"You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and'." (So also 'and' never does mean 'or'.) "There is a context which shows that 'or' is used for 'and', by mistake. Suppose a man said, 'I give the black cow on which I usually ride to A.B.,' and he rode on a black horse. Of course the horse would pass, but I do not think even a modern annotator of cases would put in the marginal note 'cow' means 'horse.' You correct the wrong word by the context."

Similarly, sometimes the courts construe the word 'may' as 'shall' and sometimes regard the word 'shall' itself as indicative of a directory and not a mandatory meaning. There is a great deal of conusion on this score to be found in some of the books on statutory interpretation, and also in the kind of language that is sometimes employed by the judges; for not infrequently expression is given to the view that in thus construing statutes courts are not giving effect to the meaning of the Legislature. Numerous expressions abound in our legal literature which tend to show as if the judges have a dictionary of their own with which they sometimes look at the words used by the Legislatures and give to them the meaning which is at variance with the normal meaning of those words. The essential thing to remember, however, is that, whenever this is done, it is only because the *context* in which the word under interpretation occurs in the opinion of the court means some thing other than what the word left to itself ordinarily would mean; so that it is ever so true to say that 'may', means 'may'; 'or' means 'or'; 'shall' means 'shall' unless of course the neighbourhood in which the word under interpretation is discovered, imposes upon that word a different meaning which gives full effect to the intention of the Legislature. The dominant rule then is that it is the *context* that controls the meaning—even as it is the environment that induces change in any biological species that finds its habitat in it.

Whether the provision of law is mandatory or directory sometimes becomes an all-important question in the interpretation of the force and effect of statutory requirements. When a power is conferred to do a certain thing in a certain way, that thing can be done only in the way prescribed or not at all. [See *Nazir Ahmad v. King Emperor AIR (1936) P.C. 253 at p. 257*]. But sometimes the power is prescribed to be exercised subject to compliance with certain conditions and limitations that appear to have been imposed for the due exercise of that power—some of these conditions and limitations may be such that even if all or any of them have been disregarded, non-compliance with them will not vitiate the action of the person exercising the power. Whenever, as a result of judicial investigation of the meaning and effect of a statutory provision, a conclusion is reached that the requirement of the statute as to compliance with an *essential* condition of the exercise of power has not been fulfilled, the result would be that no effect would be given by courts to such an exercise of power, the argument in support of that view being that there is no power to act apart from compliance with the qualification imposed by the statute for the exercise of that power. But *not every requirement of law as to the mode in which or the manner in which the power is to be exercised has the same weight*—there are some requirements that are only *directory* and non-compliance as to these does not vitiate the result. Some *artificial* rules have been laid down by courts by recourse to which the character of the provision being a mandatory or directory one can be determined. But care should be taken to remember that these rules do not furnish any conclusive test upon the question whether a given provision is directory or mandatory. The truth of the matter is that, here as elsewhere, the golden rule is that there is no golden rule. In the case of *Liverpool Borough Bank v. Turner* (1861), 30 *L.J.Ch.* 379, Lord Cambell observed:

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try and get at the

Rule in Heydon's case

In the reign of Elizabeth, the Barons of the Exchequer laid down authoritative rules of interpretation in what is called *Heydon's Case* (1584) 3 Co Rep 7a "For the sure and true interpretation of all statutes in general (be they penal, or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered (1) what was the common law before the passing of the Act, (2) what was the mischief and defect for which the common law did not provide, (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo* and to add force and life to the cure and remedy according to the true intent of the makers of the act *pro bono publico* "

Summary Statement from Sir Courtenay Ilbert book

These and some other Rules of Construction have been stated in a concise form by Sir Courtenay Ilbert in his famous book on *Mechanics of Law making* as follows

"The English draftsman has to consider not only the statutory Rules of Interpretation which are to be found in the Act of 1889, but also the general rules which are based on judicial decisions and which are to be found in a good many useful text books on the interpretation of statutes Among the most important of these rules are

1 The rule that a statute must be read as a whole Therefore the language of one section may affect the construction of another

2 The Rule that a statute may be interpreted by reference to other Statutes dealing with the same or similar subject matter Hence the language of these rules must be studied The meaning attached to a particular expression in one statute, either by definition or by judicial decision, may be attached to it in another And variation of language may be construed as indicating change of intention

3 The general rule that special provision will control general provision

4 The similar rule that where particular words are followed by general words (horse, cow, or other animal), the generality of the latter will be limited by reference to the former (*Ejusdem generis rule*)

5 The general rule, subject to important exceptions, that a guilty mind is an essential element in a breach of a criminal or penal law It should, therefore, be considered whether the words 'wilfully' or 'knowingly', should be inserted, and whether, if not inserted, they would be implied, unless expressly negatived

6 The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares

7 The presumption against any intention to contravene a rule of international law

8 The presumption against retrospective operation of a statute subject to an exception as to enactments which affect only the practice and procedure of the courts

9 The rule that the power imposed on a public authority may be construed as a duty imposed on that authority ('may' 'shall') "

(c) Construction—mandatory and Directionary provisions

The last mentioned rule, namely that 'may' in some cases may be judicially interpretted as though it were 'shall' is liable to give the impression that the judges are competent to substitute the word 'shall for the word 'may occurring in the statute Similarly, there are some cases in which 'or' has been construed as 'and , and *vice versa*, but this is not to say that wherever the judges do so they take liberty with the language used by the Legislature Jessel, M R in the case of *Morgan v Thomas*, 51 L J Q B 557, 9 Q B D 643 remarked

of acts performed in violation of these conditions. In the case of *Liversidge v. Sir John Anderson and another* (1942) *A.C.* 206 the expression to be interpretted was, "If the Secretary of State has reasonable cause to believe etc. . .", and the question was whether the words required that there must be an *external fact* as to reasonable cause for the belief, and one, therefore, capable of being challenged in a court of law; or whether the words in the context in which they are to be found, point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains. Viscount Maugham was not disposed to deny that in the absence of the context such a phrase as—

> " 'if A.B. has reasonable cause to believe' a certain circumstance or thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if A.B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean if A.B. acting on what he thinks is reasonable cause (and of course acting in good faith) believes the thing in question."

He therefore held that there was no preliminary question of fact which could be submitted to the Courts and that, in effect, there is no appeal from the decision of the Secretary of State in these matters provided only that he acts in *good faith*.

Lord Atkin, on the other hand, in a strong, vigorous dissenting speech observed:

> "It is surely incapable of dispute that the words 'if A has X' constitute a condition the essence of which is the existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be that is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact, in others of both fact and law. But in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean 'if A thinks that he has.' 'If A has a broken ankle' does not mean and cannot mean 'if A thinks that he has a broken ankle.' 'If A has a right of way' does not mean and cannot mean if A thinks that he has a right of way.' 'Reasonable cause' for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause is in our law to be determined by the judge, and not by the tribunal of fact if the functions deciding law and fact are divided. . . .
>
> "No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this regulation they have done so.
>
> ". . . It is said that it could never have been intended to substitute the decision of judges for the decision of the minister; or, as has been said, to give an appeal from the minister to the courts. But no one proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest; nor does he sit on appeal from the constable. He has to bear in mind that the constable's authority is limited, that he can only arrest on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief, any more than if there is reasonable evidence to go to a jury the judge is concerned with whether he would have come to the same verdict.

real intention of the Legislature by carefully attending to the whole scope of the statute to be construed "

To the same effect are the observations of Lord Penzance in the case of *Howard v Bodington* (1877), 2 *P D* 203

Considering that it is difficult to lay down any hard and fast rule which will assist in the determination of the question as to what is and what is not a directory or mandatory provision, the important point to be borne in view is that the controversy as to whether a certain provision is mandatory or directory in each case presents itself for solution *only in situations where the question relating to the validity of acts performed by agents or authorities on whom powers are conferred comes up for consideration* If there be some requirement of law which has been imposed as a condition precedent for the exercise of power, and the condition has been disregarded by the agent or authority whose act or acts are under challenge the act or acts, as the case may be, would be regarded as having no legal effect whatever (see for instance in re *Gifford* (1888), 20 *Q B D p* 368) But if the requirement of law is such that its non compliance would not affect the legal character of the exercise of power the provision would not be regarded as mandatory but only directory (See for instance *Reg v Ingall* (1877) 2 *Q B D p* 199) This distinction between mandatory and directory provision is also relevant in a controversy where the question about the competence of Court to issue a writ of *mandamus* to a public functionary to take the step required under law comes up for consideration, for unless the statute imposes a duty no *mandamus* can lie

But the extension of this conception to cover cases where, to all intents and purposes the doing of a thing or the exercise of power is not prescribed in any manner as being controlled by a condition, is wholly unjustified and unwarranted For instance, ART 141 of the Constitution prescribes, "Whenever the National Assembly or a Provincial Assembly is dissolved, a general election for the reconstitution of the Assembly *shall be held not later than six months from the date of dissolution*, " If the question presents itself upon the construction of this Article, whether an election that has been held *after* six months' time of the dissolution of the Assembly is valid, the short answer to the problem would be to say that the circumstances as to the holding of that election within the space of six months after the dissolution of the Assembly is *not* at all a condition as to the exercise of power of holding election The power of holding election is a requirement of the Constitution and the requirement of ART 141, namely that election be held within six months' time has been enacted merely with a view to ensuring that election will be held [illegible] ld within [illegible] hold the [illegible] directory or mandatory is therefore thoroughly irrelevant to the question as to the validity of the election held after six months' time, for the simple reason that, on the face of it, *the provision in question does not make the exercise of power relating to the holding of election contingent upon its being held within six months' time* It is for this reason that the observations contained in the case of *Zain Noorani v Secretary of the National Assembly of Pakistan*, *PLD* (1957) *Karachi* 1 and 1957 PLD Supreme Court p 46) to the effect that the word *shall* in ART 141 is *directory* and not *mandatory* are to be read subject to this qualification To read them otherwise is virtually to say that Election Commissioners cannot be compelled to hold election within six months' time simply because the provision is merely directory [illegible] not mandatory—which, to say the least of it, is not the law

Similarly, words and expressions like 'it shall be lawful', [illegible] 'reasonable cause to believe' etc occurring in statutes requir[illegible] the precise meaning to be attached to them in the [illegible] must depend the answer which the Court will give as [illegible]

is always competent to introduce into the law) a Secretary of State occupies a different position, as an executive officer, from an ordinary citizen. Surely the omnipotence and omniscience of Cabinet rank have seldom received so much deference as in this case! Thus a principal Secretary of State and a member of the Government is not, in a mere matter of the liberty of the subject, 'at all in the same position as, for example, a police constable' (per Viscount Maugham). He is one of the high officers of State, who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office, who has access to exclusive sources of information. . . (He has) both knowledge and responsibility which no Court can share (per Lord Macmillan). He is, says Lord Romer, not some minor official holding a subordinate posiiton. He is the Secretary of State. The majesty of his position constrains Lord Romer, when confronted with the phrase reasonable cause, to the conclusion that sometimes even the most familiar words and expressions are used in other than their ordinary meaning, and this is the case here.

"This aspect of the decision is perturbing to those who are unable, whatever may be the exigencies of war, to divest themselves of certain old-fashioned constitutional doctrines. Generations of Englishmen have been brought up to regard it as one vital aspect of the Rule of Law (for which, among other things, this country is now fighting the most crucial war in its history) that all persons are equal before the law and that for any unjustified infringement of the liberty of the subject the liability of a Minister of State is no whit different from that of a policeman, or, indeed, from the meanest of the King's subjects. Many of the great constitutional battles in our history have been fought on this very issue. If we are to understand for the future that executive office, dignity or responsibility, whether in peace or in war, exempts the incumbent from inquiry into the reasonableness or arbitrariness of his conduct, when it affects the elementary rights of a citizen, then we must revise all our ideas. Far from sharing Professor Goodhart's enthusiasm for this vindication of executive power, we submit that *Liversidge v. Anderson* has put back the clock to a day when Englishmen found it necessary to declare that the power of the executive had increased, was increasing, and ought to be diminished. If they have not entirely lost the spirit of their ancestors, they will say so again, when the full effect of this case becomes apparent in our jurisprudence."

In the case of *Magor and St. Mellons Rural District Council v. Newport Corporation*, (1951) 2 *All E.R.* 839, Lord Simonds fixed the *outer* frontiers of the arena within which judicial mind must operate to discover the force and effect of the statutory provisions which come up before the Courts for interpretation and construction :

"My Lords, the criticism which I venture to make of the judgment of the learned Lord Justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions and I am content to say that I agree with my noble and learned friend. But it is on the approach of the Lord Justice to what is a question of construction and nothing else that I think it desirable to make some comment, for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned Lord Justice lays down for the guidance of himself and, presumably, of others. He said: [(1950) 2 ALL E.R. 1236]:

"We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

The first part of this passage appears to be an "echo of what was said in Heydon's case,

I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive Their function is to give words their natural meaning, not, perhaps in war time leaning towards liberty, but following the dictum of Pollock, C B , in *Bowditch v Balchin* (1850) 5 *Ex* 378, cited with approval by my noble and learned friend Lord Wright in *Barnard v Gorman* (1941) *A C* 378 In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute In this country, amid the clash of arms, the laws are not silent They may be changed, but they speak the same language in war as in peace It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law In this case I have listened to arguments which might have been addressed acceptably to the Court of King s Bench in the time of Charles I . "

The foregoing two extracts are typical of the manner in which two judicial minds trained in the same system of law, being cognizant of the demand which the law makes, namely, that the words of the statute should be given their full effect, reach divergent conclusions It is these cases that illustrate more than anything else the utter impossibility of regarding rules of statutory interpretation or construction of constitutional instruments as being anything more than "insubstantial aids" in the way of performing judicial duties The trouble only arises if those rules are regarded as infallible guides and consulted as though they were "invincible oracles" upon the settlement of complicated questions that are canvassed before the judges as to the meaning and effect of the statutory language Any student wishing to make himself familiar with the mode in which some of the famous textbook writers and jurists in England have reacted to the conflicting interpretation bestowed upon Regulation 18B by the House of Lords in the above case, would do well to read *Law and Orders* by C K Allen, (1950 *Ed*) Appendix 5, pages 333 to 352 The following extract therefrom would indicate the sort of criticism to which that decision has been subjected

"The hinge of Lord Atkin's speech is that the term (reasonable cause) has, upto the date of this decision, had one clear meaning, and one plain effect, in every branch of our law, whether common or statutory It has involved an objective test, by an independent tribunal, of the reasonableness claimed for the conduct which is impugned Lord Atkin has supported this proposition by abundant illustration, and has stated categori [illegible]

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of meaning anything so fantastic In the particular case of malicious prosecution Lord Atkin observes (and we submit that the principle applies equally to any other branch of the law) that the objective test exists against any person, rich or poor, powerful or weak, including any member of the executive, whether Secretary of State or not

"None of this is denied or even challenged, in respect of English law up to November, 1941 In all the other speeches, there is not a single instance to disprove Lord Atkin's general proposition, not a single exception from the rule on which he relies *Liversidge v Anderson*, therefore, places an entirely new interpretation on a very familiar term of art, and, by admission, opens up what Lord Atkin calls the era of 'subjective' cause

"Why? Because, in this new interpretation (which, of course, the House of Lords

all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom."

Headings and Marginal Notes.

Headings are occasionally useful to control the meaning of ambiguous expressions [*Martins v. Fowler* (1926) *A.C.* 746] but not the marginal notes—for the latter are not regarded as a part of the statute. [See *R. vs. Bates and B. Russell (1952), 2 All E. R. 842 at* 844]. Punctuation is not decisive of the intention of the Legislature which must be gathered from the words used (1890) 24 *Q.B.D.* 449.

Dictionaries —Reports of Debates, etc.

Then there are what are called *external aids*; *Dictionaries* could be referred to for determining the meaning of words not defined in the interpretative clause of the Act. [See *Re Ripon Housing Order*, (1939), 2 *K.B.* 838 (C.A.)].

Reports of Parliamentary debates are, as a rule, inadmissible as even the statement of objects and reasons appended to the bill that ultimately became the Act. [*Canadian Wheat Board vs. Manitoba* (1948), 2 *D.L.R.* 726, and *Administrator-General of Bengal vs. Premlal Malik* (1895), *I.A.* 107). Reports of Committees, however, stand on a different footing. They can be cited as showing the pre-existing state of law, and how it was sought to be rectified. [See *Assam Railways & Trading Co. vs. I. R. C.* (1935), *A.C.* 445].

174. The Judges and the Problem of the Interpretation of the Constitution

The rules of statutory construction that we have so far noticed, apply also to the interpretation of constitutional instruments. That, anyhow, is the legal tradition that we have inherited in this country. This is also the position in India, [See *AIR* (1950) *S.C.* 27 *Gopalan v. State of Madras*).] It will now be for the Supreme Court of Pakistan to give a decisive lead as to the course which the judicial interpretation of our Constitution must take in the future. There are two rival concepts that will contend for mastery in the interpretation of constitutional instrument in our country. These may be called the American theory of progressive interpretation and the British or the Commonwealth theory which insists upon a literal interpretation of constitutional instruments, that is the theory that says that intention of the Legislature is to be gathered from the words used. The rules adopted for the interpretation of *Colonial* and pre-independence *Indian Constitutional Legislation* are the same as those accepted for the interpretation of the statutes in England. It is true that there are numerous variations on the theme of constitutional interpretation and the decisions of the Judicial Committee of the Privy Council, it is submitted, may be read with profit in an attempt to discover how constitutional instruments like the British North America Act, the Australian Constitution Act, etc. have been construed by that Tribunal.

Interpretation of Statutes: Rowland, J. in Emperor versus Benoari Lall has summed up the attitude of Privy Council.

The line of approach which has characterised the attitude of the Judicial Committee of the Privy Council in construing *statutes* was tersely stated by Rowland J. in the case of *Emperor v. Benoari Lall Sharma & others*, reported in *A.I.R.* (1943) *F.C. p.* 36 *at page* 58, and the following extract from his judgment is instructive:

"In 27 *I.A.* 209; (1901) 23 *All.* 152; *Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh, at page* 213 it was said:

"We are not testing the question by general principles but by the expressions of the Code which relate to appeals. Their Lordships turn to the Code to see what it says.

"In 47 *I.A.* 33: *AIR* (1920) *P.C.* 56: 56 *I.C.* 163: 43 *Mad.* 550: 47 *I.A.* 33 (*P.C.*); *Krishna Ayyangar v. Nallaperamal Pillai*, at page 42 it was said: The construction of the explanation must depend on its terms and no theory of its purpose can be

(1584), 3 *Co Rep 7a* 76 *E R* 637 42 *Digest* 614, 143) three hundred years ago and, so regarded, is not objectionable But the way in which the learned Lord Justice summarises the broad rules laid down by *Sir Edward Coke* in that case may well induce grave misconception of the function of the court The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need re statement It is sufficient to say that the general proposi tion that it is the duty of the court to find out the intention of Parliament—and not only of Parliament but of Ministers also—cannot by any means be supported The duty of the court is to interpret the words that the legislature has used Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited see, for instance, *Assam Railways & Trading Co , Ltd v Inland Revenue Commissioners* (1935) *A C* 445, and particulary the observa tions of *Lord Wright* (1935) A C 458 "

173 Internal and External Aids—for the Construction of Statutes

There are also what are called "internal aids" for the interpretation of statutes, they are the *aids* that help in the unlocking of the intention of the Legislature from the title, preamble, the headings, marginal notes, schedules annexed to the Act etc As a rule, a short title is hardly of much assistance in the unfolding of the meaning of an Act, although a long title is usually regarded as being of some assistance as it is open to discussion in a Parliament But care should be taken to note that the title should never be allowed to affect or restrain the plain meaning of a statute—it is only to serve, if at all the purpose of offering an *aid* in the resolution of difficulty [*Sage v Eicholz* (1919) 2 *K B* 171 *See also Vacher v London Society of Compositors* (1913), *A C* 107, where Lord Moulton said the title is part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope," and Maxwell at p 43 *See also In re Scarisbrick Resettlement Estates* (1944) *Ch* 229)]

The preamble is generally looked at by courts for giving effect to the intention of the Legislature when the text is ambiguous but not otherwise [See *Prince Ernest of Hanover v Attorney General* (1955) 2 *W L R* , *p* 13, 3 *W L R* , *p* 868 *See also Ellerman Lines Ltd v Murray* (1931), *A C* 126, also see remarks of Sastri J , in (1950) *S C p* 27 *Gopalan s case*] Place of Preamble in the scheme of Interpretat on of an enactment

"The preamble of a statute", says the celebrated American Jurist *Mr Story* is a key to open the minds of the makers as to the mischiefs that are to be remedied and the objects that are to be accomplished by the provisions of the statute "

Where the provisions of an organic instrument are clear, the Preamble cannot be invoked in aid of construction to extend or qualify the plain meaning of the words used Nor is [illegible] a doubt in regard to the [illegible] issible but desirable for [illegible] Legislature to invoke the aid of the Preamble for it might in such a case furnish the ground and cause as to the making of such a statute [*Income Tax Commissioners v Pemsel* (1891) *A C* 531, *Sussex Peerage* case 3 *L T* (*O S*) 277 (1844), 11 *C L* & *F* 85, *Bholaparsad v King Emperor* (1942) *F C* 17] Similarly in the case of *Henning Jacobson v Massachusetts* (1905) 49 *L Ed* 643, *Mr Justice Harlan* observed (at p 648)

"Although that preamble indicates the general purposes for which the people ordained and established the constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or any of its departments Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to

For support of the proposition that the ordinary rules of statutory interpretation are applicable to the constitution interpretation, reference has frequently been made to the statement of law in *Grey v. Pearson* [(1857) *H.L.C.* 106, to the effect that in construing wills, and, indeed, statutes, as in construing all other written instruments "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther." (See *Interpretation of Constitution by Sir John Latham in Essays on the Australian Constitution*). The Constitution must however be construed liberally, for, a narrow and pedantic approach of its provisions will stultify the consummation of the purposes for which Governments are founded.

Constitution must be construed liberally.

Reference in this connection should be made to the case of *In the matter of Central Provinces and Berar*, reported in *A.I.R.* (1939) *Federal Court, p.* 1, where the principles, in accordance with which constitutional instruments should be interpreted, have been stated by the then *Chief Justice of the Federal Court of India.* In this connection the following cases are also instructive.

(1) *James v. Commonwealth of Australia* (1936), *Appeal Cases p.* 578 where it was remarked. "It is true that Constitution must not be construed in a narrow and pedantic sense. The words used are necessarily general and their full import and their true meaning can often only be appreciated when considered as the years go on in relation to the vicissitudes of acts which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate the full import of that meaning".

(2) *Attorney-General for New South Wales v. The Brewery Employees Union*, (1908), 6 *C. L. R. page* 469 gives a general statement of the principles applicable to the interpretation of terms used in the constitution: "The Constitution, it must be remembered, is an instrument of government which from its nature must express its meaning in general terms. It is not only a law in itself, but an authority for making laws, and was intended by means of its broad general terms to adapt itself as far as possible to the changing conditions of trade and commerce, and to the new conceptions of legal rights and obligations which might in the ordinary course of things be expected to be evolved in the development of Australia. On the other hand it must always be remembered, . . . that the Constitution is something more than an instrument of government. It embodies the terms on which the people of the several states agreed for the sake of union to surrender their autonomy in certain respects. Keeping both these aspects of the Constitution in view, the true rule of interpretation would appear to be that there should be given to all legal and technical expressions the widest meaning that is consistent with the terms of the contract of the Union." (p.533).

(3) *British Coal Corporation v. The King*, (1935). *A.I.R. Privy Council, page* 158.

(4) *Henrietta Muir Edwards v. Attorney-General for Canada* (1930), *Appeal Cases, page* 124, where it was remarked "The provisions of the *British North America Act*, 1867, enacting *Constitution for Canada*, should not be given a narrow and technical interpretation, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house—as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."

175. Relevance of American cases on the interpretation of U.S. Constitutions to our System of Jurisprudence.

(1) D' Emden v. Pedder.

In the case of *D'Emden v. Pedder* (1904), 1. *C.L.R.* 91, the High Court of Australia found it proper to consult and to treat as a "welcome aid", but not as "an infallible

entertained unless it is to be inferred from the language used

In 3 *M I.A* 468 (1841-46) 5 *Moo P C* 276 1 *Sar* 305 (*P C*), *The Queen v Eduljee Byramjee, at p* 488 it was said 'If such be the undoubted effect of the charter we must give effect to its provisions however injurious we may conceive the consequences to be '

In 59 *I A* 283 (1932) 19 *AIR* (1932) (P C) 165 *Nagendra Nath Dey v Suresh Chandra Dey*, it was said 'In construing such provision (limitation) equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide '

In 55 *I A* 18, 15 *AIR* (1928) *P C* 2 107 *I C* 14 7 *Pat* 221 (P C) 221, *Mt Ramanandi Kuer v Mt Kalawati Kuer, at p* 23 it was said 'It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law on which it may be founded '

In A I R (1918) *P C*, 352, *at p* 354 (1917) *A C* 537 86 *L J P C* 151 117 *L T* 387 33 *T L R* 439 (*P C*), *Australian Alliance Assurance Co v Attorney General of Queensland*, it was said Their Lordships are not concerned with the policy of the Act nor can they find in the novelty of the provision or in the language of other parts of the Act sufficient ground for disregarding the plain words of the enactment '

In 18 *Pat* 234, *at page* 248, 26 *AIR* (1939) *P C* 47 180 *I C* 1 40 *Cr L J* 364 1941 *Rang L R* 789n 18 *Pat* 234 66 *I A* 66 *I L R* (1939) *Kar P C* 123 (*P C*), *Pakalanarayana Swami v Emperor*, it was said 'But in truth when the meaning of words is plain, it is not the duty of Courts to busy themselves with supposed intentions '

"It may safely be said, without citing authority, that ordinarily the Courts construing the language of a statute will assign to it that meaning which consistently with the language used, is favourable to the liberty of the subject The function of Judges is to give words their natural meaning not perhaps, in war time, leaning towards liberty but remembering, that in a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute

"In 5 *I A* 178 *at page* 193 [3 *C L R* 197 3 *Sar* 834 3 *Suther* 556 (1878) 3 *A C* 889 (*P C*), *The Queen v Burah*), it was said 'The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which negatively they are restricted If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course, be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions '

Same Rules apply to the interpretation of a written Constitution —Some cases reviewed

These rules have often been held applicable to the interpretation of written constitutions of the colonies and self governing dominions of the Commonwealth [See *Tasmania v Commonwealth & another*, (1904) 1 *C L R* 329, *Federated Saw Mill Employees v James Moore & Sons* (1909), 8 *C L R*, 465 *per Issacs J at pp* 519 520] It was said as to the interpretation of words in the Constitution Act by *Isaacs J*, in *Australian Steamships Ltd v Malcolm* (1914), 19 *C L R* 298 *at* 328, that "The test of the contents of words ('Navigation' and 'Shipping') is what they ordinarily meant in the systems of law in Australia at the time of Federation "

mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and the scheme of the Act."

(5) A.G. for South Wales vs. Brewery Employees.

Similarly, in the case of *Attorney-General for New South Wales v. Brewery Employees' Union*: (1908), 6 *C.L.R. p.*, 469, *Higgins J. at p.* 611-612, remarked:

"Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be." *Story* pointed this out when he said in his Commentaries, 2nd Edn. Sec. 455: 'While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget, that it is an instrument of Government that we are to construe.'

(6) Engineers' Case.

In the leading Australian case *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 *C.L.R. p.* 129, the "settled rules of construction" which the *High Court of Australia* felt itself bound to apply were stated in the following words (at 148):

"What, then, are the settled rules of construction? The first, and 'golden-rule' or 'universal rule', as it has been variously termed, has been settled in *Grey v. Pearson* (1857) 6 *H.L.C.* 61, at *p.* 106, and the *Sussex Peerage Case* (1844), 11 *Cl. & Fin.* 85 *at p.* 143, in well-known passages which are quoted by *Lord Macnaghten* in *Vacher's case* (1913), *A.C. at pp.* 117-118. *Lord Haldane, L.C.*, in the same case, made some observations very pertinent to the present occasion. His Lordship, after stating that speculation on the motives of the Legislature was a topic which Judges cannot profitably or properly enter upon, said: 'Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.' In the case of *Inland Revenue Commissioners v. Herbert* [(1913) *A.C. at p.* 332)], Lord Haldane re-affirms the principle, with special reference to legislation of a novel kind. Other cases, of equal authority, could be cited, but it is not necessary.

"With respect to the interpretation of a written Constitution, the Privy Council has in several cases laid down principles which should be observed by Courts of Law, and these principles have been stated in the clearest terms. In *R. v. Burah* [(1878) 3 *A.C. at pp.* 904-905], Lord Selborne, in speaking of the case where a question arises as to whether any given legislation exceeds the power granted, says: 'The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire

guide" the decisions of *United States' Supreme Court* on the ground that there were certain provisions in that constitution that were indistinguishable from the provisions of *Australian Constitution Act* The argument was

> "In interpreting the *Commonwealth Constitution*, it is reasonable to infer that where the framers of that instrument inserted provisions indistinguishable in substance, though varied in form, from the provisions of other legislative enactments which have received judicial interpretation, they intended that such provisions should receive the like interpretation "

Reference was made to the case of *McCulloch v Maryland* (1819) 4 *Wheat U S* 316, and the High Court followed Chief Justice Marshall's judgment on the fundamental relations between the Federal Union and its constituent States in America

Griffith, C J, remarked (at p 112)

> "We are not, of course, bound by the decision of the *Supreme Court of United States* But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the *United States Constitution* by so great a Judge so long ago as 1819, and followed upto the present day by the succession of great jurists who have since adorned the *Bench of the Supreme Court at Washington* So far, therefore as the *United States Constitution and the Constitution of the Commonwealth* are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the *Constitution of the Commonwealth* not as an infallible guide, but as a most welcome aid and assistance '

The Privy Council, however, in the case of *Bank of Toronto v Lambe* (1887) 12 *A C* 575, while admitting the relevance of the authority of McCulloch's case considered all the same that it was impossible to argue from one case to another (a) Bank of Toronto versus Lambe (P C)

In a later Australian case *Amalgamated Society of Engineers vs the Adelaide Steamship Co Ltd* (1920), 28 *C L R* 129, the fundamental difference between the *Constitution of the United States and that of Australia* was effectively pointed out in the words that follow (3) Re Amalgamated Society of Engineers 28 C L R 129

> "In the words of a distinguished lawyer and statesman Lord Haldane, when a member of the House of Commons, delivered on the motion for leave to introduce the bill for the Act which we are considering— The difference between the Constitution which this bill proposes to set up and the Constitution of the United States is enormous and fundamental This bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every constitution established within the *Empire—I mean the institution of responsible Government a government under* which the executive is directly responsible to,—nay, is almost the creature of—the Legislature This is not so in America but it is so with all the constitutions we have granted to our self governing colonies On this occasion we establish a Constitution modelled on our own model—pregnant with the same spirit and permeated with the principle of responsible Government Therefore, what you have here is nothing akin to the *Constitution of the United States* except in its most superficial features ' With these expressions we entirely agree " (p 147)

In the case of *Attorney General for Ontario v Attorney General for Canada* (1912), *A C* 571, the *Judicial Committee* in regard to the interpretation of the British North America Act, observed — (4) A G for Ontario vs A G for Canada

> "If the text is explicit, the text is conclusive, alike in what it directs and what it forbids When the text is ambiguous, as, for example, when the words establishing

should be avoided if possible. Of two alternative constructions, that which gives rise to fewer or less complicated questions should be favoured.

(15) Applicability of Rules of Statutory Construction.

"Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn.

"In the main, the general principles governing the construction of statutes apply also to the construction of Constitutions; but, inasmuch as one function of a Constitution is to establish the frame work and general principles of Government, merely technical rules of construction are not to be applied so as to defeat the principles of the Government or the objects of its establishment. Constitutional provisions are presumed to have been more carefully and deliberately framed than is the case with statutes; hence, it is sometimes said that less latitude should be indulged by the courts in their construction.

(16) Intent and purpose.

A Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.

The fundamental purpose in construing a constitutional provision is to ascertain and to give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the objects sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. Effect should be given to the purpose indicated by a fair interpretation of the language used. The intent may be shown by implication as well as by express provisions.

While it has been said that the construction of a constitutional provision should be neither liberal nor strict, it is quite generally held that in arriving at the intent and purpose the construction should be broad or liberal, rather than technical. However, the construction should not be so liberal as to result in nullifying a plain mandatory provision of the organic law, or as to result in a statute becoming the higher law."

Illustrations of these approaches (a) English:

That the Privy Council, would for instance, treat British North America Act, for the purposes of interpretation, as though it were an ordinary statute, would appear to be a proposition which is endorsed by W.P.M. Kennedy in his *Constitution of Canada 2nd Ed.* 1938, [*at p.* 550], where he says :

"After a careful examination of every case, in every jurisdiction dealing with the interpretation of the Act, I venture to submit that in not one of them has *ratio decidendi* depended on reasons external to the Act . . . So generally uniform has been the approach of the Judicial Committee that on the basis of it, I anticipated almost all these judgments except that one on 'unemployment insurance,' before their subject matter were referred to the Supreme Court, and thence to London".

Whether the views of Kennedy are correct or not is another matter, and there are many even in Canada who do not share his views on this score but the fact remains that what he has said about the Privy Council approach as leading to "predictable results" could never be true even about the Supreme Court of the United States of America as it is working today after the famous (or infamous) Court-Revolution that took place in 1937, to say nothing of the fact that the pre-1937 Supreme Court, also called the 'old-Court', had so interpreted the Constitution that due to its judicial activism it was to all intents and purposes becoming, as remarked by a recent writer, "an essentially *laissez faire* organisation, for American economic

In *Attorney General*
583 Lord Loreburn,
f a completely self
governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act '

"In two decisions the Judicial Committee has applied these principles to the inter pretation of this Constitution, namely, *Webb v Outrim* [(1907) *A C* 81 4 *C L R* 356], and the *Colonial Sugar Refining Co 's case* [(1914) *A C* 237 17 *C L R* 644] In the first mentioned case, quite independently of any observations as to the meaning of the word 'unconstitutional', it is clear that their Lordships proceeded on the ordinary lines of statutory construction In the second case the *Judicial Committee* considered the nature of the instrument itself in order to determine more satisfactorily the depository
n, as to which this Court has never
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judicial investigation which those two august tribunals of the Empire have marked out as required by law "

176. Progressive Interpretation

Having stated the fundamental view point from which their Lordships of the Privy Council have often approached the questions concerning the construction of Colonial and Dominion Constitution Acts, we are now in a position to appreciate the somewhat dis tinguishable attitude which has been adopted by the United States Supreme Court to the problem of interpreting the Articles of the United States Constitution We would call the American view point as yielding place to "progressive interpretation"—as opposed to the English "Literal" or "grammatical" interpretation of constitutional instruments

The rules of construction which the American Courts apply in the determination of constitutional controversies have been lucidly stated in "Corpus Juris Secondum", Vol XVI, as follows

"(14) Rules of Construction in General

A constitution should be construed as fundamental law and should be interpreted in such a manner *as to carry out the broad principles of Government stated therein*

A constitution should be construed with reference to, and in the light of, well re cognised and fundamental principles lying back of all constitutions It is to be resorted to as fundamental law to which all other laws must yield, and should be interpreted in such a manner as to carry out the broad general principles of Government stated therein, although the meaning or principles of a constitution remain fixed and unchanged from the time of its adoption, a constitution must be construed as it is intended to stand for a great length of time, and it is progressive and not static Accordingly, it should not receive too narrow or literal an interpretation, but rather the meaning given it should be applied in such a manner as to meet the new or changed conditions as they arise

"A Constitution, a provision thereof, should receive reasonable and practical inter- pretation in accord with common sense Confusion, ambiguity, or contradiction

Judges of the Supreme Court it has been made to say during the course of last 180 years to be able to appreciate the truth of this comment.

So also in the case of *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, (1878), 96 *U.S.* 1, *at p.* 9; 24 *L. Ed.* 708 at p.710, which involved interpretation of the scope of the power conferred upon the National Government to establish "Post Offices and post road", the same approach was reiterated. When the Electric Telegraph came into use the objection was made that its regulation or control was outside the power conferred by the Constitution on the ground that the framers of the Constitution could not be credited with the provision that such a power would at all be needed. The objection was repelled and the answer made by Waite, C.J. provides the principle of progressive constitutional interpretation. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

It would be useful, in this context to refer to the *Australian case* of *King v. Brislan ex parte Williams*, (1935) 54 *C.L.R.* 262, which contains a review of some cognate cases decided by the Privy Council like (a) (1932) *A.C.* 304, *in re Regulation & Control of Radio Communication in Canada*, and (b) (1912) *A.C.* 333 *City of Montreal v. Montreal Street Railway*. In this case the validity of Wireless Telegraphs Act was questioned on the ground that the Australian Constitution provided in Sec. 51 (v) for the Parliament to make laws for the peace, order, and good government of Commonwealth with respect to "postal, telegraphic, telephonic, and other like services." It was contended that "Broadcasting" did not fall within the scope of this power. A perusal of the judgment in this case as also that of *Attorney-General v. Edison Telephone Co. of London*, (1880) 6 *Q.B. D.* 244; *or Postmaster-General v. National Telephone Co.*, (1909) *A.C.* 269, would show how careful are the Judges trained in the habit of English Common Law thinking to keep strictly to the analysis of language used by the Legislature and to, what might be called, the dictionary approach —the search for meaning from the words used.

This attitude would be found fully reflected in the observations of the *Judicial* Committee of the Privy Council in the *Labour Relations Board of Saskatchewan v. John East Iron Works Limited*, *AIR* (1949) *Privy Council, page* 129, where it was ruled that the expression "Superior District or Country Courts", occurring in section 96 of the British North America Act of *1867*, could not apply to a tribunal invested with jurisdiction of a type and kind which was absolutely foreign to the conception and scope of judicial power currently in vogue at the time of enactment of that Act (at p. 133):

> "It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board. For, as the Act contemplates and the Rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the Board for an order to be made :
>
> (a) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice,
>
> (b) requiring an employer to re-instate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge,

and social life " (See p 170 *of Judicial Review* in the English Speaking World *by Edward McWhinney*—1956, *Toronto Press*)

But the matter is sufficiently important for us in Pakistan to look at it somewhat closely

We have already referred, in another place, to the views of Professor K C Wheare, as to the manner in which the United States Supreme Court has from time to time construed words like 'liberty' etc so as to include in it varying shades of meaning (see p 314) All we can now do is to amplify the point of his remarks by citing some American cases so that the concept of "Progressive interpretation" is thrown into bold relief (b) American cases

The *Supreme Court of United States of America* in the case of *United States v Patric B Classic* (1941), 313 *U S* 299 85 *Lawyers Edition, page* 1368, observed at p 1378 that the fact that with respect to a certain subject matter, it was difficult to believe that the framers of the constitution were familiar or that they could not have conceivably provided for it is of very little significance in the determination of the question whether the provision of the Constitution applies thereto It was observed in the same case that the nature of the *Federal Constitution* is to be read not as a legislative code subject to continuous revision with the changing course of events but rather as a revelation of the great purposes which were intended to be achieved by it as a continuing instrument of Government In the words of Mr Justice Stone

> "We may assume that the framers of the Constitution in adopting that section did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of Government *Cf Davidson v New Orleans*, 96 *U S* 97 24 *L Ed* 616, *Brown v Walker*, 161 *U S* 591 595 40 *L Ed* 819 16 *S Ct* 644, 5 *Inters Com Rep* 369, *Robertson v Baldwin*, 165 *U S* 275, 281, 282 41 *L Ed* 715, 717, 718, 17 *S Ct* 326 If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose "

These remarks of Mr Justice Stone should be placed side by side with those of Chief Justice Taney in the *Dred Scott case*, 19 *Howard* 393 (1857) to be able to appreciate the difference between the two extreme attitudes of one and the same court to the problem of judicial interpretation of the provisions of the Constitution

> ' It (the Constitution) speaks not only in the same words, but with the same meaning and intent with which it spoke when it came into the hands of its framers and was voted upon and adopted by the people of the United States Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day "

United States Constitution speaks in the same words, yes, but he would be a bold critic indeed, who would say "it speaks with the same meaning and intent with which it spoke when it came into the hands of its framers and was voted upon and adopted by the people of the United States " for you have only to read the record of what, according to the

for all time. They sought merely to provide a starting point."

To this might be added the additional consideration that the amending procedure in the *United States'* Constitution is, comparatively speaking, difficult of achievement and this in turn has brought about a radically different judicial outlook to prevail in the matter of interpretation of its provisions—so that, what cannot be done by a formal amendment, may nevertheless be achieved by a judicial interpretation of its provisions. It is obvious, for these reasons, that our Courts cannot go as far as United States Supreme Court has been in the matter of bestowing upon the provisions of the Constitution an extra-ordinarily wide, large and elastic interpretation.

But even in the United States as far back as 1819 no less a Judge than *Chief Justice Marshall* in the case of *Sturges v. Crown in Shield*, 4 L.Ed. p. 529 at 550, with regard to the argument based on the "Spirit of Constitution" observed:—

> "Although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Willoughby quoted.

Similarly, Willoughby in his *Constitution on the United States*, after referring to several decisions of the *U.S. Supreme Court* where the Judges had invoked in aid of the construction of the Constitution of America the "spirit" of the Constitution, decisions, like *Loan Association v. Topeka* (20 *Wall* 655); *Fallbrook Irrigation District v. Bradley* (164 *U.S.* 112); *Downes v. Bidwell* (182 *U.S.* 244), *and Dorr v. United States* (195 *U.S.* 138), stated his opinion upon the problem as follows:

> "It is the opinion of the author that the statements which have been quoted would have an unfortunate effect if generally accepted and applied as rules of construction or interpretation for determining the powers granted to, or the limitations imposed upon, Congress or to or upon the States by the Constitution,—an unfortunate effect because it would render indeterminate what those powers or limitations are. The line of distinction between conclusions which may be validly drawn from the general purpose of the Constitution and of the nature of the Union or Government intended to be provided for by that instrument and the conclusions which may not, with constitutional propriety, be drawn from the 'spirit' of the Constitution, may not always be easy to draw, but the distinction itself is a clear and logical one. The resort to the general nature and purpose of the Constitution in order to determine doubts not otherwise resolvable is a legitimate practice, sustainable by general principles governing the construction of written instruments; but the resort to the 'spirit' of the Constitution, in order either to sustain an exercise of governmental power or to impose a limitation upon it which is not provided for by the instrument itself, is not a valid practice, since it stands in essential opposition to the other rules which the Court has declared Fundamental for determining the power granted to or limitations imposed upon the Federal Government by the Constitution." (*Vol. I, p.* 71, 1929 *Ed.*).

(c) requiring an employer to dis-establish a company dominated organisation, or

(d) requiring two or more of the said things to be done

"Other rules provide for the discharge by the Board of other functions It is sufficient to refer only to (b) *supra*, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far reaching industrial conflict It may be possible to describe an issue thus raised as a '*lis*,' and to regard its determination as the exercise of judicial power But it appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or country courts of Upper Canada

"In the Court of Appeal for Saskatchewan the learned Chief Justice (in whose opinion the other Judges concurred) accepted the view that the Board exercised a judicial power analogous to that of the Courts named on the ground that such Courts always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof But, as their Lordships think, this view ignores the wider aspects of the matter The jurisdiction of the Board under S 5 (e) is not invoked by the employee for the enforcement of his contractual rights those, whatever they may be, he can assert elsewhere But his reinstatement, which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy or collective bargaining as a road to industrial peace is secured It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which wsere familiar to the Courts of 1867"

177. Arguments based upon "Spirit of the Constitution" and the doctrine of "Political Necessity" etc.

for no other reason then at least this that this spirit is incapable of being objectively defined with the result that the entire course of interpretation of the constitutional instrument will be governed more by the whims and caprices of a judge than by appeal to those criteria and principles which are capable of being precisely formulated In the words of Kania C J, uttered in the case of *Gopalan v State of Madras, AIR* (1950) *Supreme Court page* 27 at p 42

"The Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words"

Both the *Indian* and *Pakistan Constitutions* are ponderous documents that run into meticulous details and are rather to be regarded as comprehensive codes than merely as sketches or outlines of constitutional principles which is really what can be claimed for the *United States' Constitution* In "The Government of the United States" by Munro, it has been stated about the U S Constitution

The limits within which the Rules of progressive interpretation would apply to our Constitution

"The architects of 1787 built only the basement Their descendants have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished Or, to change the metaphor, it has a fabric which, to use the words of James Russell Lowell, is still being 'woven on the roaring loom of time' That is what the framers of the Constitution intended it to be Never was it in their mind to work out a final scheme for the government of the country and stereotype it

judge of its own jurisdiction: it is the neglect of this self-imposed limitation on the exercise of the *will* instead of the *judgment* by the judges that provoked the protest of Justice Holmes:

"There is a tendency", wrote Justice Holmes to Harold Laski, in one of his letters, "to think of judges as if they were independent mouth-pieces of the infinity and not simply directors of a force that comes from the source that gives them their authority. I think our Court has fallen into the error at times, and it is that thought I have aimed at when I have said that the common law is not a brooding omnipresence in the sky and the U.S. is not subject to some mystic over-law that it is bound to obey."

The judicial function, in so far as it has reference to the power of interpreting the Constitution, is not necessarily superior to the similar function which is exercised by the executive or the legislative organs of the State when they proceed to exercise the power and perform the duties imposed upon them by the Constitution. Every agent must endeavour to interpret and apply the mandate of the principal, and the judiciary, like any other agent established by the Constitution, is charged with a duty of finally interpreting and applying the mandates of the Constitution. The argument in support of this view has been so succinctly stated by Hamilton in "The Federalist" (No. LXXVIII) that the present author can do no better than reproduce it:

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the Representatives of the People are superior to the People themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the Representatives of the People to substitute their will to that of their constituents. It is far more rational to suppose, that the Courts were designed to be an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the People to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the Judicial to the Legislative power. It only supposes that the power of the People is superior to both; and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the People, declared in the Constitution, the Judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

The sanctity that attaches to the pronouncements of the Court of ultimate jurisdiction stems not from the belief that it is infallible but is based upon the view that somewhere there must be a finality in the matter of inter-

Nor again can the doctrine of political necessity be invoked for the purpose of inferring the existence of power which on the plain construction of the language of the instrument sought to be interpreted does not appear to have been affirmed by the framers of the Constitution

Doctrine of Political Necessity & Interpretation of Constitution

"Not only", says the High Court of Australia, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, (1920), 28 C L R 129 at 151, 'is the judicial branch of the Government inappropriate to determine political necessities, but experience both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard Its inaccuracy is perhaps the more thoroughly perceived when it is considered what the doctrine of necessity in a political sense means It means the necessity of protection against the aggression of some outside and possibly hostile body It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them It may be taken into account by the parties when creating the powers, and they, by omission of suggested powers or by safeguards introduced by them into the compact, may delimit the powers created But, once the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language naturally understood may be abused This has been pointed out by the Privy Council on several occasions, including the case of the *Bank of Toronto v Lambe* 12 *App Cas* 575 *at pp* 586 587 The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere that is pure legal construction But, once their true meaning is so ascertained, they cannot be further limited by the fear of abuse The non granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts When the people of Australia to use the words of the Constitution itself, 'united in a Federal Commonwealth they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done No protection of this Court in such a case is necessary or proper Therefore, the doctrine of political necessity, as means of interpretation, is indefensible on any ground The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*" (1920)28 C L R 129 at 151, Engineers' case)

Similarly, it is inexcusable in a judge that he should sit in judgment over the wisdom of the enacted law, and, not finding it wise enough or palatable enough, so to construe it as to make it appear not what it is but as, in his view, it ought to be In other words, there is no such thing as an excusable attempt at judicial usurpation In the words of Chief Justice Stone

"While unconstitutional exercise of power by the executive and legislative branches of Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self restraint"

About this desire to subject judicial mind to the rule of "self restraint" not much need be said since it is inherent in the concept of ultimate judicial power being the final

so by means of appropriate proceedings. If we omit from our consideration the provisions of ARTs. 22 and 170 of the Constitution, which relate to the enforcement of fundamental rights etc., there would be found no other specific provision that expressly charges the court with the duty or commits to it the power of enforcing the Constitution But, nevertheless, it seems to be the underlying assumption of the entire Constitution that Courts are to act as the custodians and guardians of its mandates. This assumption can validly be made since interspersed throughout our Constitution are to be found express provisions prohibiting courts from taking cognizance of certain matters. There would be no need to incorporate these express prohibitions in the Constitution unless it were assumed that in their absence the Courts would inquire into and enforce breaches of constitutional provisions. These provisions, that may be characterised as provisions governing the constitutional ouster of the jurisdictions of courts, are the following:—

(a) ART. 23 (2) The State shall be guided in the formulation of its policies by the provisions of this Part, but such provisions shall not be enforceable in any court.

(b) ART. 32 (3) The validity of the election of the President shall not be questioned in any court.

(c) ART. 37 (2) The question whether any, and if so, what, advice has been tendered by the Cabinet, or a Minister or Minister of State, shall not be inquired into in any court. (See ART. 71 (2) for the Provincial Ministers).

(d) ART. 56 (1) The validity of any proceedings in the National Assembly shall not be questioned in any court. (See ART. 89 for the Provincial Assembly).

(e) ART. 58 (3) Every Money Bill, when it is presented to the President for his assent, shall bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court. (See ART. 91(3) for the Provincial Money Bill).

(f) ART. 142 (5) The validity of anything done by or under the authority of the Delimitation Commission shall not be called in question in any court.

(g) ART. 146 No election to the National Assembly, or a Provincial Assembly shall be called in question except by an election petition presented to such authority and in such manner as may be provided by Act of Parliament.

(h) ART. 195 (2) The validity of any Proclamation issued or Order made under this Part, i.e. Part XI, shall not be questioned in any court.

(i) ART. 216 (2) Validity of a certificate granted by the Speaker of the National Assembly that a bill for the amendment of the Constitution has been passed in accordance with the provisions of ART. 216(1) is conclusive and cannot be questioned in any Court.

(j) ART. 222 (5) The validity of the election of President elected under this Article shall not be questioned in any court.

One conceivable argument against this mode of regarding the effect of the provisions relating to the constitutional ouster of the jurisdiction of courts is to view them as having been enacted by the framers of the Constitution *ex majeure abundante cautela*. The matter is not free from difficulty and awaits the authoritative opinion of our Superior Courts. This argument, however, can have no place in the matter of interpreting a written constitution which has an express provision made in it to the effect that the Constitution is the Supreme Law of the land and is binding on all the organs and authorities set up

pretation of the Constitution And the supremacy of the judiciary's interpretative functions comes, not from any presumed moral excellence or intellectual alertness on the part of the judges of a country but from the assumption that they have the final say in the matter of constitutional interpretation It is the consciousness of this burdensome responsibility

178. The dominant purpose that ought to underlie the judicial approach to Constitutional interpretation.

In the interpretation of the Constitution the judges ought to be animated by a desire to give effect to its provisions on the assumption that they embody the working principles for practical Government It is for this reason that in the case of *James v Commonwealth of Australia*, (1936) *Appeal Cases, page* 578, *Lord Wright* observed

"It is true that a Constitution must not be construed in any narrow and pedantic sense The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as years go on, in relation to the vicissitudes of acts which from time to time emerge It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning The true test must as always be the actual language used '

In the field of constitutional law in regard to the matters affecting the judicial interpretation of the provisions of the Constitution, observations of Lord Sankey in the case of *British Coal Corporation v The King* (1935) *A C page* 500, are instructive he remarks

"In interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of its powers must be adopted "

And the same approach characterises the outlook of *Lord Jowitt L C*, in *Attorney General of Ontario v Attorney General of Canada*, (1947) *Appeal Cases, page* 107, at 153 who would like to consider the effect even of the political conceptions embodied in a constitution and the circumstances in which it was enacted

"Giving full weight to the circumstances of the Union and to the determination shown by the provinces as late as the imperial conferences, which led to the Statute of Westminster, that their rights should be unimpaired, nevertheless, it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a supreme court of appeal having a jurisdiction both ultimate and exclusive of any other member The regulation of appeals is, to use the words of *Lord Sankey* in *British Coal Corporation* case, a 'prime element in Canadian sovereignty', which would be impaired if, at the will of its citizens, recourse could be had to a tribunal, in the constitution of which it had no voice It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act* To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under section 101 of the *British North America Act* "

179. Limits on Judicial Power in relation to the judicial enforcement of our Constitution.

• Our courts are enjoined to interpret and apply the Constitution and the law in the determination of the controversies of which they take cognizance, having been moved to do

so by means of appropriate proceedings. If we omit from our consideration the provisions of ARTs. 22 and 170 of the Constitution, which relate to the enforcement of fundamental rights etc., there would be found no other specific provision that expressly charges the court with the duty or commits to it the power of enforcing the Constitution But, nevertheless, it seems to be the underlying assumption of the entire Constitution that Courts are to act as the custodians and guardians of its mandates. This assumption can validly be made since interspersed throughout our Constitution are to be found express provisions prohibiting courts from taking cognizance of certain matters. There would be no need to incorporate these express prohibitions in the Constitution unless it were assumed that in their absence the Courts would inquire into and enforce breaches of constitutional provisions. These provisions, that may be characterised as provisions governing the constitutional ouster of the jurisdictions of courts, are the following:—

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One conceivable argument against this mode of regarding the effect of the provisions relating to the constitutional ouster of the jurisdiction of courts is to view them as having been enacted by the framers of the Constitution *ex majeure abundante cautela*. The matter is not free from difficulty and awaits the authoritative opinion of our Superior Courts. This argument, however, can have no place in the matter of interpreting a written constitution which has an express provision made in it to the effect that the Constitution is the Supreme Law of the land and is binding on all the organs and authorities set up

thereunder Neither in the Indian nor in our Constitution, however, is there any such express provision as to the supremacy of the Constitution made by the framers of the Constitution

In the U S Constitution there is no provision which could be construed as authorising the Supreme Court of that country to enforce it judicially "There is a story told", says Lord Bryce, "of an intelligent Englishman, who having heard that the Supreme Federal Court was created to protect the Constitution, and had authority given it to annul bad laws, spent two days hunting up and down the Federal Constitution for the provisions he had been told to admire No wonder he did not find them for there is not a word in the Constitution on the subject " (See *Bryce's American Commonwealth* (1917 *Ed*) *Vol I* p 252), This authority of the American Courts has been assumed by them and is a usurpation and Harold J Laski is of the opinion that the Supreme Court, by exercising this power of review, is, in fact, a third Chamber in the United States (See his *American Democracy* (1948) *p* 111) Little wonder that *Lambart, a French Jurist*, felt that the power of judicial review exercised by the Supreme Court virtually amounts to establishing a government by the Judges

But the power to decide the constitutionality of Laws or administrative acts is *of the essence of judicial power, at least in countries that by means of a written Constitu*tion create non sovereign law-making and law executing bodies The power of interpreting the laws involves necessarily the function to ascertain whether they are comformable to the mandates of the Constitution and if it be found that they are not, the power to declare them void and inoperative As the Constitution is the supreme law of the land, in a conflictbetween that law and the laws either of the Congress or of the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation This results from the very theory of republican Constitution of Government, for, otherwise, the acts of legislature and executive would, in effect, become supreme and uncontrollable, notwithstanding any express prohibitions or limitations contained in the Constitution and ' the usurpations of the most unequivocal and dangerous character might be assumed, without any remedy within the reach of a citizen " In the total absence of power to enforce judicially the constitutional mandates and limitations imposed by it upon the Legislature and the executive organs set up by it, the Constitution would become a mere statement of pious platitudes and mere maxims of political morality which could be violated with impunity without any let or hindrance Such a paper Constitution is not even worth the paper upon which it is written

180. Our Supreme Court and the Constitution

The ultimate court of appeal then under our Constitution is the Supreme Court of our country And then to the question "What if the Judges violate the Constitution?" the *only answer that could be made is that somewhere there must be finality as to the* adjudication of constitutional disputes and there is no better organ than the Supreme Court to whose determinations that finality should be ascribed The Judges are bound by their Oath of Office to "preserve, protect and defend the Constitution and laws of Pakistan " "In a representative, democratic system such as ours", writes *Vinderbitt*, "the power of judiciary depends very largely on its reputation for independence, integrity and wisdom "

In this context it is appropriate that the views of, to use the words of Sir Raymond Evershed "that most cultured and erudite American Judge", who is, at least in the opinion of the present writer, one of the greatest Judges of all times, *Learned Hand of the Supreme Court of Massachusetts*, on matters affecting the sanctity, dignity, authority and the responsibility of the Supreme Court, that is, the highest tribunal of the land that renders judgments of ultimate authority, should be referred, if only because they so aptly describe the

The views of Learned Hand quoted

role which such a Court plays in the matter of interpreting and applying the provisions of a written constitution to the settlement of disputes concerning power-relations within the State.

"A constitution", says *Learned Hand*, "is primarily an instrument to distribute political power; and so far as it is, it is hard to escape the necessity of some tribunal with authority to declare when the prescribed distribution has been disturbed. Otherwise those who hold the purse will be likely in the end to dominate and absorb everything else, except as astute executives may from time to time check them by capturing and holding popular favor . . . . I do not mean that courts should approach such constitutional questions as they approach statutes, and they have never done so when they knew their business; constitutions can only map out the terrain roughly, inevitably leaving much to be filled in. The scope of the interstate commerce power of Congress is an ever present instance. It is impossible to avoid all such occasions, but it was a daring expedient to meet them with judges, deliberately put beyond the reach of popular pressure. And yet, granted the necessity of some authority, probably independent judges were the most likely to do the job well . . ."

Difficulty enforcing "general principles" enacted as Constitutional limitations.

Having shown that it is to independent judiciary that the high, the august and the responsible task of interpreting the constitution must necessarily be assigned if the constitution is at all to work, *Learned Hand* turns to the distinctive feature of the American constitution that provides for "not only the distribution of powers of government" but also an enunciation of those *general principles that are designed to ensure the just exercise of those powers*, that is clauses like *due process of law etc.*, (principles analogous to those mentioned by our Constitution in ARTs. 8, 9, 10, 11, & 12, as reflected in the constitutional limitations envisaged by the expression 'subject to reasonable restrictions imposed by law',) and thereafter proceeds to observe (in words which in their sheer force and effect of sublimity and grandeur are unrivalled in the whole range of forensic literature of the civilized world) the pitfalls and dangers that beset the way of those who are charged with the duty of applying and enforcing these principles.

"This is the contribution to political science of which we are proud, and especially of a judiciary of *Vestal* unapproachability which shall always tend the *Sacred Flame of Justice*. Yet here we are on less firm ground. It is true that the logic which has treated these like other provisions of a constitution seems on its face unanswerable. Are they not parts in the same document? Did they not originally have a meaning? Why should not that meaning be found in the same way as that of the rest of the instrument? Nevertheless there are vital differences. Here history is only a feeble light, for these rubrics were meant to answer future problems unimagined and unimaginable. Nothing which by the utmost liberty can be called interpretation describes the process by which they must be applied. Indeed if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism. The answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh. Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers? When does utterance go beyond persuasion and become only incitement? How far are children wards of the state so as to justify its intervention in their nurture? What limits should be imposed upon the right to inherit? Where does religious freedom end and moral obliquity begin? As to such questions one can sometimes say what effect a proposal will have in fact, just as one can foretell how much money a tax will raise and who will pay it. But when that is done, one has come only to the kernel of the matter, which is the choice between what will be gained and what will be lost. The difficulty

thereunder Neither in the Indian nor in our Constitution, however, is there any such express provision as to the supremacy of the Constitution made by the framers of the Constitution

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In this context it is appropriate that the views of [illegible] in the words of Sir Raymond Evershed "that most cultured and erudite American Judge [illegible] at least in the opinion of the present writer, one of the greatest Judges of all time, [illegible] of the Supreme *Court of Massachusetts*, on matters affecting the [illegible] authority and the responsibility of the Supreme Court, that is, the highest [illegible] that renders judgments of ultimate authority, should be referred, if [illegible]

pretence of interpretation is rottenness. If judges are to kill this them do it, not like cowards with a kiss, but, like brave men with a s

The power of judiciary, therefore, no matter how very grea theory, be, is primarily intended to operate, under a form of governm written constitution as a curb on the arbitrary exercise of *political* sense that Justice Frankfurther looked at the significance of the Doctrin in *Minersville School District v. Gobitis*, (1940) 310, *U.S.* 586: (1940) 84

"Judicial review", said he, "itself a limitation on popular gov mental part of our constitutional scheme. But to the Legislature no is committed the guardianship of the deeply cherished liberties."

Not only to *courts* and *Legislature*, but also to the *Executive*, is com ship of, not only "our deeply cherished liberties, our constitutional r thing more—to them is entrusted a faithful, honest and earnest duty of of the whole of our Constitution. It is for this reason that the Court sit in judgment over the acts of coordinate departments of Governme Executive—and it is only in the clearest of cases involving breach of that on them as guardians of the Constitution that their acts, or rather t should be visited with judicial disapprobation. What our Constitution is not merely legal learning, not merely their adopting a positivistic, un approach to administration of law: it requires of them judicial statesman in their taking a broader view of the judicial function than has been do past. Judges have to assume not merely the role of being the discov that they must apply to the decision of cases, they have also be accept role of the Judges, that is the kind of role that *Learned Hand* finds it d beyond, them to fulfil. The power of judicial review has to be re instinct of judicial self-restraint. Even in America where there has b from the role which the Judges of the 'pre-1937 Court-Revolution' u are indications that the 'New Court' would ply the sword of judicial revi to ensure the minimum requirements of "due process of political change ever that court notices that the legislature imposes restrictions on the ocesses, it would not approach the case from the premises of the p nstitutionability of the impugned legislation. The more so in our c ctorate is by far the more illiterate and the politician by far the mocratic forces, there is the need for the courts to exercise liberall erference in order that the minimum requirements of the der maintained by the executive and the legislature. [See further (1956) rnal 597, *Alphens Mason's* article on "*The Era of Free-Government*, 19 *ne and the preferred Freedoms*"].

1. Effect of Court's declaration of a law as "*unconstitutiona*

When our courts declare a statute as being unconstitutional the eff n is no more and no less than this that such a statute is devoid of any though it has never been passed. An unconstitutional Act confers no obligations, nor can any one be exposed to any liability under its provi obligations can accrue under an unconstitutional law.

The courts will not lightly declare administrative acts and laws pa as being unconstitutional. When a court is called upon to dete

here does not come from ignorance, but from the absence of any standard, for values are incommensurable It is true that theoretically, and sometimes practically, cases can arise where courts might properly intervene, not indeed because the Legislature has appraised the values wrongly, for it is hard to see how that can be if it has honestly tried to appraise them at all, but because that is exactly what it has failed to do, because its action has been nothing but the patent exploitation of one group whose interests it has altogether disregarded But the dangers are always very great What seems to the loser mere spoliation usually appears to the gainers less than a reasonable relief from manifest injustice Moreover, even were there a hedonistic rod by which to measure loss or gain, how could we know that the judges had it, or—what is more important—would enough people think they had, to be satisfied that they should use it? So long as law remains a profession (and certainly there is no indication that its complexities are decreasing) judges must be drawn from a professional class with the special interests and the special hierarchy of values which that implies And even if they were as detached as Rhadamanthus himself, it would not serve unless people believed that they were But to believe that another is truly a Daniel come to judgment demands almost the detachment of a *Daniel*, and whatever may be properly said for judges, among them there are indeed those as detached as it is given men to be, nobody will assert that detachment is a disposition widespread in any society

"It is not true, as you may be disposed at first blush to reply, that all this can be said with equal force of any other decision of a court Constitutions are deliberately made difficult of amendment, mistaken readings of them cannot be readily corrected Moreover, if they could be, constitutions must not degenerate into vade mecums or codes, when they begin to do so, it is a sign of a community unsure of itself and seeking protection [illegible] ich parts of a constitution as [illegible] If a court be really candid, [illegible] is result, it will injure this group in such and such ways, and benefit that group in these other ways We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses

"Practically it is very seldom possible to be sure of such a conclusion, practically, it is very seldom possible to say that a legislature has abdicated by surrendering to one faction, the relevant factors are too many and too incomparable

"Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis They are the precipitates of 'old forgotten far off things and battles long ago,' originally cast as universals to enlarge the scope of the victory, to give it authority, to re assure the very victors themselves that they have been champions in something more momentous than a passing struggle Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent And its independence will be lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs, it must be content to stand aside from these fateful battles There are two ways in which the judges may forfeit their independence, if they do not abstain If they [illegible]
if they [illegible]
taught [illegible]

"Whether the question arises under the Commercial clause or the 14th Amendment, I think the legislation is entitled to a presumption of validity. . . . . I am not persuaded that the evidence adduced by the railroads overcomes the presumption of validity to which this train limit law is entitled."

In view of the fact that grave consequences must ensue upon a declaration by the Court that the impugned law is unconstitutional, the court would not ordinarily deal with a constitutional objection if it can dispose of the controversy in the case on any other ground. (See *Chicago & Grand Trunk Railway Co. v. Wellman*, (1892) 143 *U.S.* 339.)

The theory upon which declaration as to the unconstitutionality of the impugned Acts and laws can be justified is, that in a system of written constitution, the several organs set up or established under its mandate, represent the mere agencies through which the *principal*, that is the Constituent Sovereign, the will of the people as manifested in the constitutional document, must act.

"Thus, when it is held that the enactments of the legislatures of the member States of the Union are of no legal force and effect, if not warranted by the provisions of the United States Constitution, there is applied a principle that is recognised and applied in the private as well as the public law of all constitutionally administered states, namely, that, to be valid, an agent must act within the authority granted him by his principal. Hence, when a law of a State of the American Union, whether embodied in an enactment of its legislature, or in the articles of its written constitution, is held void because not warranted by the United States Constitution, the rule applied is exactly similar to that which controls the courts of other countries when they have to deal with the acts of colonial or administrative bodies which have only those legislative or other ordinance-making powers which the sovereign authority has granted to them." (See *Willoughby's Constitution of the United States, Vol. I, p.* 2, 1929 *Edition*.)

Party aggrieved alone is entitled to challenge the constitutionality of law.

Only he is entitled to challenge the constitutionality of an Act or law, who is genuinely aggrieved by such an Act or law, that is one whose substantial rights have been interfered with. The court will always be watchful and on its guard not to be involved in settling spurious and collusive controversies and would refuse the exercise of its judicial power in cases where it may appear to it that an artificial controversy has been brought up by parties before it. And this reluctance on the part of our courts is due to the consideration that in matters that arise out of pre-arranged or fabricated cases, there will be no real contest, but that a view favourable to the party responsible for the artificially contrived litigation will have been ultimately procured on the basis of one-sided presentation of the case. (See the case of *Chicago and Grand Trunk Railway Co. v. Wellman* 143 *U.S.* 339, *as also Fairchild v. Hughes*, (1922) 258 *U.S. page* 126.)

This is also the view of the Indian Supreme Court. (See remarks in *Charanjit Lal's case*, (1951) *S.C. p.* 41).

Conclusion

A study of the constitutional decisions rendered by the United States Supreme Court, as also those of the Judicial Committee of the Privy Council and the Supreme Court of Canada and the High Court of Australia shows that they constantly keep two *guiding principles* before them while setting out to determine constitutional questions. They express a preference for avoiding a decision on constitutional grounds if the case can be otherwise disposed of. They purport to refrain from entering into any extended discussion of constitutional doctrine save as this may be necessary for deciding the case at hand. (See *Canadian Constitutional Law by Laskin, p.* 70, and the cases referred to therein. In particular see the cases of *A. G. Manitoba v. Manitoba Licence-holders Association* (1902), A.C. 73, where *Privy Council* observed with respect to the second principle that it

where the court is invited to interfere with acts of a co-ordinate department like the Executive and the Legislature

What should be the attitude of a Judge who is called upon to strike down an Act of the 'Legislature' as 'Unconstitutional' was stated by Isaacs J. of the High Court of Australia, (See *Federal Commissioner of Taxation v. Munro*, (1926) 38 C.L.R. p. 153, at p. 180) in words that have become immortal. Said the learned Judge: Federal Commissioner of Taxation vers. Munro

"It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliamen[illegible] considered necessary or desirable for [illegible] of any doubt as to its [illegible] urselves transgress the constitution or obscure the issue before us—the question is: Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind wit[illegible] parent. Nullification of [illegible] introduced. Unless the [illegible] gislation in question transgresses the limits laid down by the organic law of the constitution it must be allowed to stand as the true expression of the National Will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. *If the language of a statute is not so intractable as to be incapable of being* consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod v. Attorney-General for New South Wales* (1891) A.C. 455. It is the principle which the *Supreme Court of the United States* has applied, in an unbroken line of decision from *Marshall C. J.* to the present day. (See *Adkins v. Children's Hospital* (1923) 261 U.S. 525 at 544.) It is the rule of this Court. (See, for instance, per *Griffith C. J.* in *Osborne v. Commonwealth*, (1911) 12 C.L.R. at p. 337)."

James Bradley in his "*Origin and Scope of the American Doctrine of Constitutional Law* (1893)", *7 Harvard Law Review page 129* emphasised that in such cases the judicial function is "merely that of fixing the outside border of reasonable legislative action". Similarly, *Thayer*, differentiated the judicial function in constitutional interpretation from that which *is relevant in the construction of other documents by pointing out that*

"When a Court is interpreting a writing merely in order to ascertain or apply its true meaning then indeed there is but one meaning allowable, namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of other department, officer or individual are legal or permissible, then this is not true. In the class of cases which we have in consideration, the ultimate question is not what is the true meaning of the Constitution, but whether legislation is sustainable or not."

In America it has been held, for instance, that a statutory discrimination will not be set aside as the denial of equal protection of laws if the state of facts reasonably may be conceived justifying it. (See *Metropolitan Casualty Insurance Co. v. Brownell*, (1935) 294 U.S. 580, *Rast v. Van Deman and Lewis Co.* (1916) 240 U.S. 342. *O Gorman & Young v. Hartford Fire Insurance Co.* (1931) 282 U.S. 251, *Williams v. Mayor of Baltimore* (1933) 289 U.S. 36). Similarly, Mr. Justice Douglas in his dissenting opinion in *Southern Pacific Co. v. State of Arizona* (1945) 325 U.S. 761, observed (at p. 796) —

advert, be it even so briefly, to the history of the doctrine regarding the binding value of a judicial precedent.

Blackstone quoted.

The emergence of the doctrine of the binding value of judicial precedents, in England at least, could be traced back to the theory of the common law which regards it as representing the general custom of the land and views judicial decisions as being the principal and the most authoritative evidence that can be given of the existence of such a custom. And so we have in *Blackstone's Commentaries* the following statement on the subject:

"For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land: not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad* law, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined . . . The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." (p. 69 Vol. 1).

It would be apparent that Blackstone grounds his thesis upon the desirability of preserving historic continuity which he insists ought to be maintained in the administration of justice and upholds the 'declaratory' theory of the precedent which says that it is *evidence* of what the common law of England is. The subsequent development of the juristic thought in England has departed from this theory of the precedent advanced by Blackstone, who would have the force and effect of precedent based upon the general custom of the land and to make the decision given by courts only as evidence of that custom. The more generally accepted view now is the one advanced by Austin, who it would be recalled denounced this declaratory theory of the judicial precedent as "the childish fiction employed by our judges that judiciary or common law is not made by them but is a miraculous something made by nobody, existing I suppose from eternity, and merely declared from time to time by the judges."

Sir James Parke's view in Mirehouse vs. Rennel, quoted.

Austin quotes with approval Sir James Parke's observations made in a decision rendered by the House of Lords, in *Mirehouse v. Rennel* (1833) 1 *Cl. & F. page 527 at p. 546*, as best expressing the justification of "our system of ascribing positive authority to precedent for deciding the cases":

"Our Common Law system consists in the applying to new combination of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be

was in the nature of an advice often quoted but perhaps not always followed See *also Citizens Insurance Co v Parsons*, (1881) 7 *Appeal Cases* 96, *etc etc*)

Similarly, *Mr Justice Frankfurter*, in the case of *Youngstown Sheet and Tube Co v Sawyer*, (1952) 343 *U S* 579 at p 593, set forth the attitude which ought to be adopted by Courts while they are engaged in settling constitutional controversies On the one hand, the court should be conscious that since

> "The accretion of dangerous power does not come in a day It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority"

it ought to be vigilant and jealously guard against any move in the direction of autocratism that must result from power being allowed to go unchecked and unregulated—and, on the other, the Court should realise that

> "Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'cases' or 'controversies' "

And he goes on further to add

> "*Even as to questions that were the staple of judicial business, it is not for the courts* to pass upon them unless they are indispensably involved in a conventional litigation Rigorous adherence to the narrow scope of the judicial function is specially demanded in controversies that arouse appeals to the constitution The attitude with which this court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public So called constitutional questions seem to exercise a mesmeric influence over the popular mind This eagerness to settle—preferably for ever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits
> Due regard for the implications of the distribution of powers in our Constitution and for the nature of judicial process as the ultimate authority in interpreting the constitution has not only confined the court within the narrow domain of appropriate adjudication it has also led to 'a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision ' (Brandeis, J in *Ashwander v Tennessee Valley Authority*, 297 U S 288) A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution " (Consult further Cooley's *Principles of Constitutional Law*, Chapt XV, Sec 4 Judicial Restraints on Legislative Encroachments, pp 190 201)

182. Courts and the Judicial Precedents

"Judgment" or opinion of a Court as embodying a Rule of Law

When a court of law decides a case presented to it, it disposes of the conflicting claims advanced before it by the parties to the cause and renders what is called "judgment" in this country and "opinion" in America the judgment or opinion rendered by the court concludes the controversy between parties to the cause and is binding on them subject, of course, to the decision being upset by a higher court But, in the process of reaching a conclusion upon a controversy, the court itself evolves a rule which it follows in the decision of the case, and it is this rule or what may be called as "reason for deciding the case", which is also known as *ratio decidendi*, to which some measure of authority gets attached, and it becomes in its turn, a creative source of law for the purpose of settling cognate controversies that may arise during the course of subsequent litigation Before we understand how to disentangle this *ratio decidendi* or 'the legal reason for deciding the case' and observe the limits within which it operates as a source of law, it is necessary that we should

advert, be it even so briefly, to the history of the doctrine regarding the binding value of a judicial precedent.

Blackstone quoted.

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of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science "

Lord Halsbury's observations in London Street Tramways Case

In the same strain are the observations of Lord Halsbury in *London Street Tramways Co v London County Council*, (1898) *A C* 375 —

' It is wholly impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an extraordinary case', an unusual case', a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the re hearing and re arguing before the final Court of Appeal of a question which has been already decided Of course, I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such a judgment was erroneous, but what is that occasional interference with what is, perhaps, abstract justice, as compared with the inconvenience—the disastrous inconvenience—of having each question subject to be re argued, and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal *Interest rei publicae* that there should be *finis litium* at some time, and there could be no *finis litium* if it were possible to suggest in each case that it might be re argued because it is not an ordinary case what ever that may mean "

Rationale of the Binding Value of a Judicial Precedent

This and such other observations that are to be discovered in the judicial pronouncements of the English Courts have reference to that essential conservatism of the English mind which would rather, unless there are good and sufficient reasons to the contrary [illegible]

G W Keeton's views cited

But even in England 'the doctrine of Judicial Precedent' in the words of G W Keeton (*Elementary Principles of Jurisprudence*, p 108)

"is by no means a mechanical process and, moreover, the process of reasoning by analogy extends to it only with important limitations, which preserve the flexibility of the system, and which permit the judges continuously to adapt the Common Law to changing social needs Indeed, it has been suggested that the fabric of the Common Law changes completely in the course of a century and a half, as completely and as imperceptibly as an individual changes his skin This process of change can perhaps be best studied to day in the Law of Torts which presents a fascinating spectacle of judicial re interpretation of individual responsibility for fault in the light of changed social conditions Because this process of judicial re interpretation is not as yet complete, the Law of Torts shares with the Law of Property the doubtful honour of being one of the most difficult branches of English law to understand It is all too frequently the despair of the law student, though its labyrinthine by ways invite the legal scholar to wander at will in contemplation and criticism Until the late nineteenth century this branch of the law was still dominated by influences derived from its history from the Middle Ages onwards Nevertheless, for five centuries, the development of the law of civil liability was conditioned by the necessity for bringing all claims for redress within the orbit of one or other form of action, and even when they were abolished they still continued to influence legal thought and legal development Indeed it is only at the present time that we are finally emancipating ourselves from the tyranny of the forms of action, and that we are cautiously feeling our way towards some general theory of civil liability for wrongful harm It will be apparent that this process has also been hastened by changing conceptions of social responsibility '

Judicial Precedent and the Continental system of jurisprudence

The continental jurisprudence, more particularly that of France and Germany, does not assign much importance to the decisions of the courts as constituting a source of law and does not give to them any binding value. This may be traced to the influence of the Roman Law which as students of legal History know, has had a greater impact on the system of continental jurisprudence than it has had in England. There is not much to be found in the writings of Roman lawyers to show that Roman Law ever regarded judicial precedent as a source of law in the sense in which we do in our country. During the time of Republic the rules of *Ponti-fical College* were considered although the extent to which they controlled the judgments of the *Roman Praetors*, is not known. It was the frequent practice of the judicial tribunals to invite opinions of *jurisconsults*, that is the men who were learned in law, but even then what they said in response to such an invitation was not supposed to be binding on magistrates and judges. On the continent of Europe the decision rendered by a court has no binding force for a judicial tribunal as a precedent, nay not even upon the tribunal from where an appeal lies to the court rendering the decision. But in England and in United States, as has been stated earlier, the position is entirely different.

183. Factors on which the Authority of the Precedent depends

The authority of the precedent in our system of law is commensurate with the status of the tribunal that renders the judgment. The rule is that every Court binds the lower courts, and that some courts even bind themselves. When a higher court upsets or reverses a case decided by a lower court, the case that is reversed loses all authority as a precedent. Over-ruling takes place when a case decided in a lower court is considered in a different case taken to the appeal court and held to be wrongly decided.

Decisions of superior tribunals are thus binding on the inferior ones, and invariably the decision even binds the court that renders it in relation to the course of future litigation. Thus the House of Lords in England is bound by its decisions, so also is the Court of Appeal in England.

Limit of the Rule—Young v. Bristol Aeroplane Co.'s Case.

In the leading case of *Young v. Bristol Aeroplane Company* (1944), *K.B. p. 718, equivalent to* 1944 2 *All L.R. p.* 293, *Lord Greene M.R.*, after declaring that the *Court of Appeal* was bound by its previous decisions, made the following three reservations to the rule (p. 300):

(1) The Court is entitled to choose between two conflicting decisions of its own;

(2) the Court must refuse to follow a decision of its own which, though not expressly over-ruled is inconsistent with a decision of the House of Lords; and

(3) it is not bound to follow a decision of its own given *per incuriam*.

As to (3) above, he went on to observe:

"Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*. We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."

of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science "

In the same strain are the observations of Lord Halsbury in *London Street Tramways Co v London County Council*, (1898) *A C* 375 — Lord Halsbury's observations in London Street Tramways' Case

"It is wholly impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an 'extraordinary case', an 'unusual case', a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the re hearing and re arguing before the final Court of Appeal of a question which has been already decided Of course, I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such a judgment was erroneous, but what is that occasional interference with what is, perhaps, abstract justice, as compared with the inconvenience— [illegible] each question subject to be re argued, and the [illegible] reason of different decisions, so that in truth [illegible] Court of Appeal *Interest rei publicae* that there should be *finis litium* at some time, and there could be no *finis litium* if it were possible to suggest in each case that it might be re argued because it is not 'an ordinary case, what ever that may mean "

This and such other observations that are to be discovered in the judicial pronouncements of the English Courts have reference to that essential conservatism of the English mind which would rather, unless there are good and sufficient reasons to the contrary, [illegible] Rationale of the Binding Value of a Judicial Precedent

But even in England 'the doctrine of Judicial Precedent', in the words of G W Keeton (*Elementary Principles of Jurisprudence*, p 108) G W Keeton's views cited

"is by no means a mechanical process and, moreover, the process of reasoning by analogy extends to it only with important limitations, which preserve the flexibility of the system, and which permit the judges continuously to adapt the Common Law to changing social needs Indeed, it has been suggested that the fabric of the Common Law changes completely in the course of a century and a half, as completely and as imperceptibly as an individual changes his skin This process of change can perhaps be best studied to day in the Law of Torts, which presents a fascinating spectacle of judicial re interpretation of individual responsibility for fault in the light of changed social conditions Because this process of judicial re interpretation is not as yet complete, the Law of Torts shares with the Law of Property the doubtful honour of being one of the most difficult branches of English law to understand It is all too frequently the despair of the law student, though its labyrinthine by ways invite the legal scholar to wander at will in contemplation and criticism Until the late nineteenth century this branch of the law was still dominated by influences derived from its history from the Middle Ages onwards Nevertheless for five centuries, the development of the law of civil liability was conditioned by the necessity for bringing all claims for redress within the orbit of one or other form of action, and even when they were abolished, they still continued to influence legal thought and legal development Indeed, it is only at the present time that we are finally emancipating ourselves from the tyranny of the forms of action, and that we are cautiously feeling our way towards some general theory of civil liability for wrongful harm It will be apparent that this process has also been hastened by changing conceptions of social responsibility "

1 *All E.R.*, p. 268, where Lord Goddard refused to follow the principle laid down in *Racecourse Betting Control Board v. Secretary of State for Air*, (1944) 1 *All E. R.* 60 in regard to the competence of *King's Bench Division* to correct errors apparent on the face of the record because a case of the *House of Lords* laying down a different rule upon the same question in *Walsall Overseers v. London, and N. W. Rly. Co.* (1878) 4 *A.C.* 30 had not been considered by the Court of Appeal].

185. Doctrine of Stare Decisis and Constitutional Adjudications

In the matter of constitutional adjudications the rule of *stare decisis* has, if at all, limited application. Our Constitution gives power to the Supreme Court to review its decisions 'subject to the provisions of any Act of Parliament and of any rules made by the Supreme Court'. (See ART. 161). And it must follow from this constitutional provision that should reason and propriety demand it, the Supreme Court will not only be entitled but, it is submitted with respect, would be bound to reconsider a previously pronounced decision. But the rule of *stare decisis* has reference to the impropriety of declining to follow a prior decision in the determination of a case before the same court: departure from the rule of *stare decisis* in this sense means the competence of the Court to over-rule its previous decisions in the light of what judicial experience might teach it to do in the wake of new circumstances that may have supervened after the decision under review was rendered by it.

The position of the Supreme Court of our country in this wise may thus be alikened to the practice of the Judicial Committee of the Privy Council which, as is well-known, is not bound by its own decisions. Thus the decision that the Colonial Legislature had, at common law, power to punish contempts given in *Beaumont v. Barett*, (1836) 1 *Moore P. C.* 59 was over-ruled by the *Privy Council* in *Kielly v. Carson*, (1842) 4 *Moore P.C.* 63. The House of Lords, of course, as has been remarked earlier, is absolutely bound by its previous decisions and has no power to review the same. (See *London Street Tramways Company versus L.C.C.* (1898) *A.C.* 375). If the result of what the House of Lords decides is felt to be undesirable the remedy lies with the Parliament to promote legislation to undo or alter it. (For a full discussion on this topic see *Stuart v. Bank of Montreal*, (1909) 41 *Can. S.C.R. p.* 516; *Professor A.L. Goodhart's "Case Law in England and America"*, 15 *Cornell L. Quart.* 173, 188, 193; *E. K. Williams, Stare Decisis* 4 *Canadian Bar Review*, 289).

Privy Council Practice—

Strangely enough, the practice of the Privy Council not to be bound by its previous decisions appears to have been overridden by one qualification in the sense that in matters affecting constitutional decisions the Board is most reluctant to depart from its previous decisions. In fact there is no instance in which the Privy Council have over-ruled a previous decision in a constitutional case, although there have been cases in which it has dissociated itself from particular views expressed in earlier cases. In the case of *Attorney-General of Ontario v. Canada Temperance Federation*, (1946) *A.C. p.* 193, Viscount Simond delivering the decision of the Board observed:

A. G. Ontario vs. Canada Temperance Federation.

> "In constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon by the Governments and subjects."

In this case the argument before the Privy Council was that *Russell v. Reg.*, (1882) 7 *Appeal Cases* 829, be reconsidered: the *Judicial Committee*, however, declined to do so on the ground that that case established a principle which was deeply embedded in the constitutional law of Canada. But despite this refusal to review the case the Privy Council remarked as if to emphasize the reservation :

184. Rule of "Stare Decisis"

In an article contributed to the *Modern Law Review* (*Vol* 19, *No* 2, *March* 1956, *p* 136) by Peter Mason, we have a discussion of the rule relating to *stare decisis* as it is followed by the English Court of Appeal and as it has been applied in the course of eleven years after the decision of the Court of Appeal in the Young's case referred to above

> "It seems clear beyond doubt", says this learned author, "that Master of the Rolls envisaged, and has been taken by later courts to have envisaged, that there was a duty on later courts to examine and analyse the reasoning by which the earlier court arrived at its decision The gap in the decision in *Young's* case, which it has taken the efforts of the courts during the succeeding years to fill, was that the court in Young s case did not make it clear that a decision migl
> of some binding authority
> danger that in the absence
> *M R* (—"would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts' —) it would be difficult to preclude the advocate from using *per incuriam* principle 'as a perpetual platform on which to take the last ditch stand ' "

There is, however a presumption that an earlier court did not act *per incuriam* and the burden of showing that it did so act, falls on the party making the submission [See *Gibson v South American Stores case* (1949) 2 *All E R page* 985] Nor again is it a valid argument for not following an earlier decision merely because it should appear that there was a lack of argument *per se* in the earlier decision [See *Grower v Grower* (1950), 1 *All E R page* 104] The lack of reasoning *per se* is also no argument for declining to follow a previous precedent unless the reasoning of the Court was faulty to the extent and degree mentioned below

(a) it was so faulty because of ignorance or forgetfulness of a statute or statutory rule, or

(b) it was so faulty because of ignorance or forgetfulness of a binding authority apart from statute, and

(c) it is certain or at the very least highly probable that such faulty reasoning affected the court's conclusion

(See *A & J Mucklow Ltd v Inland Revenue Commissioners* (1954), 2 *All E R p* 508, particularly the remarks of Evershed, M R , see also *Morelle Ltd v Waterworth* (1954) 2 *All E R p* 673)

Limits of the Rules of Stare Decisis in Criminal Matters

In a recent decision *R v Taylor*, (1950) 2 *All E R p* 170 1950, 2 *K B* 368, the court of criminal appeal overruled an earlier decision of its own rendered in *R vs Treanor* (or McAvoy) (1939) 1 *All E R* 330 on the question of bigamy and laid down rules relating to the principle of *stare decisis* in criminal matters Lord Goddart, C J observed

> "But this court has to deal with the liberty of the subject and if on reconsideration, in the opinion of a Full Court that or
> misunderstood and a man has been sentenced the
> Court to consider whether he has been prop ved
> in civil cases ought not to be applied in such a case "

This decision has been regarded as constituting the most open attack on *stare decisis* yet made by a modern English Court (See *Friedman's Legal Theory, page* 332) [See also the case of *Rex v Northemberland Compensation Appeal Tribunal, ex parte Show* (1951)

Views of Cornelius

Very different, however, was the attitude of Mr. Justice Cornelius, who in a vigorously worded dissenting judgment, after holding that there was a "complete unanimity in regard to the point this Court was called upon to decide", dealt with the argument *ab inconvenienti* in words that deserve being quoted in full (p. 364):

"It is permissible, perhaps, at this stage, to refer to the argument *ab inconvenienti*, which arises naturally enough whenever a long course of legislative, administrative and judicial action has been based upon a certain view of law which is sought to be upset. Certain events have followed the pronouncement of the orders in this case, which necessitate the exercise of great caution in making these comments, lest they may influence and perhaps confuse the decision of matters already pending before other Courts. I will content myself with citing a few extracts from *Cooley's Constitutional Limitations*, and from *Crawford's Statutory Construction* (*Thomas Law Book Co., St. Louis*, 1940).

"At page 144 of Cooley's book, I find the following observations :—

'Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had the opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention.'

"Three passages from Crawford's book are relevant. At page 381, he says :—

'Where the meaning of a statute is in doubt, the Court may resort to contemporaneous construction—that is, the construction placed upon the statute by its contemporaries, at the time of its enactment and soon thereafter—for assistance in removing any doubts. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment, and acquiesced in by the Courts and the legislature for a long period of time.'

"And, speaking of 'departmental construction', which means 'construction by the Executive Department', the learned author says at pages 395 and 399—

'And where vested rights have grown up under the departmental construction, the Courts are justified in being more reluctant than in ordinary cases in adopting a construction which will destroy or disturb such rights.'

'. . . Where the executive construction has been for a long time, an element of estoppel seems to be involved. Naturally, many rights will grow up in reliance upon the interpretation placed upon a statute by those whose duty it is to execute it.'

"The kind of case to which these observations, in their terms apply, is however of importance far below that of the present case. The present is not a case where a mere 'departmental construction', or even a judicial or legislative construction is put forward, as a caution against lightly disturbing that which has been accepted and acted upon as settled law for a period, leading to development of vested rights. The rule of *stare decisis* is altogether too small in its content to fit the case. Here, the greatest organs and agencies of the State have been consciously and unanimously holding a certain belief, and have been acting upon it in numerous respects affecting the most fundamental rights of the entire people. It is difficult to imagine a law which affects so large a proportion of the public as does a law designed to grant adult suffrage, and to determine the composition of Provincial Legislatures on that basis. The Delimitation of Constituencies (Adult Franchise) Act, 1951, was procured by the Federal Government, was passed by the Constituent Assembly, was put into operation by the combined labours of the Federal and Provincial Governments, and has borne fruit in the shape of new Legislative Assemblies, which have been busy ever since passing new laws and in other ways, regulating the lives of the people. It is beyond conception to tabulate all the vested rights and

"Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments"

186. Argument ab inconvenienti—Federation of Pakistan vs. Tamizuddin Khan.

In the case of *Federation of Pakistan v Tamizuddin Khan*, reported in *P L D* 1955 *F C p* 240, (equivalent to *VII Dacca Law Reports, F C p* 291,) the question was whether the Governor-General under the Indian Independence Act, 1947, had to give his assent to the [illegible]

the decision of the case which was in April 1955, would *en bloc* have to be declared, for want of such an assent, as of no legal effect, and the submission at the bar was based on the plea that doctrine of *stare decisis* applied It was contended that the question raised prejudicially affected the interpretation of the provisions of the Indian Independence Act which had been consistently followed in Pakistan, and that it would not be in order for the Court to give effect to the view that assent of Governor General was necessary in order to make the constitutional laws, passed by the Constituent Assembly, valid—for to do that would virtually upset a consistent course of public conduct and thus disturb the entire constitutional legislation of the country Chief Justice Muhammad Munir was not impressed by this argument and he observed (at p 299)

"I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under sub section (3) S 6, needed the assent of the Governor General If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country Unless any rule of estoppel requires us to pronounce merely purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constitution or to the country to set right the position in any way it may be open to them The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule of estoppel stands in the way of a clear pronouncement"

These observations become all the more significant of the emphasis with which the argument *ab inconvenienti* was repelled if regard be had to the fact that the former Sind Chief Court that had the constitutional status of a High Court under the Govt of India Act, 1935, in the case of *M A Khuhro v The Federation of Pakistan*, reported *in P L D* (1950) *Sind p* 49, had held that upon the proper construction of the provisions of the *Indian Independence Act*, 1947, the assent of the *Governor General* was not required and further that the Federation of Pakistan, who were a party to the contest, had acquiesced in that interpretation and had not preferred any appeal against its determination to the Federal Court [See also the Indian case of *State of Seraikella v The Union of India AIR* (1951) *S C* 253, *at* 257, where the question of assent of Governor-General to constitutional laws has been considered and it has been held that it is not within the province of courts to question the laws passed by sovereign law making bodies, like the Constituent Assembly set up by the British Parliament to frame the Constitution for India]

[illegible]

[illegible] construction has been generally accepted [illegible] and generally when this has occurred [illegible] the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that [illegible] that the construction rightly interprets the intention.

Contemporary construction [illegible] can never abrogate the text [illegible] can never [illegible]

[illegible]

The question whether [illegible] a doubt upon the question of interpretation of the provisions [illegible] is a question of fact [illegible] in the minds of those who have been interpreting the provisions in question and [illegible] in the mind of the Judge who is called upon to interpret the provisions. [illegible] The doubt has [illegible] in the mind of the Judge, but the basis for the determination of this question is [illegible] the consistent course of interpretation which has been adhered to by those who have been called upon to interpret a certain provision of the Constitution. This may appear to be confirmed by the following extracts from the judgments of some of the [illegible] Judges of America.

(b) In the famous case of United States v. State Bank (6 Pet. 29), Justice Story, delivering the opinion of the United States Supreme Court, observed in relation to the construction of a statute as follows (p. 39):—

> It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would of itself furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms

interests which have developed in consequence of this law. And there are many other laws which have produced extensive effects, which cannot possibly be ascertained with exactness. These circumstances should, in my opinion, furnish an argument of almost insuperable character, in favour of upholding what has been the practice hitherto in regard to assent to constitutional laws."

It is submitted with respect, that the views of Cornelius J., have a great deal of merit in them and deserve a more serious study and attention than would normally be accorded to the opinion of a Judge who found himself in the minority of one as against four others who took a different view of the problem posed in the case referred to above. The view taken by the learned Judge is in accord with the settled principles of rules relating to *contemporanea exposito* as applied to constitutional adjudications. In a recent case, *Attorney General of Commonwealth of Australia v. Reginam, & others* (1957) 2 *All E. R.* p. 45, one of the considerations pressed upon their Lordships was to give recognition to the undeniable fact that for over a quarter of century no litigant had attacked the validity of a law under which the Australian Commonwealth Conciliation and Arbitration Court had been set up and that the Act, it was submitted, should not, at least on that score, be lightly denounced as unconstitutional. Their Lordships observed (at p. 58) —

"It is clear from the majority judgment (of the High Court of Australia) that the learned Chief Justice and the Judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the constitution the validity of the impugned provisions could not be sustained. Whether the result would have been different if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption it is not for their Lordships to say. On a question of the applicability of the doctrine of *stare decisis* to matters of far-reaching constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises."

It is apparent that their Lordships would have taken a different view of the matter if the conditions to which they made a reference had been in existence. It is clear that the doctrine of *stare decisis* was deemed relevant by their Lordships of the Privy Council in cases involving a constitutional question.

As to the effect of a decision which has been followed for a long time and has been acted upon in the general conduct of public affairs, there are authorities that tend to show that those decisions will be followed even by courts of higher authority. (See paragraph 557 in Halsbury's Laws of England Vol. 19, Second Ed.)

Views of the American Jurists

We might next cite a few extracts from the opinions of some of the American Jurists in regard to the limits within which this rule of interpretation is allowed to control their determinations.

(a) In its application to constitutional statutes, the rule is stated thus by *Cooley*:

"Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences [illegible] the provision in question

favour of adhering to this construction sometimes present themselves to the Courts with a plausibility and force which it is not easy to resist. Indeed, where a particular

"The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law."

The remarks of Brandeis J. (at 406) approved by these two learned Judges are to the following effect :—

"*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' (*Hertz v. Woodman*, 54 *Lawyers* Edition 1001). *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. (Compare *National Bank v. Whitney*, 26 *Lawyers Edition* 443). This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the *Federal Constitution*, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function . . . In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

"The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. In the cases which now come before us there is seldom any dispute as to the interpretation of any provision. The controversy is usually over the application to existing conditions of some well-recognized constitutional limitations. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute; and of cases under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of the jury. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstance that the decision of that fact is made by a court, instead of by a jury, should not be allowed to obscure its real character."

188. Our Supreme Court and the Rule relating to stare decisis

It is submitted with respect that the foregoing extract represents a correct approach to the application of the rule relating to *stare decisis* in matters affecting constitutional determinations by our Supreme Court, more particularly in the sphere of the enforcement of those fundamental rights which have been guaranteed subject to reasonable restrictions imposed by law.

The law declared by the Supreme Court of Pakistan is, it is submitted with respect, only in a limited or qualified sense binding upon itself. But the law declared by it is absolutely and unconditionally binding on all other courts in Pakistan including the High Court. This has been constitutionally provided for. [See ART. 163(1)] which is in following

and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition "

(c) In the case of *Lithographic Company v Sarony*, (1884) 111 *U S* 53, the court declared. Lithographic Company v Sarony

"The construction placed upon the Constitution by the first Act of 1790, and the Act of 1802, by the men who were contemporary with its formation, many of whom were members of the Convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive "

(d) Similarly in yet another case of *United States v Midwest Oil Co*, (1915) 236 *U S* 459 the court said at p 472 — United States v Midwest Oil Co

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity But government is a practical affair, intended for practical men Both officers, law makers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorised acts would not have been allowed to be so often repeated as to crystallize into a regular practice That presumption is not reasoning in a circle, but the [illegible] the [illegible] the

187. Limits of the Rule of Stare Decisis

Stare decisis is a doctrine of considerable pragmatic utility because it is in the interest of orderly working of the system of administration of justice that the rule of law may be allowed to rest settled rather than it be continually settled right by appeal to abstract notions of justice See also *Ghulam Mohiuddin v Crown*, *PLD* (1953) *F C* 1 where the *Federal Court* observed at p 10

"The rule of *stare decisis* is fully applicable to the present case During the last 28 years the *Sind Judicial Commissioner's Court*, and later on the Chief Court, have [illegible]

we would be disturbing a practice which has been followed in numerous cases "

The American courts, however, take a different view of the applicability of the rule relating to *stare decisis* in the matters affecting constitutional interpretation Willoughby in his *Constitution of United States at p* 74, is of the view that the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to other laws Says he, Stare decisis the view of American Courts

"In cases of purely private import, the chief *desideratum* is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis* When, however, public interests are involved and specially when the question is one of constitutional construction, the matter is otherwise An error in the construction of a statute may easily be corrected by a legislative act, but a constitution and particularly the Federal Constitution, may be changed only with great [illegible] be corrected

U S 38 (1936) 80 *L Ed* 1033, Mr Justice Stone and Mr Justice Cardozo approved the rule followed by Brandeis J, in his dissenting opinion in *Burnet v Coronado Oil & Gas Company*, (1932) 285 *U S* 393· (1932) 76 *L Ed* 815, observed at p 94

weight and authority if not absolutely binding. (See *Hakam Khuda Yar's case in* (1940) *Lahore*, 129). It is submitted that even the *obiter dicta* in the judgments of the Supreme Court are to be accorded that much weight and authority as was done by the various High Courts in pre-partition India with respect to the *obiter dicta* of the Privy Council. (See (1940) *Allahabad*, 544 the *Full Bench case of Shri Nath Shah*).

It is however essential to remember, in the words of Lord Halsbury, in the case of *Quinn v. Leathem* (1901), *A.C. page* 495, that :—

> "Every judgment must be read as applicable to the particular facts proved . . . since the generality of expressions which may be found there are not entitled to be the expositions of the whole law but govern and qualify particular case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

It is the duty of every court before which any judicial precedent is cited to grapple with the problem of determining:

(a) What were the facts ascertained in the case, and

(b) the legal reason by appeal to which the adjudication was reached by the Court.

If a decision of the superior court is based upon more than one ground and a case is presented to the inferior court in which only one of the grounds is available but not the other, it is not open to the latter court to treat either of the reasons given as *obiter* upon the view that none of the two or more grounds taken by it is shown to be legally sufficient for the determination of the case. (See *Laxmibai v. State of M. P.* (*F.B.*) *A.I.R.* (1951) *Nagpur page* 94).

A Judge of a High Court sitting singly is not bound by the judgment upon questions of law rendered by another judge sitting alone. (See 1945 *Bombay page* 173). One High Court Judge may thus refuse to follow another High Court Judge and the result of this will be that there would be a conflict of authority—which can be settled by the matter being referred to a larger Bench of the same Court or by the Court of Appeal. A High Court Judge in declining to follow his brother Judge is said to "disapprove" his decision and "not follow" him. But this is not the same thing as "over-ruling." One Judge of High Court cannot over-rule his colleague on the Bench. But even the phenomenon of "not following" is very rare indeed! (See (1948) 64 L.Q.R. 40). But such a single judge is bound by a decision of a Bench of two or more judges and in the event of his disagreement with such a decision he must refer the case to a Division Bench. (See *Khodadat Bibi v. Kamala Ranjan A.I.R.* (1940) *Calcutta, page* 584). A Division Bench of a High Court is bound by decision of a Full Bench until it be over-ruled by the Supreme Court of Pakistan.

cisions of Foreign Courts s Pursuave Precedents.

The Indian decisions as also the decisions of the Dominions of the Commonwealth and England as even those of the American courts are not judicial precedents in the sense that they are binding as authority upon our courts. But they can, in appropriate cases, have what the lawyers call *pursuasive* value and could usefully be referred to in the enunciation of a principle of law, which the court, while dealing with a situation for which there is no binding precedent available to it, might find it worthwhile to apply. The authority of the judges to make law by means of the reasons given by them for the decision of controversies that come up to them is nowhere laid down in any law. The rule, however, has prevailed if only because it has been tacitly acquiesced in by the Legislature. The ultimate reason which explains the prevalence of the doctrine of the binding value of the judicial precedents, as the Lord Chancellor of England recently put it, is the belief that "our ancestors were not necessarily more stupid than ourselves."

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tenance or annulment of administrative decrees made and promulgated by the executive Branch of our Government but also the *ratio decidendi* or the legal reason on the basis of which a decision is reached by the Supreme Court As to the question whether the Supreme Court is bound by its own decisions, considerable assistance could be derived by the student if the case of *Anwar v the Crown* reported in PLD (1955) F C 185, be carefully read by him Cornelius J in a vigorous dissenting judgment has taken the view that the late Federal Court was bound by the previous decisions rendered by it His view was based on the construction

result was reached by the learned Judge by regarding *Federal Court* to be, or what was included in the term 'court' appearing in the latter part of *S 212 of the Government of India Act* The majority view in the case under reference was that *Federal Court* was entitled to change its view of the law, but there is no reference much less an answer to the argument upon which Cornelius J reached the conclusion that it could not the majority view, be it noted, was based on the practice of the *Privy Council* which, as has been indicated earlier, unlike the House of Lords does not consider itself bound to follow its previous enunciation of law Reliance was placed by Chief Justice M Munir, who spoke on behalf of the majority on the two well known cases of the *Privy Council* on this subject—*Attorney General of Ontario & others v Canada Temperance Federation & others AIR* (1946) *P C* 88, and *In re Payment of Compention to Civil Servants etc (1929) A C 242 (See p 209 of (1955) PLD Federal Court Anwar versus the Crown)* It is submitted with respect, that ART 163 does not fetter the hands of the Supreme Court to consider itself bound by a prior decision rendered by it The word 'Court' appearing in that Article does not include "Supreme" Court for the simple reason that would tantamo

himself cogently

to be bound by its

decided Anwar's case referred to above, assuming it to be sound in principle is any longer relevant now that our Supreme Court finds itself not so much as the inheritor of the Privy Council Jurisdiction as did its predecessor, the Federal Court of Pakistan as the Highest Court established by the sovereign people who have established, under a written constitution, the framework of a Republican polity for themselves The House of Lords can afford to be bound by its own decisions since it realizes that its determinations can be easily upset by a legislative decree passed by the Parliament by means of a simple majority vote Under our Constitution, amendment of the Constitution is not so simple as all that—and our Supreme Court must assume the responsibility of sitting in judgment over its own decision and in suitable cases of having the judicial valour of upsetting its own decisions The powers of our Supreme Court are much wider than those enjoyed by the House of Lords sitting as Final Court in England—and it is respectfully suggested that it has more in common with the Supreme Court of United States whose example in these matters it would do well to follow

Before the coming into force of our Constitution all courts in our country were bound by the decisions of the Federal Court and the Privy Council (See *S 212 of the* Binding Value of Precedents —previous Practice

accept the logic of a changing society as necessitating consequential changes in law on the other are reflected in the remarks of the two judges (Denning and Asquith) quoted below.

(a) In the case of *Candler v. Crane, Christmas & Co.* (1951) 1 *K.B.* 164: (1951) 1 All E.R. 426 Denning L.J. in his dissenting judgment disposed of the contention that no action had ever been allowed for negligent statements and he urged that this want of authority was a reason against it for being allowed now. "This argument about the novelty of the action", said the learned Judge, (p. 432) "does not appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law, and it has nearly always been rejected. If one reads *Ashby v. White*, (1703) 2 *Ld. Raymond* 938; *Pasley v. Freeman* (1789), 3 *Term. Rep.* 51, and *Donoghue v. Stevenson* (1932) *A.C.* 562, one finds that in each of them the Judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the Common Law that the progressive view prevailed."

(b) Different, however, was the attitude of Asquith L. J., who observed in the same case, "I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command."

Judicial loyalty no doubt demands devotion to 'precedent,' but this is not the same thing as saying that there should be a slavish submission to the authority of precedent to such an extent that it may throttle and completely paralyse the prospect of our law ever keeping pace with the changing conditions of society. "The object of Common Law is to solve difficulties", says McCardie J., "and adjust relations in social and commercial life. It must meet, so far as it can, sets of facts abnormal as well as usual. It must grow with the development of Nation. It must face and deal with changing or novel circumstances; unless it can do that it fails in its functions and declines in its dignity and value. An expanding society demands an expanding common law." [*Prager v. Blatspiel, Stamp & Heacock Ltd.* (1924), 1 *K.B.* 566].

Any relevant judgment of any superior court cited at the Bar is a strong argument in favour of the view which could be seen reflected in that judgment, and the Court of law before which such a judgment is cited is duty bound to see if it could extract "the timber of principle from the forest of its facts." It must scrutinise the total scheme of the argument upon which the conclusion reached in the case cited appears to be grounded. The legal reason for deciding the case can emerge only from a careful consideration of the facts found in the case and the circumstances in which its enunciation has taken place. Dove-tailed with the central core of the legal reasoning would be found what are called *obiter dicta*, i.e. judicial opinions, opinions the expression of which was not strictly necessary for the determination of the controversy before the Court. These *dictas* are of varying degrees of pursuasive force, and no hard and fast rule as to the controlling efficaciousness of the assertions contained in them can be laid down. In the case of *Slack v. Leeds Industrial Co-operative Society* (1923), 1 *Ch.* 431, Sterndale M. R. observed:

"Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to brirg it under much fuller consideration. Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open, no

189. Relative merits of the law declared by the Legislature and the Courts

In several ways the law declared by means of a judicial precedent is superior to even that enacted by the legislature The judicial precedent shows the actual administration of justice at work, whereas legislative enactments can only deal with the enunciation of general provisions leaving to the courts the application of those provisions to the facts and circumstances of each particular case In the words of Sir John Salmond

> "Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognised by the court of law as adequate for that purpose A precedent, on the other hand, is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice Enacted law comes into courts *ab extra*, case law is developed within the courts themselves' (See his 'Jurisprudence" p 153)

There are some writers again who do not accord to the authority of the judicial precedent the value which has been often claimed for it They contend that the precedent is a hindrance in the way of the logical development of the science of jurisprudence "Indeed", says Professor Paton, "the doctrine of precedent may mean that unfortunate cases remain to mar logical symmetry' (See his Jurisprudence' p 163) One fundamental difference between the effect of changes in law secured through legislation and judicial precedent is that whereas a statute may change the law for the future but leave the vested rights untouched, a court can change the law only in the very act of applying it to a case It is for this reason that in America some courts while following the precedent in the case before them announce that they will not follow it in future

cases make law, not the letter of particular precedents", says Lord Mansfield in the case of *Fisher v Prince*, (1762), 3 *Burr*, 1363 A little later the same Judge in *Jones v Randall* (1774)1,—*Cowp* p 37, said

> "Precedents serve to illustrate principles and to give them a fixed certainty But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them '

It is wise never to forget that there is no particular virtue in overwhelming a court that is concerned with the practical business of administering justice with a long list of citations, the craze for quoting cases indiscriminately can soon become a snare and not infrequently has been responsible for obstructing the orderly growth of law itself Every precedent is valuable provided it can be shown to be an illustration of some principle The case is of value as a precedent only for what it means according to C K Allen,

> "In and of itself, it means nothing, before it can have any relevance to the matter in hand, it must be interpreted, the principle which it embodies, or which it is said to embody, must be brought into logical correlation with the principle on which the decision of the instant case is to depend " (See his "*Law in the Making*," *5th Edition*, *page* 211)

On the one hand, we have to secure consistency of the present determination with the
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the other hand, we have to accommodate the growth of law itself within the framework of a fast changing society

These conflicting attitudes, namely that of the essential conservatism which distrusts all novelty and change on the one hand and the progressive outlook that is prepared to

doubt, to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class "

The comment of C K Allen on the value of the foregoing statement is instructive and represents in the opinion of the present writer the best that has been said upon the pragmatic utility of drawing academic distinctions between these diverse aspects of the meaning of *obiter dicta*

"These distinctions sound admirably clear-cut in the abstract, but how apply a qualitative standard in the concrete? How distinguish between 'deliberate expressions of opinion given after consideration' and mere 'statements by the way'? By what test is an expression of judicial opinion a mere 'aside' or 'one of the links in the chain of reasoning'? A judgment, especially in higher courts where there is more time and opportunity for consideration—and sometimes for prolixity—is not always a chain, it is more like a fabric woven out of all kinds of different materials, and it is frequently difficult to determine exactly what ingredients were essential to its warp and woof Whoever is called on to make the analysis must exercise his individual faculty of discrimination and no stereotyped rules can dispense him from that delicate task "

190. How to Determine the Ratio Decidendi of a Case

We would, to begin with, notice some of the important definitions that have been *Ratio Decidend — Some definition stated*
[illegible] *Dicta* with a
of a judicial [illegible]

(1) "The underlying principles of a judicial decision", says Stephen in his *Commentaries on the Laws of England*, Vol I, p 11, "which forms its authoritative element for the future, is termed *Ratio Decidendi* It is contrasted with an *Obiter Dictum*, or that part of a judgment which consists of the expression of the Judge's opinion on a point of law which is not directly raised by the issue between the litigants *Obiter Dicta* are often valuable, though not binding, statements of the law " (a) Stephen

(2) Sir John Salmond in his *Jurisprudence* says (at p 191) (b) Salmond

"A precedent, therefore, is a judicial decision which contains in itself a principle The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi* The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large "

(3) So also Professor Chipman Gray says in his book '*Nature and the Sources of Law*,' about a judicial precedent (p 261) (c) Professor Gray

"It must be observed that at common law not every opinion expressed by a judge forms a judicial precedent In order that an opinion may have the weight of a precedent, two things must concur it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case, in other words, it must not be *obiter dictum* "

(4) Similarly, Professor C K Allen, in his '*Law in the Making*' says (at 241) (d) C K Allen

"Any judgment of any court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true *ratio decidendi* was "

whole doctrine of precedent is based on the theory that as a general rule judges do not make mistakes either of fact or of law In an exceptional case a judge may in error base his conclusion on a non existent fact, but it is better to suffer this mistake, which may prove of benefit to the law as a whole, however painful its results may have been to the individual litigant, than to throw doubt on every precedent on which our law is based

"The rules for finding the principle of a case can, therefore, be summarised as follows —

(1) The principle of a case is not found in the reasons given in the opinion

(2) The principle is not found in the rule of law set forth in the opinion

(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case, and the judge's decision

(4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them

(5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion *as it does on inclusion*

"The rules for finding what facts are material and what afacts are immaterial as seen by the Judge, are as follows —

(1) All facts of person, time, place, kind and amount are immaterial unless stated to be material

(2) If there is no opinion, or the opinion gives no facts, then all other facts in the record must be treated as material

(3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record

(4) [illegible]

(5) All facts which the judge specifically states are immaterial, must be considered immaterial

(6) All facts which the judge impliedly treats as immaterial must be considered immaterial

(7) All facts which the judge specifically states to be materials must be considered material

(8) If the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material

(9) If in a case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of all the facts held material by the various judges

(10) A conclusion based on a hypothetical fact is a dictum By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge "

The first step then is to determine the *material facts* on which the judge has based his opinion Having found the material facts, the *ratio decidendi* would be easy of discernment— it would be the conclusion reached by the Judges on the basis of the material facts and the exclusion of immaterial facts Professor Paton is, therefore, right when he points out that ' no court has the power to lay down a binding rule of law on facts which are *not* before it To discover whether the *ratio* is binding in a subsequent case we must see if the material Conclusion

was that these could not be initiated in the ordinary courts of law by means of a suit but only by means of what is called a *petition of right*, and the proceedings thus initiated were regulated by special forms of procedure.

The evolution of our procedural law on this subject takes its start from the doctrine of common law which says that "the King can do no wrong", and that, as a matter of procedure, no action can lie in the King's Courts against the Crown. The statement of this common law doctrine as appearing in *Ridges' Constitutional Law, 8th Edition, at page 295* is in the following terms:

"The Crown, therefore, at common law enjoyed a very wide immunity. No action could be brought against it. Nor was it liable in tort and though liability might exist on a Crown contract, it could only be enforced indirectly by a petition of right. The Crown also was immune from liability in respect of any property it owned; nor could proceedings be taken if the Crown committed a breach of a statutory duty. This immunity extended not only to the King personally but to the Crown in its widest sense; i.e. to any part of the central government departments. It did not apply to local government authorities or to independent statutory bodies like the Assistance Board, the London Passenger Transport Board or the Wheat Commission. It did not extend to Crown servants personally; they were always liable and it was no defence to plead that they were acting on the Crown's orders, but the Crown itself was not liable for its servants' torts in circumstances that would have made a private employer liable. Nor was a superior Crown servant liable for the acts of his inferiors; both in law were fellow servants of the Crown, though in fact the former controlled the latter just as if the private relationship of employer and employed existed."

Crown Proceedings Act.

Under the *Crown Proceedings Act*, which came in force on January 1, 1948, this common law position has undergone revolutionary changes and now, not only the procedural rule, which demanded the commencement of proceedings by means of a petition of right, has been abrogated but under section 2 it has been provided that:

"the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents or for any breach of those duties which a master owes to his servants or agents at common law or in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property."

Historical account of the growth of prevailing constitutional position.

On the transfer of the sovereign power from the *East India Company* to the *Crown*, in S. 65 of *the Government of India Act*, 1858, the liability of the *Secretary of State in Council* was stated in the following terms:

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India *as they could have done against the said Company*; and the property and effects thereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

In order to find out whether a suit of a particular kind would lie against the Government under the authority of S. 65, resort must be had to answering another question first: namely, whether the given suit is of such a character as would have been successfully instituted against the *East India Company* prior to the *Government of India Act of* 1858. This principle of S. 65 of *the Act of* 1858 was reiterated in subsequent Acts by the *British Parlia-*

SECTION — II

Constitutional Limits on Judicial Power in Specified Matters

(A)—JUDICIAL POWER AND *ACTIONS AGAINST THE GOVERNMENT*

191. A comment on ART. 136

Part VIII of our Constitution, in ART 136, provides.

"The Federal Government may sue and be sued by the name of Pakistan, and the Government of a Province may sue and be sued by the name of the Province "

This Article sets forth not only the form in which suits concerning actions against Government are to be brought, but it also affirms the principle that the subject is entitled to have redress in the ordinary courts of law against Government This Article corresponds to S 176 of the *Government of India Act* 1935, and with some minor differences to ART 300 of the Indian Constitution

The words "sue and be sued", appearing in ART. 136, are not used in any technical or narrow sense of a civil proceedings which is instituted by the presentation of a plaint, but include all proceedings which may be deemed appropriate, either under the Constitution or law, for enforcing rights which an individual may have against Government, and the term "sue" in the context of this Article means the enforcement of any claim or civil right by means of legal proceedings That anyhow was the view that was taken by the Supreme Court of India in the case of *Province of Bombay v Khushal Das* (1950), *Supreme Court page* 222, of the meaning of that term used in ART 300

"When a right is in jeopardy", said Mahajan J in *Khushal Das's case* (1950), *S C p* 222, "then any proceedings that can be adopted to put it out of jeopardy would fall within the expression 'sue' Any remedy that can be taken to vindicate the right is included within the expression " (p 236)

Ordinarily, the sovereign power of the state, in the strict theory of constitutional law could not be visualised as being amenable to the jurisdiction and authority of the courts set up by it to administer justice But the same sovereign power, by means of a constitutional declaration, can surrender itself at the altar of the Courts for the purpose of conferring rights on the subjects to enforce any of their claims and rights whenever they are thrown in jeopardy by the Government—which term, in this context is to be regarded as meaning a political organization through which the sovereign will of the State finds its expression

The courts of law derive their jurisdiction and authority from the State itself, and in the total absence of a declaration by the soverign power enabling them so to do, they

control in matters arising out of any litigation validly commenced by any aggrieved person And true to the federal principle, the Article mentions not only the competence of the individuals to sue the Federal Government, that is Pakistan, but also the Government of a Province Each of these two Governments has independent powers under the constitution within the system of federal polity established by our Constitution and each one of them has an independent juristic existence

Position in England

In England before the passing of the *Crown Proceeding Act of the year* 1947 (10 and 11 George VI, C. 44) the constitutional position, in relation to proceedings against the Crown,

Province of Bombay v. Khushaldas, (1950) *Supreme Court, p.* 222 by way of a comment on the observations of Sir Barnes Peacock in the Peninsular case referred to above:

> "In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the Court to decide." (p. 249)

Difference between Indian Art. 300 and our Art. 136.

If the foregoing appreciation of the decision is correct, it must follow that our ART. 136 is also merely *procedural* in content and the *nature of the right to sue* must be deduced from the state of pre-existing law on the subject. There is, however, one important difference between the *Indian ART.* 300 and our ART. 136 and this should not be lost sight of: our Article, by way of contrast with the *Indian ART.* 300, is worded in such a way as to practically *annul* the old limitations on the right of the subjects to sue the Government. It is interesting to contrast the language of ART. 300 of the *Indian Constitution* with our own :

"ART. 300 (1) *The Government of India* may sue or be sued by the name of the *Union of India and the Government of a State* may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs *in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.*"

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Thus it would appear that the pre-existing state of the law in regard to actions against Government has been preserved in a constitutional form in ART. 300 itself, whereas these words of limitations are not reflected in our ART. 136. But, nevertheless, under our constitution, the pre-Constitution limitations imposed by the state of pre-existing law on the character and qualifications of the right to sue the Government have been perpetuated in our Constitution by ART. 224, and the history of the evolution of the law appearing on the subject of the right to sue is therefore equally relevant, except in so far as that pre-existing law was conditioned by the limitations imposed upon the right to sue government by the language of various Government Acts (like *S.65 of* 1858, *S.32 of* 1919 and S. 76 of 1935). Anyhow that pre-existing state of law is now, having regard to the unfettered language of ART. 136, to be re-interpreted by our courts. In India the pre-existing limitations on the nature of right to sue in this respect are removable only by Acts of appropriate legislature.

It would be conducive to the clarity of exposition of this aspect of the constitutional problem if we were to take up the liability of the Government to be sued *ex contractu* separately, from its liability to be sued in respect of torts committed by its servants.

Liability of Government *Ex Contractu*

In view of the fact that ART. 134 confers on the Federal and the Provincial Government the right to acquire and dispose of property and to make contracts (as even ART. 135, which prescribes the forms in which those contracts by the two Governments have to be entered into) it must follow that the liability of the Government to be sued in respect

Secretary of State vs Kamachee Boye Sahaba's case

ment (See S 32 of the *Act of* 1919, and S 176 of the *Government of India Act*, 1935) An authoritative statement of the constitutional position concerning the nature of causes in respect of which suits would have been validly instituted against the *East India Company* prior to the *Government of India Act* 1858 is to be found in the case of *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859), 7 *Moo Ind App* 476, where Lord Kingsdown observed (at p 530)

"The careful and able re[illegible]
upon the subject which they [illegible]
that the law, as it stood in the [illegible]
the judgment of Chief Justice [illegible]
(5 *Bingh*, *N C* 273 (1839), 132 *E R* 1105) 'in which after referring to various legislative enactments, he observed that from these it is manifest that the East India Company have been invested with powers and privileges of a two fold nature perfectly distinct from each other, namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire and retain and govern territory to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India ' "

Observations of Sir Barnes Peacock in the Peninsular case

It is this dual character of the powers of the East India Company that have introduced an element of uncertainty in the interpretation of the law and such of the judicial precedents as have been considered applicable by the courts from time to time One of the oft quoted cases on the subject is that wherein Sir Barnes Peacock Chief Justice set forth the law on the subject See the *Peninsular and Oriental Steam Navigation Co v Secretary of State for India* (1861), 5 *Bombay High Court Reports (App A) page* 1 The conclusion reached was (p 15 16)

"We are of opinion that the East India Company were not sovereign and therefore could not claim all the exemptions of a sovereign, and that they were not the public servants of Government, and, therefore, did not fall under the purview of the cases with regard to the liabilities of such persons, but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit and were engaged in transactions partly for the purpose of Government and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertaking which might be carried on by private individuals without having such powers delegated to them

"But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie "

In each case, therefore, the question was whether what was done by Government was such that if it had been done by the *East India Company* before 1858 an action would have lain against it In the case of *Venkata Rao v Secretary of State* (1937) *Privy Council p* 31, their Lordships observed that S 32 of the *Government of India Act* 1915, was merely *procedural* and "it did not take any right simply because an identical right of action was not available against the *East India Company* " Following this dictum in all the later cases that have a bearing on the interpretation of S 176 of the Government of India Act, 1935, one finds that it has been consistently held that that section was merely procedural and did not confer upon the Government any absolute immunity from illegal acts It was observed in the case of

Bombay H.C. Reports (App.-A) p. 1. Their *Lordships*, however, observed with regard to the effect of S.65 as follows :—

"Their Lordships are of opinion that the effect of *S.65 of the Act of* 1858 was to debar the *Government of India* from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the *East India Company*. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The section is not, like the two which follow it, a merely transitory section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old *East India Company*. But the question before their Lordships is not one of procedure. It is whether the *Government of India* can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of S.65 of the Act of 1858 renders such legislation *ultra vires*."

Uday Chand vs. *Province of* Bengal.

In a later Indian case, the legal position was stated somewhat comprehensively by *Chakravarti J.*, in the case of *Uday Chand v. Province of Bengal, I.L.R.* (1947) 2 *Calcutta* page 141 ; and the student is referred to a careful study of that decision since it illustrates forcefully the distinction between the acts done in the discharge of sovereign and non-sovereign functions.

With regard to the nature of the non-sovereign functions it was stated that they:

"are mercantile operations or operations of like kind in which the *East India Company* actually engaged itself before and even after it had acquired sovereignty. The reason why an action lies against the Crown with reference to acts of this type is, on the one hand, a historical reason, because, actions could in fact be brought against the *East India Company* at the relevant time, and on the other hand, a statutory reason, because a specific provision, saying the right of action in such cases, has been made in all the successive *Government of India Acts.*"

And as to the acts performed in the exercise of sovereign powers, it was observed that they:

"are acts of State, properly so called, such as making a treaty, commandeering private property for war purposes, or quelling civil disturbances. Such acts are never justiciable in Courts of Law, and since the Crown itself is not answerable for such acts in Courts, there is no principle upon which it could be made liable for the acts of its officers or subordinates. The immunity is absolute'

"The other class of acts are those which are done under the sanction of some municipal law or statute and in exercise of powers thereby conferred."

Is the distinction between Sovereign and non-Sovereign functions any longer relevant.

The question for consideration is whether this distinction between "sovereign" and "non-sovereign" functions for the purpose of deciding upon the maintainability of certain forms of actions against Government can any longer be acknowledged as flowing from any of the provisions embodied in our Constitution. In view of the fact that the concept of social welfare state is visualised by our Constitution, and the Government is continually engaged in expanding the sphere of its activities in directions in which it increasingly encroaches upon the sphere of individual's rights, can it any longer be said that the

of breaches of contract committed by it is absolute and unqualified. No doubt, Sir Barnes Peacock had referred to the non suability of Government in respect of breaches of contracts entered into in the exercise of Government's sovereign powers, but this legal position has not been accepted in later decisions in India (See the remarks of Mukherjea J in Khushaldas Advani's case 1950 S C 222 and also *State of Bihar v Abdul Majid* A I R (1954) *S C (India)*, 245, See also *Venkata Rao v Secretary of State*, (1937) *P C* 31, and *High Commissioner for India v I M Lall*, (1948) *P C* 121)

Of course, there may be some statutory conditions or limitations that may be imposed in respect of a particular contract, in which case, however, those conditions and limitations have to be given their due effect, but, in so far as the Constitution is concerned, the contractual liability of the State appears to be placed on par with that of an ordinary individual under the ordinary law of contract (See Comment on ART 135)

In so far as the liability of the State for *actionable wrongs committed by its servants (that is wrongs independent of contract)* is concerned, the legal position does not appear to be so clear the difficulties do arise while effecting a proper division between the acts of Government that may be regarded as sovereign acts and other acts. Since there is no clear definition of what are sovereign acts, beyond, of course, a somewhat negative definition offered by Sir Barnes Peacock quoted earlier, it becomes difficult in each case to determine this issue. The law, however, is that in respect of its sovereign acts a Government is immune from being sued in a court of law. The reasons in support of this immunity are historical in character and they are to be traced back to the provisions of *S 65 of the Government of India Act*, 1858, whereunder, for an action to lie against Government, the test laid down was that the person aggrieved must satisfy the court that a suit in respect of that act could have been competently instituted against the *East India Company*. Some specific instances of what are sovereign acts can be gathered from the following decisions Delictual Liability

(1) *Kessoram v Secretary of State*, 54 *Calcutta, page* 969 AIR (1928) Cal 74,
(2) *Secretary of State v Cockraft*, 39 *Madras, page* 351 AIR (1915) Mad 993,
(3) *Mata Prasad v Secretary of State*, 5 *Lucknow, page* 157 AIR (1931) Oudh 29
(4) *Kader Zailany v Secretary of State*, (1931) 9 *Rangoon page* 375 AIR (1931) Rangoon 294, *etc* ,

Where, however, Government engages itself through its public servants into transactions which could be entered into by private individuals, any legal injury arising out of those transactions would give rise to an action in tort in favour of the party aggrieved and the Government can be successfully sued in respect of such wrongs committed by its servants. It was on this principle that the Government was held liable in the Peninsular case in the judgment of Sir Barnes Peacock referred to above. Similarly, trespass upon or damage done to private property in the course of a dispute as to a right to land between Government and the private owner is actionable. See *Secretary of State v Moment*, (1912) 40 *Indian Appeal, page* 48. This was a case decided by the Privy Council upon an appeal from the Chief Court of Lower Burma in which the Peninsular case decided by Sir Barnes Peacock was approved. In this case, it should be noted, *S 41(b) of Act II of* 1898 *of Burma* was the subject matter of their Lordship's interpretation. The Section enacted that no Civil Court was to have jurisdiction to determine a claim to any right over land as against the Government, and the proceedings out of which the appeal arose related to an ordinary dispute about the title to the land in the course of which there emerged a claim to damages for wrongful interference with the plaintiffs' property. Their Lordships addressed themselves to the question, whether a suit of this character would have lain against the Company, and the reasons for holding that such a suit would have lain were in their *Lordships* opinion "fully explained in the judgment of Sir Barnes Peacock C J in the *Peninsular case*", (1861) 5 Secretary of State vs Moment 40 I A 48

negligent or wrongful act or omission of an employee of the Government while acting in the scope of his employment, under circumstances where the United States, if a private person, would be liable to a claimant for such damage etc.")

In the United States suits ordinarily cannot be brought against the Federal Government except where consent has been given, and there the Federal Government enjoys the additional immunity against suits by any State unless a consent has been given for the institution of such proceedings by the Federal Government itself. The Federal Government itself is, however, competent to sue any State without the latter's consent. (See Cf. *Georgia v. Pennsylvania Railroad Co.*, (1945) 324 U.S. p. 439: 89 Law. Ed. 1051.)

But even in *United States* the opinion seems increasingly to be leaning in favour of permitting citizens to sue the Government without any let or hindrance.

Great Northern Life Insurance Company v. Read.

The American law has, to a considerable extent, been influenced in this regard by the English common law doctrine which enjoins that the King can do no wrong, and this principle appears to have been adhered to even after the United States became a sovereign democratic republic. In a recent case the unsatisfactory character of this sort of legal position has been commented upon by Frankfurter J. in a dissenting opinion (see the case of *Great Northern Life Insurance Co. v. Read*, (1944) 322 *U.S.* 47: 88 *Law. Ed.* 1121, *at* 1129) which deserves being quoted in full.

> "The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent. But consent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, (see *Kawananakoa v. Polyblank*, 205 *U.S.* 349: 51 *L.Ed.* 834: 27 *S.Ct.* 526,) it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that 'it is a wholesome sight to see 'the Crown' sued and answering for its torts. 3 *Maitland, Collected Papers*, 263".

It is submitted that the distinction between the sovereign and non-sovereign acts of the Government has lost much of its meaning and now that there is no constitutional impediment which can be invoked as standing in the way of its elimination, it must not be given any judicial recognition or effect whatever. The position in India and our country, as reflected in the two Articles, (300 *of the Indian Constitution*, and 136 *of our Constitution*) has already been adverted to above and it would appear that the liability of the Government to be sued under our *Constitution* is more extensive in its scope than under the *Indian Constitution* till at least such time as by means of appropriate legislation it is interfered with and altered.

192. A comment on ART. 135

Formal requirements in a valid contract with Government.

ART. 135 *of our Constitution* prescribes the formal requirements of contracts which are to be entered into by a person with the *Federation* or *Province* when made in the exercise of the executive authority reserved to them under the *Constitution*. *S.* 175 of the *Government of India Act*, 1935, was the *Constitutional* predecessor of the present Article and the decisions of the courts that have interpreted that section, as even S.30(2) of the *(Repealed) Government of India Act*, 1919 which in turn was based upon the *Government of India Act*, 1858. (22 & 23

age old distinction between the sovereign acts performed by the State and the acts of a mere trading or mercantile character countenanced by it should still be maintained There would be undoubtedly a class of actions which cannot be judicially entertained, as, for example

(a) anything done or omitted by a person exercising judicial function (see S 1 of Act XVIII of 1950—An Act for the protection of Judicial Officers) The basis of this immunity of Judges from action at the instance of private individuals is that the State interest in justice being done is best furthered if all the participants are able to speak freely without fear of consequences The rule, as Holdsworth has shown (See Immunity for Judicial Acts in J S P T L (1924) p 17) was first applied to the Judges of the Courts of record and would seem now to apply even to the Judges of inferior Courts if there is an error of law committed by them in the exercise of jurisdiction validly assumed by them—in other words the excess of jurisdiction is not within the rule of judicial immunity The question, whether the rule has any application to the Judges of administrative tribunal, cannot be answered satisfactorily for the simple reason that from the decided cases in England and America no clear cut principle can be deduced (See *Co partnership Farms v Harvey Smith* (1918) 2 *KB* 405, *Attwood v Chapman* (1914) 3 *K B* 275, *Collins v Henry Whiteway* (1927) 2 *K B* 378 *at* 383 for the credentials that the administrative tribunal must present before it can be within the rule) The test in each case would appear to be this Does the presiding officer of the judicial tribunal perform or purport to perform or discharge the duties or responsibilities of a judicial nature vested in them? (See S 2(5) of the Crown Proceedings Act as also the American Federal Statute of the year 1938 (52 Stat 338)

(b) acts of the State, (see the discussion of this principle at pp 621 623)

(c) injury sustained by a member of Armed Forces while on duty, (The theory of law which seems to account for this immunity seems to be that there is no contract of service between the Crown and the soldier But it is suggested that existence of contract is not necessary to establish the basis of liability which can also arise from the common law relationship of master and servant for admittedly the Crown has control over the services of the soldier (See *The Commonwealth v Quince* (1944) 68 *C L R* 227, *Shaw Savill & Albion Co Ltd v The Commonwealth* (1940) 66 *C L R* 344, *Rex v Anthony* (1946) 3 *D L R* 577

(d) anything properly done or omitted to be done in pursuance of statutory powers conferred on public servants (Immunity in this class of cases is often statutorily provided)

These exceptions are visualised even by the *Crown Proceedings Act of* 1947 to which reference has been made earlier Under the changing conditions of society the extent of the liability of the State must continue to change too

Even in America, where there is no provision corresponding to the one contained in our Article 136 legislation has been sponsored by the Congress to permit the individual to sue the State *Federal Tort Claims Act of* 1946 among other things provides that 'The United States shall be liable respecting the provisions of its title relating to tort claims, in the same manner and to the same extent as a private individual under the like circumstances The nature of the liability and its extent is also determined by the said Act (In the 1st 3rd, 4th 6th *Articles of the Federal Tort Claims Act* 1946, the liability is confined to "damage to or loss of property or on account of personal injury or death caused by the

The position in U S Constitution

What is "Act of the State."

As a general proposition of law, the *act of the State*, as technically understood in the system of our jurisprudence, is not amenable to judicial review by our courts and forms an exception to the power of the courts to review administrative actions. An act of the State is defined by *Sir Fitzjames Stephen* in his *History of Criminal Law* as :

"An act injurious to the person or to the property of some person who is not at the time of that act 'a subject of *His Majesty*; which act is done by any representative of *His Majesty*'s authority, civil or military, and is either previously sanctioned or subsequently ratified by *His Majesty*."

And Professor E.C.S. Wade defines it as follows:

"An act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown." (See his essay on "Act of State in English Law : Its relation with International Law in British Year Book on International Law" (1934) p. 98).

Whenever the executive in pursuit of a policy performs any acts in the course of its relations with another State, including its relation with the subjects of a latter state, its acts cannot be questioned in a court of law. In the leading case of *Rustomjee v. The Queen*, 1 *Q. B.D. page 487*, *Justice Mr. Blackburn* in dealing with a claim arising out of hostilities between Great Britain and China in which a certain guild owned by a claimant in China was abolished, observed:

Rustomjee v The Queen

"I do not think it can possibly be said that when the Queen has, as a high act of State, made a treaty, and received money in consequence of an act of State, the mode of distribution of it is in any way enforceable by a court of law, or subject to the findings of juries. I think there is a moral claim that it be given to the right person, which must be investigated in the manner in which Her Majesty is pleased to direct, and the ministers who direct it would probably be responsible in Parliament if they did it unjustly." (Affirmed in 2 Q.B.D. p. 69, C.A.).

To the same effect are the principles laid down in the case of *Secretary of State in Council of India v. Kamatchee Boye Sahaba*, (1859) 13 Moor's *Privy Council* 22 : 7 *M.I.A.* 476 *Forester v. Secretary of State for India in Council*, (1872), *I.A. Sup.* 10, as also in *Buron v. Denman* (1848) 2 *Ex.* 167 and *Johnstone v. Pedlar* (1921) 2 *A.C.* 262. In the case of *P.V. Rao v. Khushaldas S. Advani*, *AIR.* (1949) *Bombay* 277 *at p.* 287, *Justice Chagla* repelled the contention that an order for requisitioning of property issued by an officer of Government was in the nature of an *act of the state* on the plea that it had been done by Government in the exercise of its sovereign authority. His Lordships observed:

"An act of State is different fundamentally from an act of a sovereign authority. An act of State operates extra-territorially Its legal title is not any municipal law but the over-riding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in municipal courts."

Salaman vs Secretary of State for India

The best statement on the topic of an act of State is contained in a case reported in (1906) 1 *K.B.* 613, *at p.* 639 *Salaman v. Secretary of State for India*:

"An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal Courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of State, and as

Victoria Chapter XLI), would be of assistance in the interpretation of the present Article On analysis, the requirements of a valid contract with the *Government are the* following

(a) That it should be expressed to be made by the President or the Governor (according as it is done by the Federation or the Province),
(b) that it should be executed on behalf of the President or the Governor,
(c) that it should be executed by such person and in such manner as it may be authorised by the President or the Governor

The language of the Article is mandatory in other words any failure to comply with these requirements would affect the validity of the contract (See *City of Bombay v Secretary of State for India in Council I L R 29 Bombay 580*, *Kessoram Podder & Co v Secretary of State for India, I L R 54 Calcutta 969*, *Secretary of State v The Chettyar Firm of S R M M R M & others, I L R 4 Rangoon 291*, *Secretary of State v G T Sarin & Co I L R 11 Lahore 375*, and *Devi Prasad v Secretary of State, A I R (1941) Allahabad 377*) These decisions were under the previous Acts of Parliament noticed earlier and on the view of Lord Blackburn namely that where the Act of Parliament has received a certain judicial interpretation putting a certain meaning on its words and the legislature in subsequent Act *in para materia* has the same words it would be presumed that the legislature expresses the same meaning which it knew had been put upon the words before (See *Mersey Docks v Cameron*, 1865, 11 *H L case* 443 *at* 480 See also *Webb v Outrim* 1907 *A C* 81 and *Barras v Aberdeen Trawling & Fishing Co* 1933 *A C* 402) and the decision would be considered relevant and binding for the interpretation of such a statutory language

If a contract is unenforceable because it does not comply with the requirements of ART 135, the result would not be that it is void but only that Government cannot be sued and there is nothing which would prevent the Government from ratifying the contract [See *Chatturbuj v Moreshwar Parashram* (1954) *S C* 236] Under the general law no form of a contract is prescribed but under the present Article it would appear that a contract with the Government to be valid must be in writing and must be expressed to be made by the President or Governor etc In *Secretary of State v Bhagwandas* reported in *AIR* 1938) *Bom* 168 *Beaumont C J* said that an agreement made by correspondence can comply with the section, this observation was *obiter*, but it is pointed out, with respect the same is in accord with the principle and may well be accepted It would appear that each of the documents which taken in their totality furnish evidence of the existence of a contract must make it clear that the President or the Governor as the case may be is the principal with whom the other party is dealing and the officer actually dealing is acting on behalf of the President or the Governor as the case may be

Effect of non compliance with the requirements of Art 135

(B) THE JUDICIAL POWER AND THE ADMINISTRATIVE ACTION

193 The Concept of Rule of law & the Act of State

The rule of law demands that before, by means of an administrative decree, people s [illegible] shown as flowing [illegible] d as also in India [illegible] h the authority of the courts to control administrative actions and to undertake a judicial review of them is based There are several aspects of this highly intricate conception of the relation of the judicial power to the executive acts of administrative authorities and agencies which need at least a passing reference The problem can be studied by considering it as an application of the principle of the rule of law The authority of the courts to deal with complaints brought before it by means of appropriate proceedings in regard to either an abuse or excessive exercise of administrative action flows from its obligation to enforce the constitution and the law

of an All Pakistan Service, or holds a civil post in connection with the affairs of the Federation or of a Province, *shall not be dismissed or removed from service or reduced by an authority subordinate to that by which he was appointed*, nor again such a person shall be *dismissed or removed from service or reduced in rank unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him*. The provision relating to the giving of reasonable opportunity for showing cause are subject to three important exceptions contained in ART. 181 itself, but of these exceptions it is not necessary to say anything at this stage. ART. 181 may well be regarded as an important provision of law in that it confers upon the public servants a qualified immunity against certain types of arbitrary governmental acts. It is a constitutional right, in many ways superior in status to even a fundamental right since whereas the former can, the latter cannot, be suspended during an emergency.

Conditions of service and Tenure of Public Servants ARTs. 179 and 180 and 182

The conditions of service of persons in the Service of Pakistan are mentioned in ART. 182 and their tenure in ART. 180. Service of Pakistan means any service or post in connection with the affairs of Federation or of a Province, and includes any defence service, and any other service declared as a service of Pakistan by or under an Act of Parliament or of a Provincial Legislature, but does not include service specifically mentioned under the definition clause of Service of Pakistan in ART. 218 like Governor-General, President, Governor, Speaker, Minister, Parliamentary Secretaries, Judges of High or Supreme Court etc. Every person, before he can hold office in the Service of Pakistan must, subject to the power of President or, in relation to a Province, the power of the Governor to authorise temporary employment of non-citizens, be a citizen (ART. 179(1)), and when he is so employed, he holds the office in question during the *pleasure* of the President, if he is a member of the Defence Service, or of a Civil Service of the Federation or of an All Pakistan Service, or holds any post connected with the Defence or a Civil post in connection with the affairs of the Federation, or he holds it during the *pleasure of the Governor*, if he is a person who is a member of a Civil Service of a Province or holds any Civil post in connection with the affairs of a Province (See ART. 180). Except as expressly provided by the Constitution. the appointment and conditions of service of persons serving in Pakistan Servcies are to be regulated by Act of the appropriate legislature. [ART. 179 (2)].

The relationship between the Government and the Civil Service, be it noted, rests on a *contract* to which the Constitution attaches some incidents, and further, that the essence of that relationship is the rendering of service by the servant to or for the use of or on behalf of the master; (See *Bowen v. Hall*, 6 *Q.B.D.*, 333 *C.A.*, *of the year* 1881). See also the case of *Inland Revenue Commissioners v. Hambrook*, (1956) 1 *All E.R.* 807; (1956) 2 *W.L.R.* 919; (affirmed in (1956)3 *W. L.R.* 644, *C.A.*), where the nature of relationship between the Crown and the officer (A Tax Officer, an established Civil Servant) in England was commented upon. Lord Goddard, C.J. at the trial held that there was no contractual relationship of the sort that exists between a master and servant, although the Court of appeal dismissed the action on an entirely different ground, viz., that the action for the loss of services lay only in respect of menial servants. The facts of the case were that a tax officer who was riding a motor-cycle, whilst off duty, collided with a motor-car driven by the defendant: it was admitted that he was 1/3rd and the respondent was 2/3rd to blame for the accident. The officer in consequence of the injuries was absent from employment and had to be paid his salary: Crown brought action against the defendant and claimed damages for loss of services of the officer).

Public Service Commission.

In order to ensure the establishment of an able, talented, and properly equipped Civil Service of Pakistan, in the Chapter II of Part X, of our Constitution, we have several Articles that deal with the constitutional status, powers and authority of the Public Service Commissions for the Federation of Pakistan and for the two Provinces of East and West Pakistan. In order to ensure that the Public Service Commission are manned by upright

thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State, and what was its nature and extent An example of this is to be found in the case of *Forester v Secretary of State for India in Council*, (1872), *L R Ind Ap Supp Vol* 10 But in such an inquiry the Court must confine itself to ascertaining what the act of State in fact was, and not what in its opinion it ought to have been In like manner municipal Courts may have to consider the results of acts of State, i e, their effects on the rights of individuals, and even of the Government itself Acts of State are not all of one kind, their nature and consequences may differ in an infinite variety of ways, and these differences may profoundly affect the position of municipal Courts with regard to them For instance, an act of State may fix the relations between two States each of which continues to possess an independent existence The consequences of such an act of State are entirely beyond the cognizance of municipal Courts because they do not administer treaty obligations between independent States An example of such an act of State may be found in the case of *Nabob of Carnatic v East India Co* (1793) 2 *Ves* 56 But the object and effect of an act of State are not necessarily of this kind Its intention and effect may be to modify and create rights as between the Government and individuals who are, or who are about to become, subjects of the Government In such cases the rights accruing therefrom may have to be adjudicated upon by municipal Courts Let me take a simple example Let us suppose that a Government by an act of State annexes a neighbouring country and formally takes over all the property and liabilities of the former ruler, and that a part of such property consists of debts due to him The Government is not compelled to collect such debts *vi et armis* it may avail itself of the assistance of its Courts of law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an act of State But in deciding on such a claim the Courts must loyally accept the act of State as effective Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing Government, and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal Courts, and a subject recover from the existing Government by the processes of law applicable to such a case any debts due from the former ruler The judgments in the case of *Frith v Reg* (1872), *L R* 7 *Ex* 365, seem to me to give support to this view

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and its power and its duty to adjudicate upon and enforce rights of individuals or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of State or not '

The foregoing statement represents the rule of English Common Law But in many foreign countries it is lawful to take action against the State in Contract or Tort (See American Journal of International Law, 1931, Vol XXV p 50)

For a detailed discussion of the powers of the Superior Courts in our country to exercise judicial control over Administrative Authorities within their jurisdiction by means of the issue of appropriate ' writs'' ' orders ' or "directions" see the Chapter relating to Fundamental Rights (Section dealing with Constitutional Remedies and chapter VI)

(C) *THE JUDICIAL POWER AND THE PROTECTION OF PUBLIC SERVANTS*

194 Comment on ART 181

Part IX of our Constitution deals with Services of Pakistan and Article 181 is of particular importance to the constitutional lawyer because in it is contained the guarantee, that any person who is a member of the Civil Service of the Federation or of a Province or

where there are, as yet no strong, well-knit and disciplined political parties, the changes of government are apt to be more frequent than one would wish for. The too many changes in the government must necessarily entail the weakening of administrative grip over the management of the affairs of a country and the only way to ensure that the administrative efficiency will not suffer a serious set-back is to make, by means of providing constitutional safeguards and guarantees, the public services independent and strong so that they are able to withstand the shocks that the too frequent political changes in the government must inevitably bring in their wake. It cannot be forgotten that it is this body of civil servants, who provide a continuing apparatus of administration and often a wholesale check upon the maintenance of rule by their temporary superiors.

Nature of protection given to Civil Servants

Our Constitution has afforded considerable measure of protection to the public servants although that measure of protection can be no proof against the machinations of a scheming politician who when in office might like to retaliate against any honest and upright public servant who may have, when the politician was outside the magic-circle of office, while doing his duty incurred his odium or displeasure.

The protection afforded is of three kinds, (a) against indiscriminate and arbitrary punishment, (b) an affirmative guarantee that rules shall be so framed under clause (2) of ART. 182 as to secure.

(a) that the tenure and conditions of service of any person to whom that Article applies shall not be varied to his disadvantage; and

(b) that every such person shall have at least one appeal against any order which—

(i) punishes or formally censures him; or

(ii) alters or interprets to his disadvantage any rule affecting his conditions of service; or

(iii) terminates his employment otherwise than upon his reaching the age of superannuation;

and finally—

(c) in respect of the public servants who are members of "All-Pakistan Services", that is, services common to the Federation and the Provinces (which were the All Pakistan Services immediately before the Constitution Day) the protection extended by ART. 183 which *inter alia* includes the following :

(i) Parliament shall have exclusive power to legislate in respect of such service.

(ii) No member of such service shall be transferred to a Province or from a Province to the service of Federal Government except by order of the President made after consultation with Governor of that Province; and

(c) while in service in a Province, his promotion and transfer within that Province and initiation (as opposed to the consummation) of any disciplinary proceedings against him in relation to his conduct in that Province, shall take place by order of the Governor of that Province.

The Politician and the Civil Servants

This is not the place where any elaborate statements of the relationship which, according to the theory of sound public administration, ought to exist between the political chiefs and civil servants, could be presented—but a few general remarks upon this subject may not be out of place in this context. Modern democratic governments all over the civilised world bring about a confluence between the outlook of the lay-politician and the opinion of the expert so that correct political decisions could be taken. Ministers in the Cabinet have to have expert advice before them—but in directing what the govemental course of conduct in relation to a particular administrative problem should be, they have further to assess the impact of the decision proposed by the expert upon the public mind. The Minister, after weighing the pros and cons of the decision which the experts have advised him to take, can and should, in appropriate cases, say to the experts: "Gentlemen, I am

and independent officers, *power* has been given to the President and the Governors of the two Provinces to make appointments to the Federal and Provincial Public Service Commissions respectively—and this power is to be exercised not on ministerial 'advice' but 'in their discretion'—and what is more, under clause (5) of ART 186, it is provided, *by way of an additional precaution that*

(5) On ceasing to hold office—

(a) the Chairman of the Federal Public Service Commission shall not be eligible for further employment in the service of Pakistan,

(b) the Chairman of Provincial Public Service Commission shall be eligible for appointment as Chairman or other member of the Federal Public Service Commission or as Chairman of another Provincial Public Service Commission, but shall not be eligible for any other employment in the service of Pakistan, "

Similar restrictions apply to other members of the Provincial Public Service Commission, for which see ART 186(5)(c)

The functions of the Public Service Commission are mentioned in ART 188, and it would appear that, subject to such regulations specifying matters in which generally or in any particular class of cases or in any particular Service it may not be necessary for the Public Service Commission to be consulted, the Public Service Commission has to be *consulted*

(a) on all matters relating to methods of recruitment and upon qualifications of candidates for Civil services and posts,

(b) [illegible]

(c) [illegible] vincial Government in a civil capacity including compulsory retirement, whether for disciplinary reason or otherwise, and memorials or petitions relating to such matters

(d) on any claim by or in respect of a person who is serving or has served in a civil capacity that any costs incurred by him in defending legal proceedings instituted against him in respect of any acts done or purported to be done by him in the execution of his duty should be paid out of the Federal or the Provincial Consolidated Fund,

(e) on any proposal to withhold a special or additional pension or to reduce any ordinary pension, and

(f) on any claim involving compensation by way of Award or Pension arising out of injuries sustained while serving the Government etc ,

and the Public Service Commission is charged with the duty of advising on any matter so referred to them, and on any other matter which the President or the Governor may refer to it

It would appear that the Government is charged with the constitutional *duty of* obtaining and the Public Service Commission are charged with the corresponding duty of giving, advice in respect of matters mentioned under ART 188, and a writ of *mandamus* in appropriate cases can lie at the instance of the party interested to secure compliance with these duties

The secret of good government lies in the manner in, and the extent to, which it is able to provide for efficient administration in the country, and this in its turn can be secured by the impartial, upright and well disciplined public servants it is able to employ *for the purposes of carrying on the day to day administration of the country* The political parties have their rise and fall, the politicians come and go—but it is the civil service that goes on for ever Under a system of parliamentary democracy, the entrance and exit of politicians on the stage of public affairs is a matter of ordinary occurrence, and in a country Role of Public Services

to the Parliament, but it is not enough to be merely an adult in this sense to be able to govern—an appreciable degree of psychological maturity and some background information as to how the operations of modern Governments are to be conducted would seem to be the indispensable preliminary qualifications for any one being safely entrusted with the judicious and efficient exercise of administrative power.

The rigidity of mind and the canker of professional jealousy—those twin pillars upon which the arch of red-tape is reared—inevitably come to infest the outlook of a civil servant, not because he is no patriot, but because of the highly important position he occupies in the matter of administering the country. For instance, when he is called upon to administer the law—and the more so when he is enlisted on the side of law-making—he perforce must think of advising the making of the kind of law which is workable from the point of view of those who have to administer it and not necessarily palatable from the point of view of those whose who have to endure it in the sense that it is their lives that are going to be affected by it.

But when all is said and done, the power of the official class is not something that is grabbed by its votaries due to the love of mischief but in the words of Michael Stewart:

"The bureaucracy becomes powerful in proportion to the incompetence of other parts of Government. When there are ignorant Ministers, careless Parliaments, and over-burdened law-courts, the Civil Service does what it can to carry on the government in spite of these draw-backs. There is no real evidence which justifies the picture of Civil Servants as despots, hungering for power. They are, rather, pickers up of unconsidered trifles and they pick them up because of a professional love of tidiness. If not only trifles, but the Rule of Law and the rights of citizens are left unconsidered, the fault does not lie with the Civil Service." (pp. 61-62).

The only effective political method of rendering the civil servant innocuous in this country is to agitate for and achieve amendment of the Constitution and provide for a perpetual disqualification of at least the higher class of public servants from filling in political appointments. In fact, the public service should be dis-enfranchised. The only way to make right to vote effective in this country is to deny it to the civil servant.

To encourage the assumption of political power by a person who is incapable of having a clear perception of what is the popular need at a given moment in the life of a nation, is to hand over the whole country to what Walter Lippmann aptly calls the rule by the routineers. In his words:

"The man who will follow precedent, but never create one, is merely an obvious example of the routineer. You find him desperately numerous in the civil service, in the official bureaus. To him government is something given as unconditionally, as absolutely as ocean or hill. He goes on winding the tape that he finds. His imagination has rarely extricated itself from under the administrative machine to gain any sense of what a human, temporary contraption the whole affair is. What he thinks is the heavens above him is nothing but the roof." (See his 'Preface to Politics' p. 4).

Besides, if the secret of Constitutional Government consists in the progressive elimination of the arbitrary rule, if its superiority over other rival methods of governance is to be traced to the emphasis it lays upon equal laws and justice for all, the Bureancrat must be kept at bay or else authoritian rule would, thanks to his ubiquitous powers, become the order of the day, and instead of having the arbitrary rule by one King in the realm, we will have several hundred petty Ceasars masquerading as the servants of the people but ruling them all the same as irresponsible autocrats.

195. Tenure during pleasure

The doctrine of the English Law, namely that a servant of the Crown holds his

grateful for the advice tendered—but I should like to tell you that people of my country, whom I know more than you do, will not stand this decision" Scientific study of the economic problems is essential for anyone who means to handle the affairs of his country and the perception of this truth would entail the need for the politician to recognise the technical difficulties of his task and warrant an unusually resolute attempt on his part to train himself accordingly The theory of the institution of Cabinet Government, as it is propounded by those who have seen it at work in the country of its origin is that each department should have a lay chief with expert subordinates—the expert advises but the layman has the last word

"There are", says Michael Stewart in his recent book '*The British Approach to Politics*', "parallels to this in other spheres of public life in criminal trials, lawyers will state case, the Judge will explain the questions at issue, but twelve laymen will decide the verdict This system has been satirised, as in W S Gilbert s picture of the First Lord of the Admiralty who had never been to sea, and in the story of the Chancellor of the Exchequer being instructed in the mysteries of decimal points On the other

been satirised and some of the

come from people new to the

lightingale instructed the War Office in the obvious principle that when hospital stores are at hand, and needed, they should be used—there is no need to wait till next month for permission to open them Common sense, it is argued, acts as a corrective to routine

"There is a real distinction between the work of a political chief and that of a civil servant The former decides what the objects of government policy are, the latter advises how they can be attained This distinction, however, must not be over emphasised No one can say what the Government ought to do unless he has some idea how it can be done Ministers, therefore, do make an attempt to understand the technicalities of their Departments " (p 53 54)

The progressive evolution of the system of our administration has been from Bureaucracy to Democracy—from the rule by the red tape to the rule by the lay representatives of the people This phenomenon is in part accountable for the occasional atavistic relapses of our 'administrative style' into the still but nevertheless the deep waters of Bureaucratic nitwitism This is practically true of all the new democracies in Asia and the extent to which Brown Bureaucracies invade the art of taking decisions by the application of democratic approach is, in the last resort, the result of pro rata lack of *expert* knowledge in the responsible Ministers who take their place in the Cabinet The Secretary begins his career with the new Minister by being his mentor and guide in the beginning—but steadily the Minister finds himself in his clutches The inevitable result of this is that the Minister develops an inferiority complex and fails to humanise the already heartless administrative apparatus This evil has its roots in the fact that the Minister is by and large ignorant of the at of Government—an art which he can learn only by becoming the trainee of the bureaucrats who, as would be natural, are out to exploit the situation to their own advantage and to the disadvantage of the people Once the Ministers have shown signs of dependence on them, the bureaucrats start working at cross purposes with democracy itself, priding themselves on being unhelpful to the contemptible creature known as the man in the street and with that finesse which is traditionally associated with those who exercise power without owing responsibility to any one, the members of this caste succeed in inducting "New Despotism" into the saddle as if from the back door

The solution of the problem presented by this encounter between the forces of Bureaucracy and Democracy lies in educating the politician in the art of governance It is enough to be an adult, according to the computation of years based on calendar, to be elected

passing of the *Government of India Act*, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof. Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the *East India Annuity Funds Act*, 1874.

(4) For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of passing of the *Government of India Act*, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the Civil Service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section.

(5) No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the Civil Service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-section (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed: Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision."

And amongst the rules made or confirmed under the above section the following were relied *upon* in the argument submitted at the Bar of their Lordships:

"XIII.—Without prejudice to the provisions of any law for the time being in force, the Local Government may, for good and sufficient reasons—(1) censure, (2) withhold promotion from, (3) reduce to a lower post, (4) suspend, (5) remove, or (6) dismiss any officer holding a post in a provincial or subordinate service or a special appointment.

XIV.—Without prejudice to the provisions of the *Public Servants Inquiries Act*, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conlcusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it, and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

XV.—A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by R.13 in regard to officers of the subordinate services.

XVI.—Every officer against whom an order may be passed under Rules 10, 13 and 15, and who thinks himself wronged thereby shall be entitled to prefer at least one appeal against such order.

XXVIII.—The Secretary of State may call for any appeal withheld by the Local Government or the *Government of India* which under the rules may be made to him and may pass such orders as he considers fit; the Governor-General in Council may send for an appeal withheld by the Local Government which under the rules may be made to him, and may pass such orders as he considers fit."

The contention on behalf of the plaintiff-appellant before the Privy Council in the

office during the pleasure of the Crown, has dominated the development of the law relating to public servants in this country. The leading case on the subject is *Shenton v Smith*, (1895) *A C p* 229 (*P C*). This was a case in which an action was brought by one Dr Smith who held an office in the *Government Medical Service in Western Australia*, for questioning order of his dismissal on the ground that such an order amounted to a contravention of certain rules and regulations of the service which constituted an essential part of the conditions of his contract of service. Lord Hobhouse repelled this contention and held that the plaintiff had no right to damages, observing (at p 235)

Shenton vs Smith

> " Unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown, not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind. As for the regulations (their Lordships agreed with Stone J.) they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and they do not constitute a contract between the Crown and its servants."

The principle of this case was affirmed by their *Lordships of the Privy Council in Rangachari's* case, *AIR* (1937) *P C p* 27, and in the case of *Venkata Rao v Secretary of State AIR* (1937) *P C p* 31). These cases involved interpretation of the provisions of the *Government of India Act*, 1919 (*Section* 96 *B*, and the rules made thereunder). Section 96 B was in the following terms

Views of the Privy Council in Rangachari's and Venkata Rao's cases

"(1) Subject to the provisions of this Act and of rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed. If any such person appointed by the Secretary of State in C[illegible]
of an official superior in a Governor's
that superior does not receive the redr
titled, he may, without prejudice to any other right of redress, complain to the Governor of the Province in order to obtain justice, and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

Section 96 B of the Govt of India Act 1919

(2) The Secretary of State in Council may make rules for regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor General in Council or to Local Governments, or authorise the Indian Legislature or Local Legislatures to make laws regulating the public services. Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the Civil Service of the Crown in India shall retain all his *existing or accruing rights, or shall receive such compensation for* the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the Civil Service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the

passing of the *Government of India Act*, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof. Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the *East India Annuity Funds Act*, 1874.

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And amongst the rules made or confirmed under the above section the following were relied *upon* in the argument submitted at the Bar of their Lordships:

"XIII.—Without prejudice to the provisions of any law for the time being in force, the Local Government may, for good and sufficient reasons—(1) censure, (2) withhold promotion from, (3) reduce to a lower post, (4) suspend, (5) remove, or (6) dismiss any officer holding a post in a provincial or subordinate service or a special appointment.

XIV.—Without prejudice to the provisions of the *Public Servants Inquiries Act*, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conlcusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it, and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

XV.—A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by R.13 in regard to officers of the subordinate services.

XVI.—Every officer against whom an order may be passed under Rules 10, 13 and 15, and who thinks himself wronged thereby shall be entitled to prefer at least one appeal against such order.

XXVIII.—The Secretary of State may call for any appeal withheld by the Local Government or the *Government of India* which under the rules may be made to him and may pass such orders as he considers fit; the Governor-General in Council may send for an appeal withheld by the Local Government which under the rules may be made to him, and may pass such orders as he considers fit."

The contention on behalf of the plaintiff-appellant before the Privy Council in the

case of *Venkata Rao* [(1937) P C 31] was

"that the statute gives him a right enforceable by action to hold his office in accordance with the rules and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby"

As opposed to this it was contended by the respondent Government that there is no such actionable right conferred by the statute" Their Lordships referred to earlier cases decided by the *Board in* (1895) *Appeal Cases*, 229, (*Shenton v Smith*), and (2) in (1896) *A C* 575 (*Gould v Stuart*), but before dealing with the contentions noticed the conflict in the decisions of the *Indian High Court* (*Satish Chandra Das v Secretary of State* 54 *Calcutta* 44 *A I R* (1927) *Cal* 311 and *Baroni v Secretary of State*, 8 *Rangoon* 215 *A I R* (1929) *Rangoon* 207 being decisions in favour of the appellants' contention) Their Lordships dismissed the appeal holding that there was no such actionable right in favour of the plaintiff as had been claimed on his behalf and gave their reasons as follows (at p 34) —

"The reasons which have led their Lordships to this conclusion may be shortly stated S 96 B, in express terms, states that office is held during the pleasure There is, therefore, no need for the implication of this term and no room for its exclusion The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far reaching to commend itself for acceptance The rules are manifold in number and most minute in particularity and are all capable of change"

Their Lordships, in effect, held that as a matter of law there was no redress to be had in respect of wrongful dismissal in courts of law and they held that the remedy lay by means of a representation or memorial etc, with the executive Government They regarded the terms of the Section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subjected to capricious or arbitrary action but will be regulated by rules This assurance, however, is not of a kind which may be regarded as constituting a contract between the Crown and the civil servant so as to give rise to relief in a court of law in the event of its terms being contravened

Under the *Government of India Act*, 1935, some of the rules that had been framed under *Section 96 B of the Government of India Act*, 1919, were given constitutional status in section 240 of that Act That section, as adapted in Pakistan, was in the following terms Government of Ind a Act 935

"240—(1) Except as expressly provided by this Act, every person who is a member of a Civil Service of the Crown in Pakistan or holds any civil post under the Crown in Pakistan, holds office during His Majesty's pleasure

(2) No such person as aforesaid who having been appointed by the Secretary of State or the Secretary of State in Council continues after the establishment of the Federation to serve under the Crown in Pakistan shall be dismissed from the service of His Majesty by any authority subordinate to the Governor General or the Governor according as that person is serving in connection with the affairs of the Federation or a Province, and no other such person as aforesaid shall be dismissed from the service of His Majesty by any aythority subordinate to that by which he was appointed

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him

Provided that this sub section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason to be recorded by that authority

in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in Pakistan holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in Pakistan, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

It would be noticed that the main part of Rule 14 quoted earlier (corresponding roughly to *rule 55 of the Secretary of State's Classification and Discipline Rules*) has been re-enacted in this section. In view of this change in the constitutional position the principle of the decision in Venkata Rao's case demanded that in respect of contravention of the constitutional guarantees contained in S. 240, there would be a valid cause of action for a person aggrieved for obtaining declaratory relief in the same manner in which he could obtain relief in respect of a breach of Section 96-B of the old *Government of India Act*, 1919.

High Commissioner for India & High Commissioner for Pakistan v. I. M. Lall

And, in fact, in the case of *High Commissioner for India and High Commissioner for Pakistan vs. I. M. Lall, AIR* (1948) *Privy Council* 121, the *Privy Council* decided the matter accordingly. This was a case in which Mr. I. M. Lall, a *Member of the Indian Civil Service*, had challenged the legality of the order of the Secretary of State to remove him from the service. The case was initially heard and determined by the *High Court of Judicature at Lahore* [reported in AIR (1944) *Lahore* 240]. The suit was decreed to the extent of granting a declaration to the effect that the order removing the plaintiff Mr. I. M. Lall, was illegal and inoperative, and further that he was still a member of the *Indian Civil Service*. From this decision the Government appealed to the *Federal Court of India*, which Court by a majority judgment, varied the decree of the High Court ordering that:

"in place of the declaration (that the order removing the plaintiff from office was wrongful and void, illegal and inoperative and that plaintiff is still a member of the *Indian Civil Service*,) shall be substituted a declaration that the plaintiff, Mr. I.M. Lall, was wrongfully dismissed from *Indian Civil Service*." [See *AIR* (1945) *Federal Court* 47].

It was from this decision again that an appeal was lodged before their Lordsips of the *Privy Council* and Lord Thankerton, who delivered the judgment on behalf of the Board, after examining the provisions of *Section 96-B* of the *Government of India Act of* 1919, and of *Section* 240 *of the Act of* 1935, agreed with both *the High Court* and the *Federal Court* in holding (at p. 226):

"that the provision as to a reasonable opportunity of showing cause against the action proposed is now put on the same footing as the provision now in sub-section (2) of Section 240, which was the subject of decision in 64 *Indian Appeals, page* 40 (*Rangachari v. Secretary of State*) and that it is no longer resting on rules alterable from time to time, but is *mandatory*, and necessarily qualifies the right of the Crown recognised in sub-section (1) of *Section* 240 *of the Act of* 1935. The provisions of *Section* 96-*B* (1), now reproduced as sub-section (2) of Section 240 of Act of 1935, and of sub-sections (2) and (3) of Section 240 are prohibitory in form, which is inconsistent with their being merely permissive."

As to the declaration made by the Federal Court, namely that the plaintiff was wrongfully dismissed from the Indian Civil Service, the Privy Council altered the same so as to say that the purported dismissal of the respondent was void and inoperative and that respondent remained a member of the Indian Civil Service at the date of the institution of the present suit.

case of

in accordance with the procedure prescribed thereby "

As opposed to this it was contended by the respondent Government that there is no such actionable right conferred by the statute " Their Lordships referred to earlier cases decided by the *Board in* (1895) *Appeal Cases*, 229, (*Shenton v Smith*), and (2) in (1896) *A C* 575 (*Gould v Stuart*), but before dealing with the contentions noticed the conflict in the decisions of the *Indian High Court* (*Satish Chandra Das v Secretary of State* 54 *Calcutta* 44 *A I R* (1927) *Cal* 311 and *Baroni v Secretary of State*, 8 *Rangoon* 215 *A I R* (1929) *Rangoon* 207 being decisions in favour of the appellants' contention) Their Lordships dismissed the appeal holding that there was no such actionable right in favour of the plaintiff as had been claimed on his behalf and gave their reasons as follows(at p 34) —

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Their Lordships, in effect, held that as a matter of law there was no redress to be had in respect of wrongful dismissal in courts of law and they held that the remedy lay by means of a representation or memorial etc , with the executive Government They regarded the terms of the Section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subjected to capricious or arbitrary action but will be regulated by rules This assurance, however, is not of a kind which may be regarded as

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he rules that had been framed Government of India Act 935
under *Section* 96 *B of the Government of India Act*, 1919, were given constitutional status in section 240 of that Act That section, as adapted in Pakistan, was in the following terms

"240—(1) Except as expressly provided by this Act, every person who is a member of a Civil Service of the Crown in Pakistan or holds any civil post under the Crown in Pakistan, holds office during His Majesty's pleasure

(2) No such person as aforesaid who having been appointed by the Secretary of State or the Secretary of State in Council continues after the establishment of the Federation to serve under the Crown in Pakistan shall be dismissed from the service of His Majesty by any authority subordinate to the Governor General or the Governor according as that person is serving in connection with the affairs of the Federation or a Province, and no other such person as aforesaid shall be dismissed from the service of His Majesty by any aythority subordinate to that by which he was appointed

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action

which has led to his conviction on a criminal charge, or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority

positions were considered as being such "as could admit of no dispute" :—

(1) that unless otherwise provided by law, the Crown has the right to dismiss its servants at pleasure;
(2) that all persons who held civil posts under the Crown before the Constitution Day and were governed by section 240 of the *Government of India Act*, 1935, held their office during the pleasure of the Crown;
(3) that no such servant could maintain a suit for compensation or arrears of salary on the ground that some provision of the *Government of India Act* had not been complied with in dismissing him, though he could bring a suit for a declaration that some constitutional provision not having been complied with in dismissing him, the dismissal was inoperative and that despite such dismissal he continued to be in the service of the Crown;
(4) that no person holding a civil post under the Crown could be dismissed by an authority subordinate to that by which he was appointed and that he could only be dismissed or reduced in rank if he were given a reasonable opportunity of showing cause against the action proposed to be taken against him;
(5) that unless the order was by the Governor-General or by the Governor, as the case may be, such person had at least one right of appeal from the order terminating his services;
(6) that an order of removal was tantamount to an order of dismissal;
(7) that as regards constitutional limitations on the dismissing authority's powers, there was no difference between a permanent and a temporary servant;
(8) that, subject to a qualification to be mentioned later, other restrictions on the dismissing authority's powers, including the procedure which such authority was required to follow, that were imposed by the rules made under the *Government of India Act* were not a part of the contract of service in the sense that a breach of them could furnish cause of action to the dismissed servant; and
(9) that so far as police officers of the subordinate rank were concerned, their conditions of service were determined by or under the various *Police Acts* which could authorise an authority subordinate to that which appointed a police officer to dismiss him, and could also vary the rule in sub-section (3) of section 240 of the *Government of India Act* that a servant of the Crown, before he was dismissed, was entitled to a reasonable opportunity to show cause against his intended dismissal."

The above statement of the law, if we omit the ninth proposition from consideration, represents concisely the constitutional position concerning the remedies available to public servants in the mtater of wrongful dismissals etc.

State of Bihar v. Abdul Majid.

In the case of *State of Bihar v. Abdul Majid* reported in AIR (1954) *Supreme Court of India* 245, Chief Justice Mahajan too reviewed the constitutional position and in regard to the meaning of concept of "Office at pleasure", pointed out that (at p. 250):

"The expression concerns itself with the tenure of office of the civil servant and it is not implict in it that a civil servant serves the Crown *ex-gratia*, or that his salary is in the nature of a bounty. It has again no relation or connection with the question whether an action can be filed to recover arrears of salary against the Crown. The origin of the two rules is different and they operate on two different fields."

As to the right of a civil servant to recover the arrears of his salary the learned Chief Justice stated his conclusions in words that follow :—

"the rule of English law (that civil servants held office at pleasure of the Crown) has not been fully adopted in Section 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure and those restrictions must be given effect

Relying on a Scottish case *Mulvenna v. The Admiralty* (1926), *Supreme Court* 842, the Privy Council pointed out that it is an implied term of a contract of service with the Crown that the right to remuneration cannot be enforced in a civil court of justice and that the only remedy of the aggrieved servant is an appeal of an Official or political kind by way of petition, memorial or remonstrance. [But as to the tenability of this view of law see remarks of Mahajan C. J. referred to in *infra* AIR (1954) *S. C.* 245, *State of Bihar v. Abdul Majid*.)

196. S. 243 of the Govt. of India Act and Suraj Narain's case

The scheme of the old *Government of India Act*, 1935, was such that the conditions of service of the subordinate ranks of the various Police Forces, despite what was contained in Sections 240 to 242, were to be such "as may be determined by or under the Acts relating to those Forces respectively." The important questions that presented themselves for solution, upon the appreciation of the combined effect of Section 243 and other preceding provisions of the Chapter relating to Civil Services were:

(a) whether in the total absence of any conditions of service contrary to those mentioned in the Chapter relating to 'Civil Services' (that is, Chapter II of Part X) the provisions of Section 240 were nevertheless to be applicable even in the case of officers of the subordinate ranks of Police Service;

and further

(b) whether the right of dismissal was a 'condition of service' within the meaning of Section 243, so that if there was a valid Police rule in operation which authorised the dismissal of a Police Officer, such a dismissal would be valid although the person making the order of dismissal was subordinate in rank to the officer by whom he had been appointed.

Suraj Narain's case, *P. L. D.* (1949) *P. C.* 1, *N. W. F. Province v. Suraj Narain Anand* is important precisely upon the point that the Privy Council answered the second of the two aforementioned questions in the affirmative thereby holding that the right of dismissal was a condition of service within the meaning of S. 243 and that a valid Police rule on that subject could upon the authority of Section 243 prevail as against constitutional guarantee contained in Section 240. Suraj Narain's case

In the case of *Noorul Hassan and others v. The Federation of Pakistan* reported in *P. L. D.* (1956) *Supreme Court page* 331, these provisions were appreciated and Chief Justice Muhammad Munir felt that the Privy Council decision in Suraj Narain's case "is clearly indicative of the view that the constitutional safeguards in sub-sections (2) and (3) of Section 240 are available to police officers of the subordinate ranks unless those safeguards have been taken away by or under a *Police Act*." Noorul Hassan vs Federation of Pakistan

The other conclusions reached were:—

The constitutional safeguards in sub-sections (2) and (3) of Section 240 *of the Government of India Act*, 1935, are available to police officers of subordinate ranks unless those safeguards have been taken away by or under a Police Act. This result is consistent with the words of Section 243 because if the intention had been that Sections 240 and 241 were not at all to apply to subordinate police, nothing would have been easier than plainly to say so.

The language of Section 243 is designed to operate on the basis of repugnancy between sub-sections (2) and (3) of Section 240, on the one hand, and the Rules under the Police Acts, on the other.

The provisions of Sections 240 and 241 have no application where there is in existence a contrary.

In the minority judgment delivered by Chief Justice Munir, the following nine pro

been reserved to the executive to deal with cases in which the giving of an opportunity would be prejudicial to the public interest. It must be remembered that from the nature of the case it would be extremely difficult to make out a cogent case before a court of law for it to intervene, particularly in a case where the grievance is that the executive has not extended *proper* opportunity to the public servant or that in denying such an opportunity it has acted from improper motives or for insufficient reasons. The very fact that there is no clear provision forbidding the court to enquire into the sufficiency of the reasons, on the footing of which reasons the authority concerned has denied opportunity to a public servant would tend to show that the jurisdiction of the court can be invoked, but, for reasons that have been suggested earlier, such a jurisdiction can be invoked successfully only in a very restricted category of cases.

Is breach of rules actionable.

The question which has hitherto formed the subject-matter of considerable legal discussion and even conflict of views, namely, whether or not the breach of a rule framed by the executive pursuant to a constitutional provision concerning matters relating to discipline and other rights of public servants, is enforceable in a court of law, in the same way in which the breach of the constitutional guarantee itself is enforceable, has lost much of its relevance in view of the fact that we have no provision in our Constitution corresponding to S. 243 of the Government of India Act, and ART. 181 completely dispenses with the necessity of any rules being framed concerning the disciplinary matters and contents itself by giving only two constitutional guarantees to all the civil servants serving our State. Any invasion of these two constitutionally guaranteed rights would be actionable, subject, of course, to the over-riding limitations contained in the provisos to that Article. Under ART. 182(2) and (3), with respect to the making of provision about "conditions of service" of a member of Public Service, it has been provided as follows :

"182(2) Except as expressly provided by the Constitution, or an Act of the appropriate legislature, the conditions of service of persons serving in a civil capacity shall, subject to the provisions of this Article, be such as may be prescribed—

(a) in the case of persons serving in connection with the affairs of the Federation, by rules made by the President, or by some person authorized by the President to make rules for the purpose;

(b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province, or by some person authorized by the Governor to make rules for the purpose:

Provided...

"182(3) The rules under clause (2) shall be so framed as to secure—

(a) that the tenure and conditions of service of any person to whom this Article applies shall not be varied to his disadvantage; and

(b) that every such person shall have at least one appeal against any order which—

(i) punishes or formally censures him; or

(ii) alters or interprets to his disadvantage any rule affecting his conditions of service; or

(iii) terminates his employment otherwise than upon his reaching the age fixed for superannuation . . ."

(For the parallel provision in the Indian Constitution, see ART. 309 thereof.)

Would the breach of the terms relating to conditions of service provided for by rules framed under ART. 182(2) give rise to a cause of action in a Court of law? In the first place, if the 'conditions of service' provided for by *rules*, are violated, the aggrieved public servant would have a departmental remedy in that the rules to be framed under ART. 182(2) must, as a matter of constitutional necessity, provide for a right of appeal or review and, if they do not, a *mandamus* will lie to compel the appropriate authority to frame the

to They are imperative and mandatory It follows therefore that whenever there is a breach of restrictions imposed by the statute by the Government or the Crown the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the court As pointed out earlier in this judgment, there is no warrant for the proposition that the relief must be limited to the declaration and cannot go beyond it To the extent that the rule that Government servants hold office during pleasure has been departed from by the statute, the Government servants are entitled to relief like any other person under the ordinary law, and that relief therefore must be regulated by the *Code of Civil Procedure* " (Further see *Makkena Sambayya vs Makkena Tirupatayya (1952) Madras 865*, and the judgment of *Mookerjee, J*, in the case of *Ramdas Hajra v Secretary of State, 17 Calcutta Law Journal, page 75*)

There is no provision in our *Constitution* corresponding to Section 243 of *Government of India Act* 1935, and this presumably because ART 181, which deals with dismissal disciplinary matters etc , and extends to members of the Civil Service of the Federation or of a Province of of an All Pakistan Service, or to any one who holds any civil post in connection with the affairs of the Federation or of a Province the following two guarantees namely —

No provision in our present Constitution corresponding to S 243 of the Government of India Act 1935

(a) that his dismissal or removal from service or reduction in rank shall not take place by an authority subordinate to that by which he was appointed nor again

(b) shall he be dismissed or removed from service or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him,

by itself contains two over riding provisions which say that no such opportunity of showing cause need be given in cases —

(i) "*Where an authority empowered to dismiss or remove from service a person* or to reduce him in rank, is satisfied that for some reason, to be recorded by that authority, it is not reasonably practicable to give that person an opportunity of showing cause, or

(ii) where the President or the Governor, as the case may be is satisfied for reasons to be recorded by him, that in the interest of the security of Pakistan or any part thereof, it is not expedient to give to that person such an opportunity

These provisions are of a far reaching character and constitute by themselves a sufficient safeguard in favour of administrative action which is calculated to deal with a public servant in disciplinary matters without having to give that reasonable opportunity of showing cause which has been provided for by the Article In each case therefore, if the authority empowered to take disciplinary action is satisfied that no opportunity of the kind mentioned in ART 181 should be extended, it should proceed so to act, but in that *case it is required to make a record of the reason responsible for its decision not to afford* any such opportunity The fact that Constitution requires the authority denying a reasonable opportunity to the public servant concerned to set forth its reasons in support of such refusal would seem to suggest that the exercise of this abnormal power will not be suffered to be countenanced in a capricious or an arbitrary manner The question whether a court of law would, in appropriate proceedings, issue a direction or a writ in the nature of *mandamus* commanding the relevant authority who is proved to have acted *mala fide* or has denied opportunity of showing cause for a reason which is insufficient in law cannot be answered in the abstract but on general principles, this much at least is clear that, in any case in which the order denying opportunity to a public servant to show cause against punishment inflicted on him is bereft of reasons a court of law would be justified in law to command the authority concerned to state its reasons But it is also true that a court of law would not lightly interfere with the exercise of this power by the executive which has

rules accordingly In the second place, would not the question with respect to redress in respect of the breach of rules—as opposed to a breach of direct constitutional guarantee—come within the rule laid down by the Privy Council and affirmed by the remarks of Supreme Court Judges in *Noorul Hassan's case* referred to above [*PLD* (1956) *S C* 331] viz , that the mere breach of rule made pursuant to a constitutional provision is not actionable

In the opinion of the present writer, [illegible] of service of a public servant, unless they ar[illegible] moval from service, or dismissal within the [illegible] the aggrieved public servant must be content to seek the redress of his grievances by means of departmental and domestic procedure

It is for this reason that no attempt has been made in the present analysis to set forth a resume of the very scholarly statement of the law on that question offered by Chief Justice Muhammad Munir in the case of *Noorul Hassan v The Federation of Pakistan PLD* (1956) *S C* 331, as also a somewhat different although equally weighty opinion advanced in a majority judgment by his companion Judges In the view of the present writer however the correct rule on this point is as was laid down by the Privy Council in the *Venkata Rao s case* referred to earlier and the principle of which has been supported by Chief Justice Muhammad Munir in his judgment

Before taking leave of this topic, it is necessary to refer to certain observations made in the case of *Muhammad Ayyub v Government of West Pakistan PLD* (1957) *Lahore* 487 where atleast one of the learned Judges of the Division Bench appears to take a contrary view of the problem presented by the foregoing analysis of ART 182(2) The principle of *Venkata Rao s case* [*AIR* (1937) *P C* 31] has ben distinguished by the learned Judge Akhlaque Husain J who wrote the leading judgment and his argument is as follows (p 490) Muhammad Ayub v West Pak [illegible]

' It is a question whether the rules framed under Article 182(2) of the Constitution are in law at par with those made by the Secretary of State under the Government of India Act, 1919 The language employed in the two provisions is significantly different Two considerations weighed considerably with the Privy Council in Venkata Rao s case The first was that 'the rules are manifold in number and most minute in particularity and are all capable of change ' But statutory law dealing with the terms and conditions of Government servants, which would be unquestionably binding under the Constitution and was so under the Government of India Act, is also capable of change And there does not appear to be any legal or rational principle for holding statutory rules as not legally [illegible] parti

[illegible] Lord ships to the conclusion arrived at by them was There is another consideration which seems to their Lordships to be of the utmost weight Section 96 B and the rules make careful provision for redress of grievences by administrative process and it is to be ob served that sub section (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the Civil Service' there is no provision in our Constitution Cor responding to sub section (5) of section 96 B which read 'No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the Civil Service of the Crown in India in such manner as may appear to him to be just and equitable ' This, unlike any provision in Article 182, expressly made the authority of the Secretary of State supreme over the rules framed by him under sub section (2) which provided 'The Secretary of State in Council may make rules for regulating the classi fication of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct ' Article 182 (2), unlike

"sub-section (2) of section 96-B, does not leave it to the Authority to make or not to make rules. Nor does it merely say that the rules are only to 'regulate' the conditions of service etc. It says: 'Except as expressly provided by the Constitution, or an Act of the appropriate legislature, the conditions of service of persons serving in a civil capacity *shall*, subject to the *provisions* of this Article, be such as may be prescribed'.—

Article 180 of the Constitution provides:—

"Except as expressly provided by the Constitution—

(b) every person who is a member of a Civil Service of a Province or holds any civil post in connection with the affairs of a Province, other than a person mentioned in paragraph (a) of this Article, shall hold office during the pleasure of the Governor."

It will be noticed that the pleasure of the Governor is, by this Article, limited by express provisions of the Constitution. Article 181 expressly provided certain safeguards against unauthorised or arbitrary dismissal or removal from service or reduction in rank. Article 182(1) specifies the authority which alone can make appointments. Article 182(2) expressly provides that the conditions of service shall be governed by such rules as may be made by the appropriate authority. The first proviso lays down: 'It shall not be necessary to make rules regulating the conditions of service of persons employed temporarily on the condition that their employment may be terminated on one month's notice or less; and nothing in this clause shall be construed as requiring the rules regulating the conditions of service of any class of persons to extend to any matter which appears to the rule-making authority to be a matter not suitable for regulation by rule in the case of that class'. Can it be said (1) that it has been left to the discretion of the authority not to make any rules at all regarding the conditions of service and (2) that such rules when made do not possess a binding character? As regards the second question the language of the second clause seems to celearly indicate that the rules are binding. It is true that a discretion is given to the authority not to *extend* the rules to any matter which appears to it not suitable for regulation by rule in the case of that class; but the discretion does not extend to not making the rules at all. Again, the expression 'shall not be necessary' and 'nothing in this clause shall be construed as requiring' also seem to indicate that the making of the rules is necessary and is required by the clause. The second proviso places certain statutory restrictions and obligations upon the authority in making the rules. It does not seem possible to hold that Article 182 does not 'expressly provide', within the meaning of Article 180, for the making of the rules and for conferring upon them a binding character in law. If that be so, it would necessarily follow that the pleasure of the Governor has been expressly made by the Constitution subject to the rules which he is required to make under Article 182 and that ultimately his 'pleasure' would be operative only to such extent as the rules, which have to be made in accordance with the directions contained in the Article, may permit or in the cases specified in the first proviso. Again, it would hardly be possible to argue that an Act of the appropriate legislature dealing with the conditions of service would not, under Article 182, be binding on the Government; and apparently the intention of the Article is to place the rules on the same level as such an Act."

Having distinguished the principle of *Venkata Rao's case* [*AIR* (1937) *P.C.* 31], the learned Judge proceeded further to add (at p. 493):

"In the present cases, however, we are asked to exercise our extraordinary jurisdiction under Article 170 of the Constitution and it is not, therefore, necessary to decide whether the rights secured to the petitioners by the rules made under Article 182(2) are enforceable in a Court of law by action. It is now a firmly established principle that a High Court may, under Article 170, grant redress in an appropriate case even when

none is available by way of any usual action or proceedings, and that a manifest wrong or injustice to a citizen shall be relieved Even if the rules were of the same nature as those in *Venkata Rao's case*, the High Court will take notice of them while exercising its jurisdiction under Article 170 because the Constitutional provision under which they were made must at least be regarded, in the words of their Lordships of the Privy Council, 'as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule ' Moreover, the pleasure of the President or of the Governor cannot, under our Constitution, be regarded as inclusive of capriciousness or arbitrariness '

It is submitted, with respect, however, that the effect of ART 182(2) in the foregoing case has not been assessed in the light of clause (3) of ART 182 which seems to lay down the minimum guarantee in regard to the tenure and conditions of service in two directions,

(1) that they shall not be varied to his disadvantage, and
(2) that the person in respect of whom rules would be framed under ART 182 shall have at least one appeal against any order which punishes or formally censures him, or alters or interprets to his disadvantage any rule affecting his conditions of service, or terminate his employment otherwise than upon his reaching the age fixed for superannuation

It would thus appear that the mode of redress itself having been provided in ART 182(3), the dominant intention of the framers of the Constitution seems to be to confine constitutional guarantees to those mentioned in ART 181 and to the securing of the framing of rules in conformity with the pattern provided in ART 182 The mode of redress however having been under clause (3) confined to departmental representation the question of the same being made a subject of action in law, *mala fides* apart, atleast in the present writer's opinion, does not so much as arise To read the requirement of ART 182 otherwise so as to make the breach of any rule framed thereunder actionable, is to rob ART 181 of its meaning For, why provide specifically for two constitutional guarantees in ART 181 if every rule framed under ART 182 (2) regarding the conditions of the service by itself forms a constitutional guarantee which is to be enforceable in courts? The logic of the *Venkata Rao's case* is inescapable (But the student should carefully note that the ruling view of our courts that holds the field is contrary to the one that has been advocated by the writer)

The learned Judge it is submitted with respect, is right when he holds that ART 182 is a further fetter on the concept of "tenure during pleasure in that the terms and conditions of the civil servants can now be imposed *only* by means of Rules to be made by appropriate authorities And in fact so very all embracing is this requirement of the Constitution that care had to be taken to exclude, by means of a carefully worded proviso to clause (2) of ART 182, which visualise certain cases in which such rules need not be made by the rule making authorities But this requirement of the Constitution (viz conformity of Administrative action to Rules), in the nature of things, cannot be made enforceable by courts for the simple reason that the rules are bound to be too many to be rendered amenable to being effectively enforced by means of actions in court Besides a rule which is unreasonable could be quashed by courts There seems to be thus no escape from the requirement of this rule as laid down by their Lordships of the Privy Council in the aforementioned case—no, not even by recourse to ART 170 of our Constitution (See further chapter VI)

32. Tenure during good behaviour and other allied matters

The opening words of ART 180, (which begins with the expression, "except as expressly provided by the Constitution, every person holds office" during the pleasure of

the authorities mentioned in that Article,) by themselves suggest that there are some types of offices under the Constitution where the tenure of office is not the one held at pleasure. This exception has reference to the office which is held "during good behaviour". An instance of this kind is to be seen, for example, in the appointment of the Judges of the High Courts and the Supreme Court of Pakistan. (See Articles 150 and 151 for the Supreme Court Judges, and Articles 166 and 169 for the case of High Court Judges). This type of office can be terminated *only on the ground of proved misbehaviour or infirmity of mind or body*. These provisions relating to the tenure of office during good behaviour are extended to apply to the cases of "Controller" and "Auditor-General", and "Members of the Public Service Commission" etc. Where a person, who holds office under the Government, during "good behaviour", is dismissed without any misconduct being proved on his part in the manner directed by the Constitution, he can recover damages against the Government. (See *Gould v. Stuart*, 1896, *A.C.* p. 575). The principle affirmed in this case was that while the common law doctrine that Crown servants can hold office during the pleasure of the sovereign, was of general application, there could be cases where statute may prescribe terms of service and mode of dismissal at variance with the requirements of the common law, in which case the statute would prevail. *An office of good behaviour is an office* held under conditions expressly enacted by a statute which departs from the concept of tenure of office being held at pleasure. [See the case of AIR (1952) *Madras* 865, *Makkena Sambayya v. Makkena Tirupatayya*, where this principle has been enunciated and applied.]

The term 'Misbehaviour' has not been defined in the Constitution, but it goes without saying that it means and includes any improper exercise by the holder of such office of the functions appertaining to the office he holds, such as non-attendance, neglect or refusal to perform the duties thereof [*Shrewsbury's case* (1610) 9 *Co. Rep* 42 a].[1] If the holder of such an office has been proved to be guilty of any infamous conduct, or has been convicted of such an offence as would amount to rendering him unfit to hold the office with a sense of that much dignity and self-respect associated with that office he would be liable to be removed.

Our Constitution does not seem to contemplate the specific kind of tenure regulated by contract of the kind visualised by ART. 310(2) of the Indian Constitution which reads:—

> "Notwithstanding that a person holding a civil post under the *Union* or a *State* holds office during the pleasure of the *President* or, as the case may be, of the *Governor* of the State, any contract under which a person, not being a member of a *Defence Service* or of an *All India Service* or of a *Civil Service of the Union* or a *State*, is appointed under this *Constitution* to hold such a post may, if the *President* or the *Governor*, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

Under the English Law, however, even if there is a contract of employment for a stated period, which is terminated before the conclusion of that period without notice or proof of any just cause, no action for damages will lie. [See *Dunn v. Queen*, (1896) 1 *Q.B.* 116 (C.A.). See also *Denning v. Secretary of State for India-in-Council* (1920) 37 *TLR* 138).

Interpretation of dismissal, removal or reduction in rank.

The words, 'dismissal', 'removal', or 'reduction in rank', appearing in our Article 181, and in Article 311(2) of the *Indian Constitution*, have been interpreted by different courts of India, in different ways. The *Allahabad High Court*, for instance, in the case of *Jayanti Prasad v. State of U.P. AIR* (1951) *Allahabad, p.* 793, said that these words were technical words, indicative of the situations in which a person's services are terminated for misconduct. But other courts have observed that these words indicate various modes in which termination of service could be brought about regardless of the idea of mis-

none is available by way of any usual action or proceedings and that a manifest wrong or injustice to a citizen shall be relieved Even if the rules were of the same nature as those in *Venkata Rao's case*, the High Court will take notice of them while exercising its jurisdiction under Article 170 because the Constitutional provision under which they were made must at least be regarded, in the words of their Lordships of the Privy Council, 'as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule ' Moreover, the pleasure of the President or of the Governor cannot, under our Constitution, be regarded as inclusive of capriciousness or arbitrariness '

It is submitted, with respect, however that the effect of ART 182(2) in the foregoing case has not been assessed in the light of clause (3) of ART 182 which seems to lay down the minimum guarantee in regard to the tenure and conditions of service in two directions,

(1) *that they shall not be varied to his disadvantage*, and
(2) that the person in respect of whom rules would be framed under ART 182 shall have at least one appeal against any order which punishes or formally censures him, or alters or interprets to his disadvantage any rule affecting his conditions of service, or terminate his employment otherwise than upon his reaching the age fixed for superannuation

It would thus appear that the mode of redress itself having been provided in ART 182(3), the dominant intention of the framers of the Constitution seems to be to confine constitutional guarantees to those mentioned in ART 181 and to the securing of the framing of rules in conformity with the pattern provided in ART 182 The mode of redress however having been under clause (3) confined to departmental representation, the question of the same being made a subject of action in law *mala fides* apart atleast in the present writer's opinion, does not so much as arise To read the requirement of ART 182 otherwise so as to make the breach of any rule framed thereunder actionable, is to rob ART 181 of its meaning For, why provide specifically for two constitutional guarantees in ART 181, if every rule framed under ART 182 (2) regarding the conditions of the service by itself forms a constitutional guarantee which is to be enforceable in courts? The logic of the *Venkata Rao's case* is inescapable (But the student should carefully note that the ruling view of our courts that holds the field is contrary

The learned Judge it is subm RT 182 is a further fetter on the concep and conditions of the civil servants can now be imposed *only* by means of Rules to be made by appropriate authorities And in fact so very all embracing is this requirement of the Constitution that care had to be taken to exclude, by means of a carefully worded proviso to clause (2) of ART 182, which visualise certain cases in which such rules need not be made by the rule making authorities But this requirement of the Constitution (viz conformity *of Administrative action to Rules*) *in the* nature of things, cannot be made enforceable by courts for the simple reason that the rules are bound to be too many to be rendered amenable to being effectively enforced by means of actions in court Bindes a rule which is unreasonable could be quashed by courts There seems to be thus no escape from the requirement of this rule as laid down by their Lordships of the Privy Council in the aforementioned case—no, not even by recourse to ART 170 of our Constitution (See further chapter VI)

32. Tenure during good behaviour and other allied matters

The opening words of ART 180, (which begins with the expression, "except as expressly provided by the Constitution, every person holds office" during the pleasure of

in the nature of punishment and is reduction in rank within the meaning of the Con tion. [See also *Jatindra Nath v. R. Gupta, AIR* (1954) *Calcutta* 383].

In the case of *Muhammad Afzal Khan v. The Federation of Pakistan PLD* (1957) *Laho* Mr. Justice Kayani, while dealing with the argument that 'removal' within the meani ART. 181 'necessarily results from misconduct' and where no misconduct is all principle of ART. 181 is not attracted, observed (at pp. 22-23) :

> "For my part, I am not inclined to confine these terms (removal, dismissa reduction) to cases of misconduct. We shall see later in this judgment that ju authority has included within the scope of these terms cases of inefficiency and incap or unwillingness to work also. And in our own departmental sphere we have s times reduced persons in rank because, notwithstanding the best intention on their they were not found equal to the rank they were holding. But if this Article is inte to be a check on arbitrary conduct—as it certainly is—then I have no doubt tha context to which these terms apply should not be confined in meaning in any dire for it is not unlikely, in the jungle of arbitrariness that envelops our affairs, that a pe should be removed from service for reasons unconnected with his official duties."

It is submitted with respect, that this is taking too wide a view of the natu protection extended by ART. 181 to a public servant. Where inefficiency, and incap or unwillingness to work are not cases of misconduct—but result, let us say from dispositions and defects inherent in the person sought to be dealt with—the question of is notice to show cause would be meaningles indeed. The situation in such cases woul governed by rules applicable to such persons who have found themselves unequal to task. Removal for inefficiency or neglect of duty could be conceived as falling w the purposes of protection under ART. 181 only where they are considered to be aspec misconduct—but not otherwise. [See however for a contrary view in (a) Qazi *Hi Hussain v. The State of Pakistan,* (1958) *P.L.D. Karachi, p.* 1; (b) *Moazzam Husain Kh The State of Pakistan,* (1958) *P.L.D. Karachi, p.* 35; see also the case of *Parshotam Lal Dhi v. The Union of India* (1958) *Supreme Court of India, A.I.R. p.* 36 for the statement of ruling Indian view upon the interpretation of ART. 311(2) of their Constitution.]

Limits within which principle of ART. 181 operates.

The limits within which the principle of Article 181(2) is applicable may be forth in a summary from as follows :—

(1) The opportunity to show cause is available only when a civil servant is 'dismi or removed from service or reduced in rank'. It should be remembered 'reduction in rank' involves the idea of some sort of action to be taken, or a pu ment being inflicted. (See *Satish Chandra v. Union of India AIR* (1953) *S.C.* (1953) *Supreme Court Report* 655). In the case of *Shyamlal v. State of U.P. AIR* (19 *Supreme Court* 369, the question was whether compulsory retirement was remova dismissal within the meaning of ART. 311(2) of the Indian Constitution. Court said (at p. 374):

> "There can be no doubt that the removal—I am using the term synonymo with dismissal—generally implies that the officer is regarded as 'in some mar balmeworthy or deficient, that is to say, that he has been guilty of some misconduc is lacking in ability or capacity or the will to discharge his duties as he should do. action of removal taken against him in such circumstances is thus founded justified on some ground personal to the officer. Such grounds, therefore, invol the levelling of some imputation or charge against the officer which may conceiva be controverted or explained by the officer."

(2) There could be cases of punishment which could be departmentally inflicted (as be authorised by rules and regulations) to which the principle of ART. 181 is

conduct being imputed to the public servant concerned and they are words that are to be taken in their ordinary sense [See *Ishar Dass v. State of Pepsu, A I R* (1952)] *Pepsu*, 148, *at p.* 151).

So far as the title of our ART 181 is concerned, it tends to suggest that the protection is in respect of "dismissal, removal from service or reduction in rank" in respect of matters involving disciplinary action The case of removal of a man from service may be for reasons completely unconnected with any fault on his part and such a removal does *not disqualify him from future employment with the Government* But if removal could be shown to be the result of misconduct suspected by the authority responsible for the action, the public servant aggrieved would be entitled to the benefit of the provisions of ART. 181. Besides, it is the action proposed to be taken against the servant which necessitates the giving of notice Where there is no punitive action to be taken, the principle of ART. 181(2) would not be attracted

The constitutional safeguards mentioned in ART 181, are available to every civil servant in the service of the State despite the fact that he holds a temporary post The Government is authorised to appoint persons on a temporary basis The contract of service may provide, for instance, that the service of such servant will be terminable by giving to him one month's notice etc , or it may provide that his service will be terminable without any previous notice In each case it would become necessary to scrutinise the terms of the contract actually entered into if they are not sufficiently indicated in the letter of appointment itself. [*See AIR (1955) Allahabad 496, the case of Sharda Prasad Srivastava v Accountant General, Uttar Pradesh, Allahabad*] But if the giving of notice is not a *bona fide* move, but is gone through as a matter of form for the purpose of using it as a cloak or pretext for getting rid of a person who has made himself undesirable for some reason, then the *object* is to remove him from service and the case falls under ART 181 This is the only way in which assumption as to the existence of a temporary service subject to one month's notice, contained in the proviso to ART 182 can be reconciled with ART 181 [See the case of *Mohd Afzal Khan v The Federation of Pakistan in PLD (1957) Lahore 17 per Kayani & Sharif JJ*]

Similarly, suspension of a Government servant does not amount to reduction of rank within the meaning of ART 181 This principle appears to be well settled in India (See the cases of *Provincial Government C P and Berar v Shamsul Hussain, AIR (1949) Nagpur 118; Kali Prosanna Roy v State of West Bengal AIR (1952) Calcutta 769, Pulin Behari Chakraburty v The Divisional Superintendent, Sealdah East Indian Rly and others AIR (1953) Calcutta 45, Dandapani Gouda v The State of Orissa AIR (1953) Orissa 329*) *But there may be a case* in which suspension is ordered as a substantive punishment under departmental regulations, in which case, however, the principle of ART. 181 would be attracted and the public servant affected would be entitled to be heard before a punishment of that kind could be *validly inflicted upon him But suspension in the sense of mere interruption of work*, pending final disposal of the allegations in regard to misconduct made against a public servant, is not within the rule

The expression 'reduction in rank' has been subject matter of judicial consideration [illegible] views in regard to reduction in rank In a [illegible] *AIR (1952) Nag* 288], it was held that in the [illegible] if he is reverted to his original post in the normal course, there is no question of a punishment or penalty being imposed and the application of the provisions of ART. 311 of the Indian Constitution, which corresponds to our ART. 181, does not arise, but it would be *entirely a different thing* if such a servant is degraded or reverted to his original rank as a measure of punishment for having committed some offence or for indiscipline or insubordination or misconduct. Such a reversion is

possible the grounds on which it is proposed that the penal action be taken. Every servant should be given reasonable opportunity of showing cause why such punishment shall not be imposed.

(5) It has been held that reasonable opportunity to show cause does not include any idea of a right on the part of a public servant to be heard orally in support of his case. In each case upon an issue being raised it is for the Court to say on the facts and circumstances of a given case whether or not, in fact, the *reasonable opportunity to show cause has been extended to a public servant* before the penal action was taken against him.

(6) Provisions of ART. 181 being mandatory, if a dismissal, removal or reduction in rank takes place contrary to its clauses, the public servant aggrieved by the order is entitled to have the orders declared as void and inoperative, and further that he can have a declaration in his favour that he continues to be a member of the service at the date of the institution of the proceedings. [See (1948) *P.C. p.* 121, *Lall's case*]. Such a servant is also entitled to recover the arrears of his salary. [*State of Bihar v. Abdul Majid, AIR* (1954), *S.C.* 245].

(7) Any attempt to by-pass the requirements of ART. *181* would not be encouraged by our courts. There are bound to be cases in which the authority reducing a public servant in rank, would like to take shelter behind the plea that the action taken by it is due to the logic of administrative policy—when, in fact, it is born only out of a desire to punish, to degrade or to humiliate a public servant. Any colourable contrivance of this kind to circumvent the requirements of ART. 181 would be denounced by our courts and declared as "unconstitutional". Any attempt to avoid the duty of obeying the mandates of the Constitution is a fraud on power and would be condemned as such by our courts.

(D) *JUDICIAL POWER AND THE MARTIAL LAW*

198. Concept of Martial Law and our Constitution

The constitutional position in regard to the status of Martial Law in the scheme of our legal order cannot be deciphered merely by making a reference to any actual provisions of our Constitution, and it is legitimate to suppose that the concept of the Martial Law, as known to the pre-Constitution state of the law of our country, continues to prevail under the authority of ART. 224, even after the coming into force of our Constitution.

There are, however, a few significant features of the text of our Constitution, to which reference must be made in an attempt to clarify the constitutional position in regard to "Martial Law" *qua* the sovereign concept of the Rule of Law as it obtains in our country. Throughout the text of our Constitution no reference has been made to *Martial Law* as such, except in ART. 196, where, it is provided that notwithstanding anything in the Constitution, the Parliament shall have the power to make any law indemnifying any person in the service of the Federal or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan where martial law was in force, or validate any sentence passed, punishment inflicted, forfeiture ordered or any other act done under martial law in such area". It would thus appear that imposition of martial law is within the power of the appropriate administrative authorities and the Parliament has the power to pass what are called Acts of Indemnity. ART. 196 of our Constitution corresponds to ART. 34 of the Indian Constitution which is appropriately located in the 3rd part of the Constitution dealing with Fundamental Rights. (See the Appendix)

The other references to martial or military law in our constitution are the following:

attracted Thus, for instance, penalties like censure, withholding of increment or promotion, reduction to a lower post in a time scale, recovery from pay of a part or whole of a pecuniary loss caused to Government by negligence or breach of orders, suspension, removal from service and dismissal could be inflicted under Rule 49 of the (Civil Services Classification, Control and Appeal Rules) But it is only in cases where there is dismissal or removal from service or reduction in rank that the opportunity to show cause would be extended In such cases, therefore, whether or not reasonable opportunity to show cause should be given involves the determination of a question of fact, namely, whether what his actually been done in the case of public servant amounts to his being penalised This question of fact can only be resolved upon the evidence made available to Court and care should be taken to remember that the form of words used in the order passed against the public servant is not by itself sufficient to determine the *nature* of the action that has been taken against the public servant [See the cases of *C Sambandam v The General Manager South Indian Railway, Tiruchirapalli, AIR* (1953) *Madras* 54 (1952) 1 *Madras Law Journal* 540, and *Ramesh Chandra v State of West Bengal AIR* (1953) *Calcutta* 188]

(3) The reasonable opportunity of showing cause against proposed punishment may arise at more than one stage—as, for instance, under the Civil Services Conduct Rules, the first opportunity to show cause has to be given at the time when the truth

Council, 121 at p 126

"No action is proposed within the meaning of sub section until a definite conclusion has been come to on the charges, and the actual punishment to follow provisionally determined on Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical It is on *that stage being reached that the statute gives the civil servant the* opportunity for which sub section (3) makes provision Their Lordships see no difficulty in the statutory opportunity being reasonably afforded at more than one stage If the civil servant has been through an enquiry it would not be reasonable that he should ask for a repetition of that stage if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry "

[See also *C Sambandam vs The General Manager S I Railway, AIR* (1953) *Mad 54 at p 56 and Jatindra Nath v R Gupta AIR* (1954) *Cal* 383]

(4) In order to give 'adequate' opportunity or 'reasonable opportunity', to show cause, it is necessary that the *grounds* on which the authority is proposing that penal action should be taken, should be set forth in the notice In some cases, as has been pointed out by the Privy Council in the case of *I M Lall* referred to above it would be sufficient to indicate the *charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being*

be dismissed, reduced in rank must *know* that punishment is proposed as the punishment for certain acts or omissions on his part and he must be told in the clearest terms

Courts Martial constituted under the *Army Act*, the *Naval Discipline Act* and the *Air Force Act*.

"In the *second* sense, the word martial law means 'military Government in occupied territory', and is used to describe the powers of a military commander in times of war in the enemy territory. In this sense, martial law is recognised by Public International Law as a part of the *jus belli*. The Duke of Willington had this kind of martial law in mind when in a debate in the *House of Lords* he said:

'Martial Law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all.'

"In the *third* sense in which it is a part of *English Constitutional Law, martial law* means the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrections or other disorders in the land. In *American Constitutional Law*, martial law in this sense is a form of the police power of the State and means law which has application when the military arm does not supersede civil authority but is merely called upon to aid such authority in the execution of its civil functions." (*See Rex v. Kenneth, 5 Car. & P.* 282; *Rex v. Pinney, 5 Car.* & p. 254; *Phillips v. Eyre*, (1870). 6 *Q. B.* 1.)

After quoting a passge from *Chief Justice Tindal*'s charge to the *Bristol Grand Jury* (172 *English Reports page* 966 of the year 1832.) the *Chief Justice* proceeded to observe: (at p. 536)

"It will be noticed that the justification of this form of martial law, if it can at all be so called, is the common law of England and several statutes which create rights in and impose obligations on citizens and servants of the Crown in the matter of suppression of riots . . . . The Privy Council . . . . observed in *Marais v. G.O.C. Lines of Communications* (1902 A.C. 109), that where war prevails the ordinary courts have no jurisdiction over the action of the Military but that it is for the Civil Courts to decide whether a state of war exists or not.

"In seeking to discover the source and reason of Martial Law, the best course to adopt is to find an answer to a few simple questions. In case of war or invasion do the military have a right to act *suo motu*? If so, do they have the same right where there is a riot, insurrection, revolt or rebellion which, if not suppressed immediatery, may become a successful revolution? If the answer to both these questions be in the affirmative, a third question, and that is the most important question, immediately presents itself, namely, what are the powers of the military when called upon to act in any such contingency? Can they for the purpose of suppressing the riot or rebellion, make their own Rules and Regulations, set up their own courts to enforce such Rules and Regulations and thus infringe the right of freedom of person and of enjoyment of property to which citizen are entitled under the ordinary law in peace time? If constitutional jurisprudence furnishes an answer to these questions, that is martial law *sui generis*."

The foregoing extracts from the judgment of *Justice Muhammad Munir* represent the condensed essence of what the Courts in England and in our country have held to be the true scope and character of martial law.

Martial Law—as law of necessity

It would be noticed that the right to administer force against force is a *common law right* and the martial law, if it is law at all, is a law of necessity which must surrender to the rule of law as recognised and enforced by ordinary civil courts of the country when the conditions that led to its enforcement have ceased to prevail and society returns to state of normalcy. To the same effect were the observations of *Lord Halsbury* in the case of *Tilonko v. Attorney-General of Natal in* (1907) *A.C. page* 93, (*P.C.*) where his *Lordship* observed as follows :—

In the Fifth Schedule, in Entry No 1 of List III (the Provincial List), we have an exception of the following kind mentioned Public order (but not including the use of Naval, Military or Air Force or any other Armed Forces of the Federation in aid of the civil power) In the Federal List, the first two paragraphs of Entry 1 deal with (a) Defence of Pakistan (b) the Naval, Military and Air Forces of the Federation and any other *armed forces raised or maintained by the Government of the Federation*, *armed forces* which are not forces of the Federation but are attached to or operating with any of the armed forces of the Federation, any other armed forces of the Federation, including Civil armed forces In the Chapter relating to fundamental rights in the 3rd clause of Article 4, we have a clear exception stated in regard to the non availability of the fundamental rights to members of "the Armed Forces or the Forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them " We have also in Article 40 a provision to the effect that the Supreme Command of the Armed Forces shall vest in the President, and the exercise thereof shall be regulated by law " In the Chapter relating to Services of Pakistan, in Article 180, we have the tenure of office of a member of Defence Service maintained at the same level as that of any person in the Civil Service of Pakistan It is clear that the constitutional safe guards enacted in ART 181, are not available in the case of a member of the Defence Service Entry No 1 of List III & List I of the Fifth Schedule

199. Some definitions of Martial Law considered

"Martial Law in the proper sense of that term", so runs the statement as to the meaning of that phrase in *Wharton's Law Lexicon* 'means the suspension of ordinary law and [illegible] als " It must be clearly [illegible] which forms part of the [illegible] mes used as meaning the common law right of the Crown to repel force by force in the case of insurrection invasion or riot and to take such exceptional measures as may be necessary for the purpose of restoring peace and order

As to the constitutional foundations of the existence of Martial Law, as it is known to the *English Common Law*, it was observed in *Blackstone's Commentaries*, *Vol I*, *p* 413, "For Martial Law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is as *Sir Matthew Hale observes*, (*in his History of Common Law*) in truth and reality no law, but something indulged rather than allowed as law The necessity of order and discipline in an army is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the *King's Courts* are open for all persons to receive justice according to the laws of the land ' [See also *Grant v Gould* (1792) 2 *H Bl* 69]

The meaning and scope of Martial Law were set forth with admirable lucidity by *Justice Muhammad Munir* in a Full Bench case decided by the *Lahore High Court* reported in *P L D* (1953) *Lahore* 528 *at* 533 (*Muhammad Umar Khan v The Crown*), and the present writer can do no better than reproduce some extracts from that decision in an attempt to present in a concise form the statement of law in regard to the true character of Martial Law Muhammad Munir's summing up in Mohd Umar Khan versus The Crown

> "In constitutional jurisprudence ', said *Muhammad Munir*, *C J*, "*Martial Law* is used at least in four differnt senses In the *first* sense, it is used with reference to the law relating to discipline in the armed forces of the State which is administered by tribunals, called Courts Martial These courts are constituted for the purpose of regulating the government of the military and their jurisdiction in no circumstances extends to the civilians In our country, martial law in this sense means the law administered by

Phillips vs. Eyre.

As to the legal import and character of *Indemnity Act*, *Chief Justice Cockburn* in the case of *Phillips v. Eyre*, reported in 1869 4 *Q.B. page* 225, made some observations which are instructive in this context as they help the comprehension of the reason why such a legislation is passed:

"There can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individual who, innocent possibly of all offence, have been subjected to injury and outrage often of the most aggravated character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of most tyrannical, arbitrary and merciless character, acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices, or fears—acts not done with the temper and judgment which those in authority are bound to bring to the exercise of so fearful a power, but characterised by reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that against any abuse of local legislative authority in such a case protection is provided by the necessity of the assent of the Sovereign, acting under the advice of Ministers, themselves responsible to Parliament. We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will, therefore, be incumbent on the defendant to make good these averments in order to support his plea."

Martial Law and the U.S. Constitution.

With regard to the concept of Martial Law as it is known to Constitutional Law of America, a few words needs must be said. Section 4 of Article IV of the *U.S. Constitution* is usually invoked for the purpose of justifying the imposition of martial law. That provision is in the following terms:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Further it should not be forgotten that it is the *President* who under the United States Constitution is the *Commander-in-Chief* of the Armed Forces. (See Section 2 of ART. II of the United States Constitution.)

The President under our Constitution too has nevertheless vested in him the Supreme Command of the Armed Forces but there is a fundamental difference in regard to this Constitutional conception as it is known to the two systems of jurisprudence: under our Constitution the power to declare war and peace lies with the Prime Minister and his Cabinet and the exercise of the Supreme Command by the President "shall be regulated by law". The American President has unqualified power to act as the executive of the U.S. Government but our President is constitutionally bound to act under advice in this field. The United

"The notion that 'martial law' exists by reason of the proclamation—an expression which the learned counsel has more than once used—is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force." Til k A G Natal

And then his Lordships proceeded to observe:—

But it is found convenient and decorous, from time to time, to authorise what are called 'courts' to administer punishments and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so called courts martial administering summary justice under the supervision of a military commander analogous to the regular proceedings of courts of justice is quite illusory.

The *Acts of Indemnity* are usually passed after the conclusion of the period of martial law. The purpose of such legislation is to deprive the civil courts of their jurisdiction to undertake a judicial review of the acts committed during the martial regime by the military officers and others acting in their aid. Such, for instance, was the legislation passed by means of a pre Constitution Ordinance by the Governor General acting under S. 42 of the Government of India Act, 1935, being *Ordinance No. II* of 1953 indemnifying the servants of the Crown and other persons in respect of acts done by them in good faith under martial law and validate sentences passed by special military courts. It would be useful to reproduce some of the provisions of that Ordinance to show the extent to which the jurisdiction of courts to enquire into acts committed by the servants of the Crown had been curtailed:— The pu of an A Indemn

"S. 3 (1)—No suit, prosecution or other legal proceeding shall lie in any court against any servant of the Crown for or on account of or in respect of any act ordered or done by him or purporting to have been ordered or done by him in the martial law area during the martial law period for the purpose of maintaining or restoring order or of carrying into effect any regulation, order or direction issued by any authority responsible for the administration of martial law in the said area to which he was subordinate, and no suit, prosecution or other legal proceedings shall lie in any court against any other person for or on account of or in respect of any act done or purporting to have been done by him under any order of a servant of the Crown given for any such purpose as aforesaid:

Provided that the act was done in *good faith and in a reasonable belief* that it was necessary for the purpose intended to be served thereby."

S. 6.—All sentences passed during the martial law period by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall be deemed to have been lawfully passed, and all sentences executed according to the tenor thereof shall be deemed to have been lawfully executed."

S. 7 (1)—Every person confined under and by virtue of a sentence passed by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall continue liable to confinement until the sentence, as reduced by remissions, if any, earned under the rules applicable to the serving of such sentence, is served, or until he is released by order of the Central Government."

This legislation was declared *intra vires* in the case of *Muhammad Umar Khan v. Crown* (*PLD* 1953, *Lah.* 528) referred to above.

Legislature to pass an Act of Indemnity and make suitable provisions defining the extent to which the consequences emanating from the enforcement of martial law, after the cessation of its period of enforcement, should not be given judicial effect by the ordinary Civil Courts in this country. And this legislative power is conferred only on the *Parliament*. (See ART. 196 of our *Constitution*.)

lartial Law s an aspect of *jus belli*.

Martial Law *fourthly* and *finally* as a concept of international law enters as an aspect of *jus belli*. In that sense Martial Law is 'incidental to the state of solemn war and appertains to the law of the nations.' The municipal laws have nothing to do and therefore cannot provide for Martial Law in this sense: it is the province of international law to determine the precise implication of this term.

200. Canadian Governor-General's Right to Proclaim Martial Law

On January 16th, 1838, the *Attorney and Solicitor General, Sir John Campbell* and *Sir R. M. Rolfe* in their joint opinion tendered advice to the *Governor-General of Canada* on the question relating to his *right to proclaim Martial Law*: after remarking that such a right flowed, as a necessary consequence of the 'undoubted prerogative of *His Majesty* for the public safety to resort to the exercise of Martial Law against open enemies or traitors', the authors of the opinions emphasised that it is not essential for *Martial Law Regime* to be validly imposed that it should be preceded by a proclamation to that effect. Proclamation in such cases merely constituted a notice to the public generally as to the existence of conditions that had compelled the sovereign power to resort to the imposition of the Martial Law. In the 'opinion' it was further observed:

> "The right of resorting to such an extremity is a right arising from and limited by the necessity of the case—*quod necessitas cogit, defendit*. For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the *Irish rebellions of* 1798 and 1803, and also of the *Irish Coercion Act of* 1833.
>
> "From the foregoing observations, your Lordship will perceive that the question, how far Martial Law, when in force, supersedes the ordinary Tribunals, can never in our view of the case, arise. Martial Law is stated by Lord Hale to be in truth no law, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded."

201. The concept of Military Law

Before concluding our consideration of this topic of martial law we might add a few observations to clarify the concept of martial law in the sense in which it more appropriately is described *Military Law*. *Military Law* in this context is distinguishable from *civil law* and is that branch of law which regulates the *Constitution, Powers* and *Jurisdiction of Courts-Martial* to punish persons subject to that law. Military Courts are to be distinguished from courts-martial; generally speaking a military court in occupied territory is, as its name suggests, a court which is set up by the Military Commander to try persons who commit offences in the territories which are under military occupation, whereas a military court for Prisoners of

States President, in his capacity as the chief executive, has his duty limited not merely to en forcing the rights, duties and obligations growing out of the Constitution but his power also extends to these matters as they stem from the Constitution, the international relations of the United States and to all the protection implied by the nature of Government The Con gress under the United States Constitution has the power to declare war but should the

gress, that is, it alone can put the country into a state of war *ab initio* (See *Cunningham v David Neagle* (1890) 135 *U S* 1 *at p* 64 34 Law Ed 55)

The two theories of martial law as reflected in the decisions of the *Supreme Court* have been stated by way of a summary statement in the *Senate Edition of the Constitution of the United States of America*, 1952 *Edition, at page* 398, as follows

"By *one*, which stems from the *Petition of Rights* 1628, the common law knows no such thing as martial law, at any rate martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity of which necessity the civil courts are the final judges By the *other* theory martial law can be validly and constitutionally established by supreme political authority in war time "

(The student is referred to *Charles Fairman's The Law of Martial Rule, Chicago* 1930 *and the case of Ex Parte Milligan of the year* 1866, 18 *Lawyers Edition page* 281 *for a* detailed study of the constitutional position as it obtains in the United States on the question relating to martial law)

The position in America Limits within which Martial Law operates stated

The *limits* within which martial law (if it be called law at all), being a law of necessity is available as a defence in the ordinary civil courts, were stated by Chief Justice Muhammad Munir in the case of *Muhammad Umar Khan v Crown, PLD* (1953) *Lahore* 528 referred to above

"Whether where the defence of necessity and good faith cannot be founded on civil law, e g right of private defence or the use of force to disperse unlawful assemblies and there is no indemnity bill, it will be recognised by civil courts is an open question though observations occur in several cases clearly indicating that such necessity will be recognised as a good defence (*Phillips v Eyre* 1870 6 *Q B* 1 and *Tilonko v Attorney General of Natal* 1907 *A C page* 93) If martial law is law and its limits are prescribed by necessity, then

(1) Not only the Crown has the prerogative to proclaim martial law but without any such proclamation the military can take over where by war, insurrection re bellion or tumult civil authority is deposed, suspended or paralysed,

(2) all acts done by the military which are either justified by the civil law or were dictated by necessity and done in good faith will be protected, even if there be no bill of indemnity,

(3) while preventive action for the duration of the martial law will be valid, punitive action will generally be invalid,

(4) martial law will cease *ipso facto* with the cessation of the necessity for it, and

(5) sentences of confinement by military courts will expire with the expiry of the martial law " (P 539)

If any or all of the above consequences that would ordinarily ensue upon the cessation of the period of martial law, are to be prevented from taking effect, it is for the

shall be detained in Military custody. Under S. 95, power has been given to the ordinary criminal court, having jurisdiction in the matter, to require, if it is of the opinion that proceedings against an offender ought to be instituted before itself, the *prescribed officer* at his option either to deliver the offender to the nearest magistrate to be proceeded against according to law or to postpone further proceedings pending a reference to the Central Government, and under S. 96 is preserved the superiority of the civil court in respect of trial of a person who has been convicted or acquitted by a court martial. The Section provides :

"96.—(1) Notwithstanding anything contained in section 26 of the General Clauses Act, 1897, or in section 403 of the Code of Criminal Procedure, 1898, a person who has been convicted or acquitted by a court martial, or whose case has been summarily disposed of under this Act or the rules framed under this Act, may be afterwards tried by a criminal court for the same offence or on the same facts.

(2) If a person, who has been awarded a punishment for an offence by a court martial or otherwise in pursuance of this Act, is afterwards tried by a criminal court for the same offence or on the same facts, that court shall, in awarding punishment, have regard to any punishment he may already have undergone in respect of that offence."

It should be noticed that this section is to prevail over S. 26 of the General Clauses Act or S. 403 of the Code of Criminal Procedure.

These sections are as follows:—

(a) *S. 26 of the General Clauses Act*:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

(b) *S. 403 of Criminal Procedure Code*:

"403 (1)—A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which

War is a Tribunal, which is convened by a detaining power pursuant to the International Convention relative to the treatment of prisoners of war to try cases of alleged offences committed by Prisoners of War in captivity Generally speaking, military courts enforce martial law whereas Courts Martial enforce Military Law (See Military Courts Manual by Treadwell, London, 1945) Certain pieces of legislation exist on the statute book of Pakistan like the *Army Act*, 1952, the *Naval Discipline Act*, 1934, the *Air Force Act*, 1953, which more appropriately may be described as Military Law in this sense Under the Army Act, for example, *General*, *Field General*, and *District*, and *Summary Courts Martial* are set up (see S 80 of the *Pakistan Army Act*, 1952) these Courts Martial are thus, in effect, statutory courts and their procedure and jurisdiction are controlled by the provisions contained in these Acts Their main function is to enforce military law in respect of soldiers and such civilians, mentioned therein, as have, by reason of their employment or occupation, rendered themselves subject to military law When a person joins the armed

(See *Military Courts Manual by G W Treadwell, London*, 1945, pp 12 13)

In England as far back as in 1689, by the first *Mutiny Act*, the law relating to the main tenance of discipline in the standing army was put on a statutory basis and since then the law has to be re enacted by Parliament annually This is also true of the *Air Force Act* but not of the *Naval Discipline Act* In our country, however, all these Acts are perpetual Acts in the sense that they have not to be renewed periodically The student of the historical

e with its Stuart

the Army Act,

ercise an annual

control over the maintenance of King's Armed Forces Each year the Army Act had to be re enacted and of course if Parliament did not re enact it the maintenance of standing Army (and the expenditure involved in maintaining it) would become unconstitutional

202. Personnel of the Armed Forces and their relationship with General Law of the Land.

To the student of constitutional law the actual content of these three Acts that govern the Armed Forces of our country is not so important what is important for him is to grasp the legal relationship which the personnel of the Armed Forces sustain to the general system of the civil law

Certain propositions in this behalf are well established and we will proceed to expound them in as brief a measure as possible

(1) A soldier who is liable to be dealt with under the *Army Act*, *Naval Discipline Act* or *Air Force Act*, continues to be liable under the ordinary civil law By becoming a soldier, a person does not cease to be a citizen He continues to be subject to the ordinary law of this country Most of the offences punishable under the Penal Code of Pakistan are also punishable under the Army Act No doubt, a special procedure for the trial of offences by courts martial is prescribed but the overall liability to being proceeded against under the ordinary civil law of the land is not thereby abrogated

We will illustrate this by making a reference to the Army Act Section 94 of the Pakistan Army Act (XXXIX of 1952) consigns the actual choice of the kind of court, whether civil or court martial, where an offender is liable to be tried in respect of a civil offence, to the *discretion* of a *prescribed officer*, and if that officer decides that the proceedings in respect of a given offender shall be taken before a court martial such a person

"This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the *Courts of Westminster Hall*, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the *Courts of Westminster Hall* for a prohibition. *Naval Courts Martial*, *Military Courts Martial*, *Courts of Admiralty*, *Courts of Prize*, are all liable to the controlling authority, which the *Courts of Westminster Hall* have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them."

Rex vs. Secy. for War Ex-Parte Martyn.

In later cases, however, the scope of the power of interference of Civil Courts with the determinations of Courts-Martial has been considerably narrowed down and it would appear from as recent a case as *Rex v. Secretary of State for War ex parte Martyn* (1949) 1 *All E.R.* 242, that the principle to be deduced is that when the finding of a Court-Martial is challenged in a Civil Court, all that need to be determined is whether the Court-Martial had jurisdiction to try a particular person. This question being answered in the affirmative, the further issue, whether proper rules of procedure had or had not been followed, will not be a matter for the King's Bench to determine. That Court can only interfere with Military Courts and matters of Military Law in so far as the *civil rights* of the soldier or other person with whom they deal may be affected. The provision which formed the subject matter of debate in that case was *Rule* 34(*c*) *of the Rules of Procedure*, 1926, framed under *S.* 70 of the *Army Act*, 1881, which had provided that "If the Court allow the special plea, they shall record their decision and the reasons for it, and report it to the convening authority and adjourn; such a decision shall not require any confirmation, and the convening authority shall either *forthwith* convene another Court for the trial of the accused, *or order the accused to be released*". The question before the Court was whether, in the event of a convening authority not *forthwith* convening another Court-Martial, the second belated Court-Martial will have jurisdiction to try the offender. Lord Goddard in that very case remarked : to allow this contention would amount to deciding that the members of the Court-Martial were wrong in holding that they had been convened in accordance with the Rules of Procedure. That, according to the learned Judge, was a question essentially within their competence to decide, it being a matter "of Military procedure" and consequently it would be one to interfere with which, the *Court of King's Bench* would have no jurisdiction.

It is submitted with respect, that this is taking too narrow a view of the extent and reach of the controlling power of the High Court with respect to the determinations of Courts-Martial. The case cited, *prima facie* would certainly be establishing a departure from the wide range of power which according to the rule laid down in *Grant v. Gould* vests in the High Court. To allege that all questions of defect of jurisdiction must emerge from sources external to and apart from the breaches of the provisions of Military Law, would be tantamount to taking too narrow a view of the situation. It is submitted that, in the last resort, it is immaterial whether the breach of either the provisions of *statute* or *rules made thereunder are regarded as furnishing the basis for holding that the Courts-Martial have acted in either total absence or excess of their jurisdiction*. In each case, it remains to be seen whether the breach or violation of the provision of law or rules is one that *affects jurisdiction* or is again one which may be viewed as being something incidental to the exercise of jurisdiction lawfully assumed by the Court-Martial.

Rex vs. Officer Commanding.

In yet another case *Rex. v. Officer-Commanding Depot Battalion etc. ex parte Elliott*, (1949) 1 *All E.R.* 373, the ground of attack against the validity of Court Martial's determination was based on the alleged infringement of certain *rules* which had provided for the bringing up of offenders for trial before Court-Martial *within certain time-limit*. The Court

he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged

(5) Nothing in this Section shall affect the provisions of S 26 of the General Clauses Act, 1897, or S 188 of this Code "

It should be noticed that S 26 of the General Clauses Act prohibits a *second punishment* being inflicted in respect of the same offence for which under one of the two or more enactments a man has already been prosecuted and punished S 403, however, prevents an ordinary criminal court from trying an offence which has been dealt with by *a court of competent jurisdiction for an offence and convicted or acquitted of such offence while such conviction or acquittal remains in force*

This principle of the paramountcy of the ordinary civil courts would also be found preserved in the *Naval Discipline Act of* 1934 (See S 101), and the *Air Force Act of* 1953 (See S 125)

(2) "When a soldier is put on trial on a charge of crime", says *Dicey*, "obedience to the superior's order is not of itself a defence He is bound to obey any lawful order which he receives from his military superior, but a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience of the order (say) of the Commander in Chief Hence the position of a soldier in theory and may be in practice, is a difficult one He may as it has been well said, be liable to be shot by a court martial if he disobeys an order [illegible] aw of the Constitution [illegible] the *Cape of Good Hope* [illegible] 561 *of the year* 1900)

Solomon J adopted the rule laid down in *Manual of Military Law* as a reasonable and proper rule to apply in cases where a soldier has obeyed unlawful orders of his superior *That rule states "that if the Commands are obviously illegal, an inferior* would be justified in questioning or even in refusing to execute such commands but as long as the orders of the superior are not obviously and decidedly in opposition to the Law of Land, or to the well known established custom of the Army so long must they meet with complete and unhesitating obedience There is an opinion of Mr Justice Willes to the effect that an officer or soldier acting under orders from his superior which are not necessarily or manifestly illegal, would be justified " [See *Keighly v Bell* (1866), 4 *F & F*, 763 *at p* 790]

(3) The civil courts have the power by their process to undo the effect of what the courts martial have done provided that it can be shown that they have acted in excess of their jurisdiction Thus if courts martial assume jurisdiction in respect *of persons not liable to be tried by them*, a *writ of habeas corpus* will issue directing the detenu to be released forthwith (See *M S K Ibrat v The Commanding Officer, H M P S "Dilawar" and others in P L D* (1956), *Karachi* 324)

203. Controlling Jurisdiction of the High Court and the Courts-Martial

Th[illegible] of the High C[illegible] ART [illegible] could also reach [illegible]

that these Courts Martial have acted without jurisdiction The earliest case of considerable relevance upon the subject is the one already referred to namely *Grant v Gould*, (1792) 2 *H Bl* 69, where it was observed with respect to the jurisdiction of the power of the Supreme Court (at p 100)

petitioner, and any one reading the judgments of the three Judges who presided the Court, will gain the impression that according to their Lordships, Civil Courts will interfere only if, as a result of what the Court-Martial does, the civil rights of a person subject to Military discipline are affected. The expression 'civil right' has not been defined in any of the judgments that were delivered in the case but from the facts of that case it would appear that the right to be retained in Service was not considered such a *civil* right so that an invasion of that right could give rise to a cause of action with respect to which controlling jurisdiction of the superior court could be validly exercised.

It is submitted that the decisions cited above are no *reliable* guide for the purpose of determining the *extent of the power of the High Court under our Constitution to interfere with the determinations of the Court Martial.* If the authority of *Grant v. Gould* is given its full effect, the jurisdiction of High Court in *certiorari* and prohibition (as also in *habeas corpus*) proceedings would be as broad as it would be in any other case where determinations of other *inferior* tribunals are involved.

It is important to remember that in England the question of the efficaciousness of the controlling jurisdiction of the High Court has lost much of its importance in view of the passing of *Court Martial (Appeals) Act of* 1951 (14 *and* 15 *Geo. VI c.* 46), whereunder a person convicted by Court-Martial may, with the leave of Court-Martial, lodge an appeal against his conviction.

204. A Comment on ART. 160—Ouster of the Jurisdiction of the Supreme Court.

The appellate jurisdiction of the Supreme Court of our country, which could have conceivably been exercised under ART. 160 to examine the proceedings of Courts-Martial, has been expressly taken away by that Article itself, and a person aggrieved by the determinations of Court-Martial can only invoke the jurisdiction of High Court under ART. 170. Although, the High Court would give due weight to the principle that a person subject to Military Law has by his own free will engaged himself to submit to that law for what it is worth, yet despite this consideration, but consistently with another principle, namely that Courts-Martial themselves being creatures of statute must move within the well defined area of their authority described therein and that they are, therefore, under a statutory obligation to conduct themselves in accordance with the procedure described therein, the High Court will vigilantly guard against any transgression of their jurisdictional powers and would see to it that they are effectively confined within the area of authority reserved to them under the law. [See further In re *Allen* (1860), 30 *L.J.Q.B.* 38; *as* also *Rex v. Governor of Wormwood Scrubs Prison, ex parte Boydell* (1948) 1 *All E.R.* 438: 2 *K.B.* 193; see also the case of *M.S.K. Ibrat v. Commander-in-Chief of Navy*, (1956) *P.L.D. S.C.* 264.]

(E) THE JUDICIARY AND THE ELECTION LAW

205. A comment on ART. 146

Article 146 of our Constitution provides:

"No election to the National Assembly or a Provincial Assembly shall be called in question except by an election petition presented to such authority and in such manner as may be provided by Act of Parliament."

The adjudication of disputes with regard to the validity of election is thus taken out from the jurisdiction of the ordinary courts and a special procedure has been prescribed by recourse to which alone the elections, in the first instance, can be called in question under the Article in question. An election petition has to be presented to such *authority* and in such *manner* as may be directed by Act of Parliament: it would appear,

of *King's Bench Division* presided over by *Lord Goddard* refused the writ (it is submitted, rightly), remarking that the contravention of a provision of that kind would be no ground for the exercise of controlling jurisdiction of the *King's Bench Division* Depot Battal on Ex Parte Elliott

In both of these cases it would appear that the only reason that the Court gave for declining jurisdiction was the fact that the persons complaining against the determinations of Courts Martial were found to be *subject* to Military Law

It is submitted that the issue whether or not a person is subject to Military Law is not decisive of the question whether the Court Martial had or had not the jurisdiction to deal with him *in the way it did* The mere finding of the subject hood to Military Law does not conclude the issue of jurisdiction of the Court Martial, in fact, cases could be conceived where the Court Martial may be said to be acting in the absence or excess of its jurisdiction, merely because it had violated the mandatory provisions of law that defined its jurisdiction In such cases it would hardly be disputed that the Court Martial would be acting without any jurisdiction, and that its determination would be a nullity The defect of jurisdiction of Courts Martial would arise, and it is submitted can only arise, when there is contravention of some provision of military law—and a non compliance with the provisions of military law that deal with the question of a person being liable under the Military Law is only one form of defect of jurisdiction How could it then be said that if only a person is proved to be subject to Military Law he cannot be heard to say that in his case Court Martial acted without jurisdiction in dealing with him? Similarly, the consideration that Civil Courts would interfere with the determinations of Courts Martial *only when civil rights of the person aggrieved are thereby affected*, does not do justice to, much less clearly present the principle involved in the maintenance of so rigid an attitude towards the scope of the controlling jurisdiction of the High Court For any writ to issue to an inferior tribunal the person approaching the High Court must show that he *is aggrieved* by the determination of that inferior tribunal—in other words, that his rights have been adversely affected If by the expression 'civil rights' is meant the aggregate of a person's rights to *life*, *liberty* and *property* there is no harm in using that expression—for it is undoubtedly true that unless there is actual or threatened invasion of some well defined right to life, liberty and property the Courts will not entertain petitions for the issue of writs

In this context, it is instructive to consider the case of *Rex v Mansergh* (1861) 1 *B & S* 400, where the question was whether a writ of *certiorari* to quash an order of petitioner s dismissal passed by the Court Martial could issue even on the ground that that the Court Martial had no jurisdiction to try the petitioner It was alleged in that case that at or about the time of the offence the petitioner was not in the Indian Service but in the 15th Regiment of Foot stationed in England and the Chief of the Indian Army had no jurisdiction to convene a Court Martial for his trial Rex vs Man ergh

It should be remembered that the sentence awarded to the petitioner was one of *dismissal* and not that of, either sentence of imprisonment, or of death The prayer for the issue of writ was rightly refused upon the view that a person who enters in Military Service virtually surrenders himself at the will and pleasure of the Sovereign in so far as the term of his office is concerned and that, such a person cannot be heard afterwards to complain that he has been wrongfully dismissed If the Sovereign can terminate his service at its will and pleasure then the question that this was done by a Court Martial that did not have jurisdiction to do so ceases to be relevant

It is no doubt true that the judgment of the Court proceeded upon the basis of a distinction between infringement of *civil rights* and the *rights affecting Military status of the*

the various candidates and pronounce upon the validity of these nomination papers: it would seem to follow from this that should he decide to accept the nomination paper of a person in whose case the qualifications prescribed by ART. 32(2) are not fulfilled, there is no means of rectifying the error, if ART. 32(3) is construed as throwing a mantle of protection over even the misdeeds of the Election Commissioner so glaring as the one supposed in this case.

It is suggested that the way out of these difficulties is to confine the question of the immunity given by ART. 32 (3) with regard to the competence of courts to question the validity of President's election to the inviolabilty of all requirements regarding the electioneering process—except the questions relating to compliance with the qualifications prescribed by the Constitution. The argument in support of this view is that when a person does not fulfil the qualifications prescribed by the Constitution he cannot even offer himself as a candidate for election— and as that is a matter which is external to the total electioneering *process* and constitutes a defect in the holder of the office it is amenable to being inquired into by means of a *writ of quo-warranto*. The Election Commissioner has no jurisdiction to abrogate the requirements of ART. 32(2) in the case of a candidate who contests the Presidential election and he cannot be suffered to do so by giving a perverse finding of fact in favour of holding a given nomination paper to be valid. Paragraph 4 of Schedule I enjoins that any member of National or Provincial Assembly may nominate for election a person *qualified* for election as President, and under paragraph 5, the scrutiny into the validity of the nomination paper is to be held by the Chief Election Commissioner and it is after this determination has been made, namely that the nomination paper is valid, that the person whose nomination paper is valid is put on path to being elected—he will be *forthwith* elected if there is no other rival candidate having a valid nomination in his favour, or he will be duly elected after the contest at the poll. Is determination of the question relating to the *validity of nomination paper* not a condition precedent to the commencement of the electioneering process—so as to take it out of the sphere of immunity afforded by ART. 32 (3) to the validity of the election of the President from being called into question by Court?

In other elections, the question as to the validity of nomination papers is normally regarded as being a matter inquirable by means of an election petition—but this is so, not because nomination is a step in the electioneering process but because statutes like Corrupt Practices Order etc. by artificiality of construction have expressly declared these questions as being within the competence of Election Commissioners to inquire into and adjudicate.

therefore, that special legislation is necessary before effect can be given to the provisions of ART 146 Until provision is made by an Act of Parliament, the making of election petition will continue to be covered by pre existing legislation on the subject which has been preserved and perpetuated by ART 224 of our Constitution Hitherto, the law covering the presentation of election petitions arising out of Provincial Elections and settlement of disputes concerning them has been regulated by *Corrupt Practices Order of* 1936 and the rules made by the Provincial Legislatures in that behalf The *Corrupt Practices Order* in its Third Part, Para 2, lays down as follows —

> "No election shall be called in question except by election petition presented in accordance with the provisions of this Part of this order "

The procedure is provided in Part III, and in para 4 thereof provision is made for the Governor to appoint

> "Commissioners for the trial of petition three persons who are or have been or are eligible to be appointed Judges of a "High Court, and shall appoint one of them to be the President "

The corrupt practices like bribery, undue influence, personation etc have been mentioned in the First Schedule of the said *Corrupt Practices Order of* 1936

It is essential to remember that what ART 146 prevents ordinary courts from doing is to call in question the *election* of the candidate But it has been judicially determined that this Article cannot be interpreted to mean that in no conceivable case can an ordinary court enquire into the validity of the proceedings conducted by the Election Tribunal itself and thus indirectly interfere with its conclusions [See the discussion under the *Writ of Quo Warranto*, in the Chapter relating to *Constitutional Remedies* and the case of *Hari Vishnu Kamath vs Ahmad Ishaque & others AIR* (1955), *S C p* 233, which involved interpretation of the *Indian Article* 329 *B*, which corresponds to our *ART* 146 and the Case of *Md Saeed vs Election Tribunal*, *PLD* (1957), *S C* 91]

Can the Supreme Court grant special leave to appeal under the powers reserved to it under ART 160, in a case where a person has been unseated by the Order of Governor of a Province consequent upon a report made to him by an Election Tribunal appointed by him to inquire into and adjudicate election disputes under the *Corrupt Paractices Order of* 1936? Could the order passed by the Governor in such a case be regarded as *Judgment Decree*, *Order* or *Sentence* of a *Tribunal*, within the meaning of *ART* 160? Or, in the alternative could the report of the Tribunal to the Governor be described as falling under the expression *Judgment*, *Decree*, *Order* or *Sentence*? The answer to these questions must depend on the view that the Courts might take of the legal character of the Order passed by the Governor consequent upon report made to him by the Tribunal If the Governor has no discretion but to accept the report and give effect to it, his order may well be regarded as an order of the Tribunal and thus rendered subject to the appellate power of the Supreme Court (See further discussion on this topic under the "Writ of Quo Warranto", in Chapter VI)

The validity of election of the President of Pakistan under ART 32(3) shall not be questioned in any Court Does this injunction cover the case of a person who does not fulfil the qualifications described by ART 32(2) as being in the nature of conditions precedent for a person being deemed as duly qualified to contest election to the office of the President? What happens if a non Muslim gets elected, or the person who is not a citizen of Pakistan or one who is less than forty years of age, gets declared duly elected as President Can his election be questioned in a Court of law? The provisions of the First Schedule confer upon the Chief Election Commissioner the power to scrutinise the nomination papers of

the President lost the battle but, as events have shown, judging from the opinions since rendered by the *Supreme Court*, not the *Campaign*. (See 51 *Harvard Law Review* 397).

The number of Judges who could be appointed to the *Supreme Court of U.S.* is not fixed under the *Constitution*. The *Judiciary Act of* 1789 established the Supreme Court with "a Chief Justice and five Associate Justice." In 1869 the number of Judges had been raised to nine, including the Chief Justice.

ART. 124 of the Indian Constitution.

The *Indian Constitution, in its 124th Article*, establishes *Supreme Court* "consisting of a *Chief Justice of India* and, until *Parliament* by law prescribes a larger number, of not more than seven other Judges."

207. Constitutional Status of our Supreme Court

Our Constitution places the Supreme Court at the apex of the judicial system of our country. It is a court of ultimate appeal in matters civil and criminal, and has original jurisdiction not only in its capacity as the Federal Court, but also in its capacity as the guardian of Constitution, more particularly for the due enforcement of the fundamental rights guaranteed to the citizens and non-citizens by our Constitution. The law declared by the Supreme Court is binding on all the courts in Pakistan, and all the executive and judicial authorities throughout Pakistan are directed to act in aid of its process.

Some general observations on the Role of Supreme Court in a system of written constitution.

We will presently study in some detail the jurisdictional aspects of the authority of the Supreme Court, but at the outset it is necessary to make a few general observations about the role which the Supreme Court plays in a federal polity as an interpreter of its written constitution.

Henry Sidgwick quoted.

The remarks of Henry Sidgwick on the importance of judiciary in a system of constitutional governments are apposite in this context:

> "The importance of the judiciary in political construction is rather profound than prominent. On the one hand, in popular discussion of forms and changes of Government, the judicial organ often drops out of sight; on the other hand, in determining the nation's rank in political civilization; no test is more decisive than the degree in which justice, as defined by the law, is actually realised in its judicial administration, both as between one private citizen and another, and as between private citizens and members of the Government." (See his 'Elements of Politics' p. 481).

Harold Laski's views.

To the same effect are the words of Harold Laski in his Book 'A Grammar of Politics' 1948 Ed. p. 542:—

> "When we know", says he, "how a nation-State dispenses justice, we know with some exactness the moral character to which it can pretend."

Status of Supreme Court.

The Supreme Court is not just one court amongst other courts in the judicial system of this country, but it is an institution that by the example of independence and impartiality that it is expected to provide in its decisions and declarations, is likely to set the pace for not only the High Courts and Courts subordinate to it in the matter of administering justice, but it is also to provide for other coordinate organs of Government, like the Executive and the Legislature, guidance as to the manner in which the Constitution is to be worked by them. As has been remarked earlier, being the court of ultimate jurisdiction, it is left to its sagacity and wisdom to determine the limits of its own authority. It is for this reason that those responsible for the final judicial interpretation of our constitution must always be careful lest they exaggerate th[illegible] own power and aut[illegible] They must be eager to dis-
cover what exactly is the sc[illegible] udicial power [illegible] mers of the Constitution
have reserved to them. It [illegible] ven the Judg[illegible] ngs made up of flesh
and blood, and, in their end [illegible] gs objecti [illegible] but see truth with
any eyes except their own. [illegible] seen that [illegible] the controver-

SECTION—III

Jurisdictional Aspects of the Superior Courts

206. Constitutional limit on the number of Supreme Court Judges

Number Supreme Court Ju[c] fixed und[er] the Constitut[ion] to avoid t[he] Executive Packing the Court

ARTS 148 to 164 deal with the *Establishment*, *Constitution* and *Jurisdiction* of the *Supreme Court* The number of Judges who are to preside the Supreme Court has been determined under the Constitution Chief Justice and "not more than six other Judges The Parliament may, however, by an Act increase the number of other Judges This constitutional limitation on the number of Judges is an important safeguard that ensures the autonomy and independence of the Supreme Court as a legal institution and precludes the possibility of the executive "packing" the court in the manner in which at least one of the American Presidents had threatened to do in the case of the U S Supreme Court merely because in his opinion the Supreme Court of the U S did not act properly in the discharge of its judicial functions

Example from U S History

It would be recalled that the judicial invalidation of a great deal of *New Deal Legislation* sponsored by Roosevelt regime led to the formulation of that President s specific programme for securing the re organization of the inferior federal courts to attain greater efficiency and the appointment of one New Justice, up to six in number, for every justice of the Supreme Court who, having passed the age of 70 years and served for 10 years failed to retire The proposal shocked many who felt that this step, if taken, would threaten the independence of judiciary The President, in his radio report, to the people, of March 9 1937, supported the proposed legislation "In the last 4 years", said he, the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside The Court has been acting not as a judicial body, but as a policy making body The Court in addition to the proper use of its judicial functions has improperly set itself up as a third *House of the Congress*—a Super Legislature, as one of the Justices has called it—reading into the constitution words and implications which are not there, and which were never intended to be there We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself We must find a way to take an appeal from the Supreme Court to the Constitution itself We want a Supreme Court which will do justice under the Constitution—not over it In our Court we want a Government of Laws and not of men " He then outlined his proposed legislation as follows

> "What is my proposal? It is simply this whenever a Judge or Justice of any Federal Cour
> retire on a p
> with the app
> That plan has two chief purposes By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal Justice speedier and therefore less costly, secondly to bring, to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work This plan will save our Constitution from hardening of the judicial arteries "

The proposed legislation was heavily amended by the Judicial Committee of the Senate and emerged in an emasculated form—practically bereft of the substance of the proposal to reform the Judiciary as the President had outlined it in his Radio Report Thus

body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Thus the sanctity that attaches to the pronouncements of Judiciary in regard to the interpretation of Constitution stems not from the belief that it is infallible, but its authority to control all operations under the constitution is based upon the view that somewhere there must be finality in the matter of constitutional and legal adjudication. And the supremacy of the Judiciary's interpretative functions comes, not from any presumed moral excellence or intellectual alertness on the part of the judges of a country having a written Constitution but from the assumption that they have the *final* say in the matter of constitutional and legal interpretation.

It is the consciousness of this burdensome responsibility of delivering the last word as to the meaning of the words used in the Constitution that ought to exert the greatest measure of wise and tardy self-restraint upon the judiciary of a country having a written Constitution and charged with the duty of interpreting the fundamental law.

208. The Method of Securing appointment of Supreme Court Judges

It is these considerations that bring home to a student of politics and law the importance of ensuring that the Judges who preside the Court of ultimate jurisdiction are chosen with special care. The question of judicial appointment is a vaxed one and it lies beyond the scope of present study to embark upon an examination of the rival methods that have been suggested by the political theorists for the purpose of securing appointment to the high office of judgeship of the highest court within a country. Broadly speaking, there are two rival methods for recruiting personnel of the Judiciary—election and nomination. Apart from several experiments that have been tried in various countries in the matter of securing appointment of Judges, the two distinct examples of the adoption of the method of election could be seen in:

Election vs. Nomination

(a) the Swiss Constitution where 14 members of the Federal Court are elected by the Legislative Assembly, and

(b) in the Constitutions of some of the American States where selection to the Supreme Court of the State takes place by election.

But even the apologists of the system of recruiting Judges by means of election are beginning to realise that, having regard to what experience has taught them, it cannot any longer be defended as being the best method. The argument against the method of election is that a Judge should not be selected for purely political reasons but for his legal fitness, his impartiality and for his independence. It is difficult to believe that a candidate who has been returned successful in a system of election to the office of Judgeship will not be swayed by extra-judicial considerations in the determination of cases that come up before him, and the temptation to do so would be all the greater if the Judge is to successfully run for an additional term. Even election by a legislature, though comparatively speaking a much better method than the one in which election takes place by the adult members of a community, is not a successful method of recruiting Judges, and in Switzerland if the system has not worked as unsatisfactorily as was to have been expected, it is only because the

sies before him by his conception of what the law upon the point before him is, and even when he is applying a statute or a precedent, it cannot be forgotten that *it is he who has to determine what precisely is directed to be done by the statute or what the binding value of a precedent in relation to the controversy before him is to be*

The conferment of this enormous power upon the Judges of the Supreme Court must carry with it a high sense of responsibility for, after all, it is the self restraint of the Judges that is the only limit on the powers of the Supreme Court

About this desire to subject the judicial mind to the rule of "self restraint", not much need be said since it is inherent in the concept of Supreme Court, as the repository of ultimate judicial power, as being the final judge of the limits of its own jurisdiction It is the neglect of this self imposed limitation on the exercise of the *will* as opposed to the *judgment* by the Judges that provoked the protest of Justice Holmes

"There is a tendency", wrote Justice Holmes to Harold Laski, in one of his letters, "to think of judges as if they were independent mouth pieces of the infinity and not simply directors of a force that comes from the source that gives them their authority I think our Court has fallen into the error at times, and it is that thought I have aimed at when I have said that the common law is not a brooding omnipresence in the sky and the U S is not subject to some mystic over law that it is bound to obey

The judicial function, in so far as it has reference to the power of interpreting the Constitution, is not necessarily superior to the similar function which is exercised by the executive or the legislative organs of the State, when they proceed to exercise the power and perform the duties imposed upon them by the Constitution Every agent must endeavour to interpret and apply the mandate of his principal and the Legislative, Executive and Judiciary, like any other agent established by the Constitution, are all charged with the duty of interpreting and applying the mandate of the Constitution The power of the Judiciary to interpret the Constitution is distinguishable only in one respect from the power of other agents—its interpretation is final and binding on all other coordinate organs of the sovereign power The argument in support of this view has been so succinctly stated by Hamilton in "The Federalist" (No 78) that the present writer can do no better than reproduce it

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void No legislative act, therefore, contrary to the Constitution, can be valid To deny this, would be to affirm, that the deputy is greater than his principal, that the servant is above his master, that the representatives of the people are superior to the people themselves, that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things to keep the latter within the limits assigned to their authority The interpretation of the laws is the proper and peculiar province of the courts A constitution is, in fact, and must be regarded by the judges, as a fundamental law It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative

Court. Both in the case of a High Court Judge and a Judge of the Supreme Court, the age limit ought to be 70 at the very least. The benefit of judicial experience is an invaluable asset and if a Judge is made to retire after 5 to 10 years of sitting on the Bench he will have hardly any opportunity of putting his experience into any practical effect. Besides, such Judges invariably look up to *ad hoc* appointments after their retirement and are more likely than not to have an eye on them even while they are sitting on the Bench. And as to the pernicious consequences of this, very little need be said here.

In 1928, Mr. Hughes who later became the Chief Justice of United States Supreme Court, in his well known study entitled "The Supreme Court of the United States" at pages 76 and 77, made the following observation :

> "Under present conditions of living, and in view of the increased facility of maintaining health and vigour, the age of seventy may well be thought too early for compulsory retirement. Such retirement is too often the community's loss. A compulsory retirement at seventy-five could more easily be defended. I agree that the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist on remaining on the bench, is too great to permit chances to be taken, and any age selected must be somewhat arbitrary as the time of the failing in mental power differs widely. The exigency to be thought of is not illness but decrepitude."

In the United States, opinion seems to be sharply divided on the question of fixing any time-limit for the judges to continue on the Bench of the United States Supreme Court, but those who hold the view that some such time-limit is necessary appear to be of the opinion that it should be placed somewhere at 75. In the United States, under the statute, it has been made possible for a judge to voluntarily retire at 70 when compensation would be paid to him, provided by that period he has put in at least ten years of service on the Bench. In Australia, too, there is no provision for compulsory retirement, but the Royal Commission recommended in 1929 that a compulsory retiring age for federal justices be placed at 72 years. (See the report of the Royal Commission on the Constitution at pages 251-252). It is suggested by the present writer that the age of retirement of the Supreme Court Judges at 65 is impolitic and ought to be enhanced by at least 5 years. The same age limit should apply to the case of judges of the High Court.

210. Jurisdiction of Supreme Court—Plan of Present Study

We will study the jurisdictional aspects of the Supreme Court under the following heads :—

(1) Supreme Court and the exercise of its federal jurisdiction. (ART. 156);

(2) Supreme Court as a Court of Appeal in matters involving interpretation of the Constitution, (ART. 157) ;

(3) Supreme Court as a Court of Appeal in civil matters, (ARTs. 158 and 160);

(4) Supreme Court as a Court of Appeal in criminal matters, (ARTs. 159 and 160);

(5) Supreme Court and its general jurisdiction to grant special leave to appeal, (ART. 160);

(6) Supreme Court and its authority to tender advice upon questions of law, consequent upon reference made to it by the President, (ART. 162);

(7) Supreme Court and its jurisdiction to enforce by means of appropriate writs, directions etc., fundamental rights guaranteed by the Constitution, (ART. 22 See chapter VI); and

(8) Supreme Court and the power of its review. (ART. 161)

Swiss Federal Court has not the power to declare the Federal Legislation unconstitutional

By and large students of contemporary political affairs are agreed that appointment of 'ie most satisfactory method of securing appoint- Court And that is precisely the method that our [149 the appointment of the Chief Justice of Pakistan is to be made by the President, and of other Judges by the President "after consultation with the Chief Justice" Thus the executive makes the appointment in the case of Chief Justice of the Supreme Court, and of other Judges after consultation with the Chief Justice In ART 149 qualifications for being appointed to the judgeship of the Supreme Court have been laid down, and these are calculated to further restrict the free choice of the executive in the matter of making appointment

In ART 150, the person holding office of a Judge of a Supreme Court can continue doing so only until he attains the age of 65 years, and in ART 151, we have provisions relating to the removal of the Judges of the Supreme Court A Judge of the Supreme Court shall not be removed from his office except by an order of the President made after an address by the National Assembly supported by the majority of the total number of members of the Assembly and by the votes of not less than 2/3rd of the members present and voting The grounds of the removal are ARTs 150 and 151

"proved misbehaviour or infirmity of mind or body" (ART 151)

A person who has held office as a permanent Judge of the Supreme Court shall not as provided by ART 150(2), "plead or act before any court or authority in Pakistan Similarly, a Judge of the High Court shall not plead or act before that court or any court or authority within the jurisdiction of that court (ART 166(3)) Similarly under ART 174, a person who is, or has been a Judge of the Supreme Court or of a High Court shall not be eligible for appointment as Governor of a Province" These provisions were incorporated in the Constitution to ensure that a Judge while in office may not look forward to being the recipient of any patronage after his retirement at the hands of the Government or anyone else It is often felt that in the absence of these constitutional provisions that preclude the possibility of a Judge becoming an employee of the Government as a Governor of a Province or his competence to practise, the Judge is exposed to the temptation of having so to conduct himself in the performance of his judicial duties as to curry favour with outside elements It is therefore felt that the existence of these provisions is likely to ensure the independence of judiciary ARTs 150(2 166(3) and 174

Similarly, under ART 175, the conduct of a Judge of Supreme Court or of a Judge of a High Court shall not be discussed in the National or a Provincial Assembly This provision is of course subject to the provisions of ART 151 which lays down the procedure which must be gone through before a Judge of the Supreme Court could be removed from office From the nature of the case, the conduct of such a Judge would be discussed in the ART 175

of the Parliament or Provincial Assembly to discuss freely any and every conceivable question has been restricted in cases where such a discussion involves reflection on the conduct of a Judge of the Supreme Court or of a High Court Such a right has been denied by the Constitution to the members of the Legislatures The provisions of this Article are designed to render immune Judges of the superior courts in Pakistan from any manner of attack being made against them on the floor of the Legislature It is submitted that a disregard of this provision by any member of the National or Provincial Assembly will expose

shall be a party, to controversies between two or more States, etc. To the same effect under *S.75 of the Australian Constitution*, the High Court of Australia has been *inter alia* given original jurisdiction in all matters "between States", or in which Commonwealth is a party. It must be noted that the terminology of the *Australian Constitution* is somewhat misleading in that the *Australian Constitution* calls the *Supreme Court of Australia as High Court*, and the "High Court" of the Province or the State as the "Supreme Court" of those Provinces or States respectively.

In order to be able to invoke successfully the original jurisdiction of our Supreme Court in federal disputes the conditions laid down by ART. 156 must be strictly complied with. The Supreme Court is not a court of ordinary civil jurisdiction so that it could be deemed competent to entertain a claim in the exercise of its original jurisdiction merely on the ground that there is no other court in the country which has the jurisdiction to decide the kind of question raised in the suit. In the case of *Ramgarh State v. Province of Bihar*, reported in AIR 1949 *F.C.* 55, it was observed in regard to the scope of the jurisdiction conferred on the Federal Court under *S.* 204 of the *Government of India Act that*:

"Federal Court of India is not a court of ordinary original civil jurisdiction in all matters and between all parties. Its original jurisdiction is derived from and is limited by S.204. This section imposes two limitations: (i) as to the parties, and (ii) as to the subject matter."

In that case it was held that the plaint instituted on behalf of a State which was not an "Acceding State", could not be entertained, as it related to a party not covered by the terms of S.204 of the Government of India Act.

Two cases decided by the *Federal Court of undivided India* in regard to the nature and extent of "Federal Jurisdiction" as defined by *S.* 204 *of the Government of India Act* are instructive as they have a bearing on the interpretation of the present Article, and these are:—

(1) *United Provinces v. Governor-General-in-Council, AIR* 1939, *Federal Court* 58, *and*

(2) *Governor-General-in-Council v. The Province of Madras, AIR* 1943, *Federal Court* 11.

In the former case the *United Provinces* filed an action against the *Governor-General-in-Council* challenging the constitutionality of *S.* 106 *of the Cantonment Act*, and claimed that all fines imposed and realised by criminal courts arising out of the enforcement of the impugned Act and wrongly credited to Cantonment Fund be made over to it by the defendant. Although the *Cantonment Board* was a corporation with statutory powers and duties of its own, it was not an independent body. But as the defendant exercised considerable measure of control over it, this interest which the *Governor-General-in-Council* had was sufficient to make it possible for the *Federal Court* to take cognizance of an action brought by a Province for the purpose of obtaining a declaration that the enactment was *ultra vires*. With regard to the relief sought for by the *United Provinces* to *recover* the fines from *Cantonment Board* it was held that the Board could have been directly sued by the plaintiff and as *S.*204 did not contemplate any suits against any party other than Government the relief could not be awarded.

With regard to the meaning of the expression 'legal right' appearing in S.204, after referring to the definition of that concept as given by various eminent jurists like *Dr. Holland*, *Austin* and *Salmond*, *Justice Sulaiman* observed (at p. 66):

"The term 'legal right' used in Section 204 obviously means right recognised by law and capable of being enforced by the power of a State but not necessarily in a court of law. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty, even though no action may actually lie. The only ingredient seems to be a legal recognition and a legal protection. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the *Governor-General-in-*

211. Federal Jurisdiction of Supreme Court (ART. 156)

The federal jurisdiction of our Supreme Court in substance may be described as its exclusive competence to adjudicate disputes between (1) the Federal Government and the Governments of one or both Provinces, or (2) the Federal Government and the Government of a Province on one side and the Government of the other Province on the other, or (3) between the Governments of the Provinces in and so far as the dispute involves any question whether of law or fact on which the existence or extent of a legal right depends on any question as to the interpretation of the Constitution Under ART 156, it is provided that the Supreme Court in the exercise of its jurisdiction under that Article shall not pronounce any judgment other than a declaratory judgment

The constitutional provision on this subject of federal jurisdiction in the Government of India Act of 1935, was contained in its 204th Section, which, as adapted in Pakistan, was in the following terms — S 204 Govt of India Act

"204 (1)—Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends

Provided that the said jurisdiction shall not extend to

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, before the date of the establishment of the Federation, or of an order made thereunder on or after the date for the interpretation of the *Indian Independence Act*, 1947 or of any order made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the *Instrument of* Accession of that State, or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State, or

(iii) arises under an agreement made after the establishment of the Federation, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute,

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment "

The original Federal Jurisdiction of the Supreme Court is provided for by the Indian Constitution in Article 131, and the only difference between that Article and our Article would seem to lie in the fact that the clause relating to Supreme Court pronouncing only declaratory judgments in the exercise of its original jurisdiction is not to be found in the Indian Article

In every federal constitution, provision has to be made for the determination of disputes between the federal units either *inter se* or with the federation In the Constitution of the United States, in ART 3, S 2, this jurisdiction has been affirmed in that it is provided that the judicial power *inter alia* extends to controversies to which United States

This difficulty of settling inter-provincial disputes, when there *is* no settled legal principle or rule by appeal to which the controversy between contending parties would be settled, has also been referred to in the case of *Dominion of Canada v. The Attorney-General of Ontario*, 1910 *Appeal Cases* 637 at 645, in which *Lord Loreburn observed*:

> "It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical, on the one hand, and a particular province with laws of its own, on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States and Provinces within a Union. But the conflict is between one set of legal principles and another. In the present case, it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of the law that can be invoked as applicable."

The moral of the foregoing observation is that unless a controversy can be resolved by the application of legal principles or provisions it cannot be treated as justiciable.

The aforementioned cases, the American and the Canadian, it would appear tend to establish two radically different and conflicting approaches to the question relating to the law applicable in the settlement of Federal disputes.

(c) Finally, reference may be made to another practice of the American Supreme Court: It ordinarily refuses, in suits instituted by one State against another, to entertain mere *technical pleas* such as objection to multifariousness, of leaches and the like except in so far as they affect the merits of the controversy. That court approaches the consideration of the controversy in an untechnical spirit. (See *Virginia v. West Virginia*, (1911) 55 *Lawyers Edition page* 353. This was a suit between the *Commonwealth of Virginia* and the *States of West Virginia* to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original *State of Virginia* which was assumed by *West Virginia* at the time of its creation as a separate State. The Supreme Court considered that such a controversy should be settled in an untechnical spirit proper for dealing with a *quasi-international* controversy.)

ART. 156 & ARTS. 118 & 129

The original jurisdiction of the Supreme Court has been declared in ART. 156 to be 'subject to the provisions of the Constitutuon.' The question that arises for determination is: What are the provisions of the Constitution which could conceivably over-ride the original jurisdiction of the Supreme Court? There are the following provisions to be considered in this context :—

(1) Article 118 contemplates the establishment of a *National Finance Commission* "as soon as may be after the *Constitution Day*, and thereafter at intervals not exceeding five years", and the duty of this Commission thus established is to make recommendations to the President as to—

  (a) the distribution between the Federation and the Provinces of the net proceeds of the taxes mentioned in clause (3) of Article 118;

  (b) the making of grants-in-aid by the Federal Government to the Governments of the Provinces;

  (c) the exercise by the Federal Government and Provincial Governments of the borrowing powers conferred by the Constitution; and

  (d) any other matter relating to finance referred to the Commission by the President.

Upon the receipt of the recommendations of the Commission, the President "shall by Order specify, in accordance with the recommendations of the Commission under sub-

Council or the *Secretary of State*, would not be sufficient in itself for holding that the former could not possibly possess any 'legal rights' at all against the Central Government even in respect of rights conferred upon them by the provisions of the Act or the rules made thereunder "

In the second case, it was the *Governor General in Council* who brought a suit against the *Province of Madras* for the declaration that *Madras General Sales Tax Act (IX of 1939)* was *ultra vires* The suit was dismissed as a result of the finding that the impugned Act was not unconstitutional and from this decision of the Federal Court appeal was lodged before the Privy Council who too dismissed the same (see *Governor General in Council v Province of Madras, AIR 1945 Privy Council* page 98) The validity of the Act was sustained by the Federal Court upon the principle decided by the *Federal Court in Province of Madras v Boddu Paidanna & Sons, AIR, 1942 Federal Court p 33* The Privy Council, while dismissing the appeal, following 'the usual practice' made no order as to costs Their *Lordships of the Privy Council* referred, in support of this practice, to the case of *Attorney General for Manitoba v Attorney General for Canada (1925 Appeal Cases p 561)*, where it had been said

"In accordance with the usual practice there will be no costs "

Although it was realised that the position was not exactly the same as in Canada, but *Lord Russell of Killowen* observed that it was 'very analogous' to it

Some American cases reviewe

Some of the American decisions that bear on the interpretation of *Section 2 of Article III of the United States Constitution* are instructive, particularly the decisions that interpret the clause appearing in the said section 'between two or more States' The principles laid down in some of these decisions may be briefly referred to

(a) It has been held in (1921) 65 *Lawyers Edition* 937 at 943 (*New York v New Jersey*) that a very *heavy burden* lies on the party moving the original jurisdiction of the Supreme Court to sustain the allegations in the plaint It was observed

"Before the Federal Supreme Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence "

(b) Similarly, the case of *Rhode Island v Massachusetts*, (1838) 12 *Pet* 657 9 Law Ed 1233 is instructive upon the question of the law which is to be applied in the decision of inter statal disputes Considering that the two States, parties to the dispute may not be having identical legal provisions known to their domestic law upon the situation giving rise to the dispute, it does become a matter of difficulty to decide what principles to apply in the determination of these disputes This case involved adjudication of a boundary dispute and the question being a justiciable one and not a political question, it was held that a 'prescribed rule' of decision was unnecessary in such a case Mr Justice Baldwin observed

"The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves 294), which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power, it comes to the court, to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires " (p 737)

Supreme Court will have to be obtained specifically in relation to such a ground before it could validly be raised in argument in appeal.

T. 164 The expression 'interpretation of the Constitution' has itself been interpreted by the Constitution in ART. 164, which in terms provides "In this part, references to any substantial question of law as to the interpretation of the Constitution shall include references to any substantial question of law as to the interpretation of the *Government of India Act*, 1935, or the *Indian Independence Act*, 1947 including any enactment amending or supplementing the said Acts or any Order made under the said Acts". The effect of this interpretation provided by the Constitution itself is to enlarge, by artificiality of construction, the content of the expression "interpretation of the Constitution", which in the absence of such an interpretation would have been confined only to the interpretation of questions arising only under the present Constitution.

It is interesting to compare the effect of ART. 157 of our Constitution, read with ART. 164, on the one hand, and ART. 132 of the Indian Constitution read with its interpretative Article, namely ART. 147. These sets of Articles are practically couched in the same language except, of course, the explanation which has been appended to the *ART.* 132 of the *Indian Constitution* regarding the construction of expression 'final order', as including 'an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.'

This explanation has been designed by the framers of the *Indian Constitution* to undo the effect of a pre-Constitution construction of the expression 'final order' appearing in S.205 of the *Government of India Act*, 1935, that was offered by the Federal Court, for instance, in the case of *Kuppuswami Rao v. The King*, (AIR 1949 *Federal Court page* 1), wherein it was ruled that the order of a High Court over-ruling objection of the criminal prosecution based on the contention that there was no proper sanction warranting such a prosecution, and remanding the case for trial before a lower court, was not to be regarded as a final order for the purpose of *S.205 of the Government of India Act*. The effect of the present explanation is practically to over-rule this view of the law and upon the facts of the case presented by *Kuppuswami Rao v. The King*, the Indian Courts would now treat the order complained of as being final order for the reason that it decides an issue which, if determined in favour of the appellant, would be sufficient for the final disposal of the case. It is a strange feature of the *Indian Constitution* that although it has expressly interpreted the word 'final order' in the manner stated above in ART. 132, it does not give to the same expression appearing in ART. 133 the same meaning: presumably the effect of this omission in ART. 133 of the *Indian Constitution* would be that the Indian courts would accept the pre-Constitution judicial interpretation of that expression. (See *Election Commission v. Venkata Rao, AIR* 1953 *Supreme Court, page* 210).

The scheme of ART. 157 of our Constitution is to place questions relating to the interpretation of the Constitution on higher pedestal, regardless of the nature of the proceedings in which they may arise, and to confer the widest amplitude of power in regard to the adjudication of these questions upon the Supreme Court. The Supreme Court is primarily a Constitution Court, and constitutional questions ought therefore to engage its attention far more than any other question of legal import. The old *Section* 205 *of the Government of India Act*, which was the constitutional predecessor of the present Article, in one essential particular, was cast in a somewhat narrower mould in that there was no provision in it for special leave being obtained from the Federal Court in case the High Court had refused to grant the certificate. In the case of *Kishori Lal v. Governor-in-Council* (1940) *Federal Court page* 4, it was held that the Federal Court had no power to grant special leave if the High Court had refused to grant a certificate under S.205 of the Act. In an earlier

clause (a) of clause (2), the share of the net proceeds of the taxes mentioned in clause (3) which is to be allocated to each Province, and that share shall be paid to the Province concerned, and shall not form part of the *Federal Consolidated Fund*"

Under clause (5) of ART 118, the recommendations of the National Finance Commission, together with an explanatory memorandum as to the action taken thereon, shall be laid before the National Assembly and the Provincial Assemblies Obviously, the determination of the disputes between the Federation and the Provinces that have reference to the distribution of the net proceeds of the taxes mentioned in clause (3) of ART 118, *cannot validly be made into a subject matter of adjudication by the Supreme Court in the* exercise of it original jurisdiction Although ART 118 does not in terms preserve the finality of the recommendation made by the National Finance Commission and the action of the President taken thereupon, in the sense that it does not expressly bar the jurisdiction of the Supreme Court to take cognizance of these disputes, the fact remains that the whole [illegible]

prescribed by ART 156

(2) ART 129 hardly seems to be an exception to the exclusive competence of the Supreme Court to enquire into Federal disputes since that Article itself postulates that before the machinery improvised by it as to the settlement of disputes between Federal Government and one or both Provincial Governments, or between the two Provincial Governments" can be given effect to, the dispute must be one which under the law or the Constitution is *not* within the jurisdiction of the Supreme Court"

The combined operation of ART 129 and ART 156 raises the following question What is the nature or kind of dispute for the settlement of which ART 129 has been designed, since that dispute *ex hypothesi* has to be one which under the law of the Constitution is *not* within the jurisdiction of the Supreme Court It is difficult to answer this question satisfactorily since ART 156 is cast in very wide terms and appears to yield place only to ART 118 in the manner indicated earlier and that too for the limited purpose of taking controversies relating to distribution of taxes of the kind mentioned in that Article outside the orbit of the jurisdiction of the Supreme Court

212. Supreme Court as the Court of Appeal in matters involving Interpretation of the Constitution. (ART. 157)

Article 157 of our Constitution provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil, criminal or other proceedings, provided

(1) the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution,

(2) in the event of High Court refusing to give such a certificate, the Supreme Court may, upon being satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order

Where either the certificate is given or the leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid (i e a substantial question of law as to the interpretation of the Constitution) has been wrongly decided But if any other ground is sought to be raised in such an appeal, leave of the

also *Jagdam Sahai v. Emperor, AIR 1948 Allahabad p. 12; Kondo Tukaram v. Emperor, AIR 1946 Nagpur p. 144).* These cases raised questions which have lost their importance in view of the language employed in ART. 157, and it would now appear that an application could be made to the High Court inviting it to give a certificate within such time as may be prescribed under the rule-making power given to the superior courts.

ART. 171 In this context it is appropriate to notice that in ART. 171 the High Court has been given the power to transfer cases to itself from subordinate courts if it is satisfied that the case in question involves a substantial question of law as to the interpretation of the Constitution the determination of which it considers necessary for the disposal of the case. It also has the power in such a case either to dispose of a case itself or determine the said question of law and return the case to the Court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said Court on receipt of such a determination would then proceed to dispose of the case in conformity with its judgment. The provisions of this section are calculated to cut short the long and dilatory procedure which ordinarily would involve the taking of the various steps by way of presenting appeals from the Courts of first instance to the District Courts and then finally to the High Court. The Constitution thus gives to "substantial questions of law as to the interpretation of the Constitution" a high priority and confers an abnormal power on the High Court to withdraw such cases and deal with them in the manner indicated in the Article.

The provisions of ART. 171, as also of 157, have to be liberally interpreted and the High Court and the Supreme Court are expected to consider the substantial questions of law as to the interpretation of the Constitution as a matter of top priority and fundamental importance.

213. Supreme Court as a Court of Appeal in Civil Matters (ART. 158)

ART. 158 provides for an appeal from any judgment, decree or final order of a High Court in civil proceedings in the following three cases:

(a) If the amount or value of the subject-matter of the dispute in the Court of first instance was, and also in dispute on appeal is, not less than Rs. 15,000, or such other sum as may be specified in that behalf by Act of Parliament.

(b) If the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount.

(c) That the case is a fit one for appeal to the Supreme Court.

In respect of all the above conditions, it is High Court that is charged with the duty of certifying whether or not the conditions (a), (b) or (c) reproduced above are fulfilled in a given case. The additional limitation upon the right to take appeal mentioned by clause (2) of ART. 158 is, ". . . no appeal shall, unless an Act of Parliament otherwise provides, lie to the Supreme Court from the judgment, decree or final order of a Judge of a High Court sitting alone." Clause (2) of our Article corresponds to clause (3) of the *Indian Article* 133.

The following points of distinction between the scope of the Indian ART. 133, and ART. 158 of our Constitution, which provides for the appellate jurisdiction of our Supreme Court in appeals from High Courts in regard to civil matters, should be noted:

(1) In cases where the judgment, decree or a final order appealed from affirms the decision of a Court immediately below in cases visualised by clauses (a) and (b) of the Indian Article no appeal shall lie in India unless the High Court *further certifies that the appeal involves some substantial question of law*. There is no such limitation under our Constitution as to the existence of a substantial question of law as being a condition precedent before the right to appeal in cases where High Court has affirmed in its judgment, decree or final order the decision of the Court immediately below it.

case, *Lakhpatram v Behari Lal & others, AIR* (1939) Federal Court page 42, it had been ruled that Federal Court, being a statutory court, its jurisdiction must be constructed from the terms of the Statute which created it, and further it was impossible to point to

e Federal Court an inherent power to entertain an in cases where the High Court has refused a *Secretary of State, AIR (1938) Federal Court page 1*)

Both the Indian and our Constitution have now removed this difficulty by expressly providing for the jurisdiction of the Supreme Court to grant special leave in cases where the High Court has refused to give a certificate It should be noticed that the power to grant certificate is reserved to a *High Court* and if, under the domestic procedure

Judge sitting alone functions as a High and it would be immaterial for the Court in such a case whether an appeal

from his decision is taken to the *Letters Patent Bench* or *Division Bench* or not There is nothing that debars a direct constitutional appeal being taken to the Supreme Court either upon a certificate being given by a single Judge or upon special leave having been obtained from his decision And this position may be contrasted from the position

final order judgment ough under

Article 158 of our Constitution there is an express prohibition against the entertainment of appeal by the Supreme Court from any judgment, decree or final order recorded by a Judge of a High Court sitting alone, if such a decision involves a substantial question relating to the interpretation of the Constitution, a direct appeal will lie therefrom under the provisions of ART 157 The principle as to the combined effect of Indian ARTs 133 and 132 has been discussed in the case of *Election Commission v Venkata Rao* (1953) *S C* 210, and it is submitted that the decision is helpful in the interpretation of the combined effect and scope of ART 157 and 164 of our *Constitution*

Finally, it should be noticed that for an appeal to lie the requirement of ART 157 is that there should be "a judgment, decree or final order of a High Court involving a *substantial* question of *law* as to the interpretation of the *Constitution*" Thus the question involved in the determination of the appeal must be one not only of law but it should be a substantial question and then it should relate to the interpretation of the Constitution and not of any other law Once of course a certificate is granted on the premises of the existence of some such question and special leave is also obtained to raise other grounds it is not an insuperable bar in the way of entertaining an appeal at the time of hearing if the substantial question as to the interpretation of the Constitution is abandoned at the Bar 'The substantial question of law" within the meaning of this Article has been construed as being one in regard to which there can be a difference of opinion but it must be of such a general importance that it would be proper that it be settled by a declaration from the Supreme Court

Section 205 of the *Government of India Act*, 1935, had provided for the certificate being given *suo moto* The language of that Section was " and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly " Thus the duty was primarily cast upon the High Court to give the certificate It was not necessary for a certificate to be granted under Section 205 that any formal application be made to the High Court Up

question whether

pronounced its

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

"111.—Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty-in-Council—

(a) from the decree or order of one Judge of a High Court constituted by His Majesty by Letters Patent, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under S. 102 no second appeal lies.

"112.—(1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty-in-Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts."

These provisions have to be read in the light of the provisions of *Federal Court Enlargement of Jurisdiction Act 1949 (I of 1950,) S.6*, and the *Privy Council Abolition of Jurisdiction Act, 1950, S.9. Section 9 of the Privy Council Abolition of Jurisdiction Act, 1950*, modified the provisions of the *Code of Civil Procedure* and any other law in force on the appointed day relating to *Pakistan Appeals and Petitions* in such a way that a reference in the said provisions to His Majesty in Council there assigned substituted references to Federal Court. The question that arises for consideration in this context is to determine the combined effect of the provisions of Civil Procedure Code as in force immediately before the Constitution Day and the provisions of the Constitution in regard to appeals to the Supreme Court arising out of civil proceedings. The principle of construction is obvious: to the extent that the provisions of Civil Procedure Code come in conflict with the provisions of the Constitution they stand abrogated. Substantially, Article 158 embodies the provisions of Ss. 109 and 110 of the Civil Procedure Code.

The important thing to bear in mind is that ART. 158 contains conditions upon the fulfilment whereof appeals would lie to the Supreme Court and any legislation which derogates from this constitutional right to appeal to the Supreme Court would, to the extent of such derogation, be void and inoperative. For instance, the right of appeal conferred under ART. 158 will over-ride those provisions of Civil Procedure Code under its 104th section which expressly provide that no appeal shall lie against any order passed in appeal against an appealable order under the Civil Procedure Code. Thus the Code of Civil Procedure prohibits the hearing of second appeal against appealable orders. But this provision, if it should come in conflict with the right to take an appeal under ART. 158 to the Supreme Court, would be deemed as inoperative. Even in the pre-constitution period

(2) The value of the claim involved in India has been fixed at Rs 20,000 as against this our Constitution has prescribed the sum of Rs 15,000 for an appeal to be taken to the Supreme Court

(3) Out of abundant caution in clause (2) of ART 133, the framers of the Indian Constitution have provided ' Notwithstanding anything in ART 132, (which talks of the Constitution appeals) any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to

law as to the interpretation of the Constitution has been wrongly decided This

It is, however, difficult to believe that the framers of our Constitution in omitting this clause from Article 158, were giving effect to any intention on their part of preventing the party appealing under ART 158 to raise a substantial question of law as to the interpretation of the Constitution merely because under ART 157 neither a certificate had been given by the High Court nor special leave had been obtained in respect thereof

ART 158 and Ss 109 & 110 of Code of Civil procedure

It remains now to consider the effect of the provisions of the Code of Civil Procedure contained in Sections 109 and 110 that have reference to the appeals being brought to the Supreme Court

In ART 227(4), it has been provided, "without prejudice to the other provisions of the Constitution, the Supreme Court shall have the same jurisdiction and powers as were immediately before the Constitution Day, exercisable by the Federal Court and references in any law to the Federal Court shall be deemed to be references to the Supreme Court And in the ART 218, "Federal Court" has been defined as meaning "the Federal Court established under the Government of India Act, 1935, and functioning as such immediately before the Constitution Day" Consequently, Sections 109 to 112 of the Code of Civil

terms

"109 —Subject to such rules as may, from time to time be made by His Majesty in Council regarding appeals from the Courts of the Provinces and the Capital of the Federation, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,
(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and
(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to *His Majesty in Council*

"110 —In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards

disposing it of as such? The application was connected, no doubt, with the criminal case in the sense that it concerned the rights of the Advocate to appear and plead the case of his clients who were parties to the criminal appeal, but the matter in controversy which was presented for consideration of the court, was certainly not a criminal matter in any sense of the expression. In our opinion the case should have been treated as a civil proceedings. In the view that we have taken we direct that the appeal before us should be regarded as a civil appeal and the learned counsel appearing for the appellant gave an undertaking that his clients would pay the court fees in civil appeals under the Rules of this Court." [See *Iqbal Ahmed v. Allahabad Bench*, (1950) *page* 162].

Similarly, proceedings under *Taxing Statutes* are not civil proceedings (*Raleigh Investment Company v. Governor-General-in-Council, AIR* 1947 *Privy Council, page* 78).

The High Court while dealing with the question of issue of certificate under ART. 158, has to consider under clauses (a) and (b) the question of valuation of the claim involved or the proprty in dispute, and grant or withhold the grant of certificate in accordance with its findings in that behalf; but so far as clause (c) is concerned the High Court is called upon to certify that :

"the case is a fit one for appeal to the Supreme Court."

In other words, where other conditions are fulfilled but the pecuniary conditions contemplated by (a) and (b) are not available, it is for the High Court to say whether the matter is a fit one for appeal to the Supreme Court. Under clause (c), the grant of certificate has no relevance to the pecuniary value of the subject-matter at all, and the view of the law on the question of determining the fitness for appeal would be analogous, if not the same, as taken by the Privy Council of S.109(c) of the Civil Procedure Code. It must show that there is something so special about the case that regardless of a low pecuniary value involved it may be deemed as a fit case for appeal being taken from it to the Supreme Court. Lord Buckmaster delivering the judgment of the *Privy Council* in *Radhakrishna Aiyar v. Swaminatha Aiyar AIR* (1921) *Privy Council p.* 25, in respect of clause (c) of *S.* 109 *of Civil Procedure Code*, observed that questions:

"as for example, those relating to religious rites and ceremonies, to caste and family rights, or such matters as the reduction of the capital of Companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money",

are relevant for determining the fitness of a case for appeal to the Privy Council.

His Lordships further remarked:

"when any certificate is granted under that order (R.3 of O.45), it is, in their Lordships' opinion, of the utmost importance that the certificate should show clearly upon which ground it is based... Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they seriously affect the rights of litigant parties and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face."

High Court should give reason why t has refused to give the Certificate.

In view of the fact that under ART. 160 the Supreme Court is empowered to grant special leave to appeal "from any judgment, decree, order or sentence of any court or tribunal in Pakistan other than a court or tribunal constituted by or under any law relating to the Armed Forces", it is desirable that where a certificate is refused the High Court should give concisely the reasons why it considers that the certificate should not be granted. This would enable the Supreme Court to appreciate those reasons while determining whether or not the power of granting special leave under ART. 160 should be exercised by it. Considering that the main burden of administering justice lies upon the High Courts in the country, the Supreme Court will not lightly disregard the reasons that the High Court gives

the Privy Council held that Section 104 (2) of the Civil Procedure Code only dealt with the problem of internal appeals in British India but could not validly affect the maintainability of appeals to the Privy Council (*See AIR* 1924 *Privy Council, page* 95, *Ramlal versus Kishanchandra*) It will anyhow be obvious that S 104 (2) of the Civil Procedure Code cannot now be given an effect which may cut down the scope of the right of appeal conferred by the Constitution under ART 158

The expression, 'judgment', 'decree', or 'final order', will have the same meaning which was accorded by the judicial interpretation of that expression in the pre constitution period Any final declaration of the rights of parties reached during the course of civil proceedings by the High Court would be within the scope of the expression, "any judgment, decree or final order of a High Court," and the decisions of various courts that have interpreted this expression, as it appears in *S* 109 *of the Civil Procedure Code*, would, therefore, be of assistance and would be relevant Under the Civil Procedure Code the word 'judgment' has been defined in S 2 (9), as "a statement given by the Judge of the grounds of a decr [illegible]
term 'judgment' [illegible]
not merely the g[illegible]
decision itself, which in effect will be the decree or final order passed by it In substance, [illegible]

Similarly, when a High Court deals with a reference under S 166 of the [illegible] Act, it is not giving a judgment, but only offers an opinion upon the facts stated in the reference made to it, and cannot be construed as a judgment against which an appeal can be taken (See 1923 *Privy Council page* 148, *Tata Iron & Steel Co v Chief Revenue Authority*) The word 'decree' as defined by the *Civil Procedure Code*, under S 2(2), as 'the formal expres [illegible]

If for any reason after the order complained of, a suit is still alive and has yet to be disposed of, the order in question would not be deemed to be the final order (See AIR 1933 *Privy Council page* 58, *Abdul Rahman v Cassim & Sons* Further see AIR 1949 *F C page* 1, *Kappuswami Rao v King*, and AIR 1950 *F C* 83, *Moolji Jaitha & Co v K S & W Mills & Co*)

ART 158 uses the words 'civil proceedings', and ART 159 the expression criminal proceedings The question that arises is what is to be understood by these expressions Can there be proceeding that is not civil proceeding within the meaning of ART 158 and also not a criminal proceeding within the meaning of ART 159? It is submitted that there may be proceedings going on before a criminal court which are really proceedings of a civil nature, as for instance, if during the pendency of proceedings of a criminal nature the High Court is called upon to decide whether or not the Advocate seeking to appear is entitled to appear under some provisions of the law, such a determination would be regarded as arising out of civil proceedings and cannot be considered by itself as criminal proceedings In fact in AIR (1950) Allahabad, page 162 *Iqbal Ahmad v Rex* the learned Judge was called upon to consider whether a certain Advocate was entitled to appear on behalf of certain accused persons, and when the matter went in appeal from the order recorded by the High Court Judge to the Supreme Court, the question whether the proceedings were civil or criminal, was dealt with as follows — Distinction between Civil and Criminal Proceedings

"A preliminary point was debated before us as to whether the learned Judge of the High Court was right in treating the application of the applicant as a criminal matter and

rules not inconsistent with the aforesaid rules as may be made in that behalf by the High Court.

The Indian Article, however, provides for the power of the Parliament to confer on the Indian Supreme Court any *further* powers to entertain and hear appeals from any judgments, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law. There is no such enabling power vested in our Parliament.

The criminal appellate jurisdiction of the Supreme Court is also to be spelled out from provisions of the next succeeding ART. 160, which confers upon the Supreme Court the power of granting special leave to appeal from "any judgment, decree or order or sentence of any Court or tribunal in Pakistan *other than a Court or tribunal constituted by or under any law relating to the Armed Forces.*" It would thus appear that in the event of any certificate being refused by the High Court under ART. 159(c), an application could validly be made to the Supreme Court for the grant of special leave to appeal and the Supreme Court in appropriate cases would allow such an application granting leave to appeal.

Meaning of ·iminal proceedings.

The expression "criminal proceedings" is not capable of precise definition but it would appear that, by and large, if a person is charged with the commission of a crime which is being enquired into or tried, and the tribunal enquiring into or trying the same, has power to punish such an offence, the tribunal would be described as being engaged in conducting "criminal proceedings". There are some jurists who seem to consider that the object of civil proceedings is to *enforce rights* while the object of criminal proceedings is to *punish wrongs*. Although there is a great deal of truth in this mode of drawing a distinction between criminal and civil proceedings, it is essential to remember that punishment is not necessarily present in criminal proceedings, nor always absent in civil proceedings. Security proceedings under *S. 107 of Criminal Procedure Code* to bind a person foi keeping the peace are criminal proceedings though their primary object is not to imprison the individual proceeded against, and in civil proceedings a defiance of an order of injunction issued by a Court of competent jurisdiction would entail *imprisonment* for the person committing the breach.

It is a useful test for the purpose of discriminating between civil and criminal proceedings to find out whether a given wrong, which is the subject matter of adjudication, is being regarded in its public or private aspect; all criminal proceedings are instituted against an offender on behalf of the State upon the view that the wrong committed by an offender is regarded as wrong done to the *community at large*. But the same wrong can also be regarded as a private wrong committed against a private individual, in which case, however, proceedings of a civil nature can be commenced against the delinquent at the instance of the individual so injured. "Thus a thief may be criminally prosecuted by the State for the purpose of being punished but a trespasser may only be civilly sued by him whose rights he has violated." This is further illustrated in criminal proceedings commenced at the instance of the Crown for offences of "rash and negligent driving" resulting in injuries to a person. The offender may also be civilly dealt with, at the instance of the person injured, by way of an action in damages.

ackstone on distinction between 'public' and 'private' wrongs.

We might next consider the distinction drawn by *Blackstone* between private and public wrongs, which, it is submitted, is of considerable assistance in the determination of the question whether the nature of the judicial process involved is civil or criminal: according to him *private* wrongs are those that result from infringement or deprivation of the *private or civil rights* belonging to individuals considered as *individuals* and are thereupon frequently termed *civil injuries*, whereas public wrongs are a breach and violation of

in support of its refusal to sissue a certificate either under Ss 158 or 159 of our Constitution

Concurrent findings of facts

The practice of the Privy Council on this point as reflected in their decisions as also in the judgments of the civil High Courts will be of considerable assistance in the discovery of the principles which have guided these tribunals in applying the provisions of the *Civil Procedure Code Ss* 109 *and* 110 Ordinarily, the concurrent findings of facts given by two courts would not be disturbed by the Supreme Court and normally neither a certificate would be granted by the High Court in those situations nor again would the special leave to appeal be granted by the Supreme Court This would be in keeping with the practice of the Privy Council, but it is wise never to forget the words of Lord Thankerton in *Bibhabati v Ramendra Narayan, AIR* 1947 *P C p* 19, to the effect

> "It is not by any means a cast iron practice, there may occur cases of unusual nature which might constrain us to interfere with the concurrent finding of facts to avoid mis carriage of justice "

No new point to be allowed to be raised

As a rule no new point would be allowed to be raised before the Supreme Court This too was the rule that the Privy Council followed if a point had not been raised before the Court below the Judicial Committee was extremely reluctant to allow it to be raised in appeal [See (1) *Raja of Ramnad v Sundara*, (1918) *L R* 46 *I A* 64 *P C*), (2) *Ghansham das Jaynarain v Rammasayam Ganesh Narayan* (1935) 53 *R P C* 160 *P C* See also *Grey v Manitoba & North Western Rail Co of Canada*, 1897 *A C* 254)]

214 Supreme Court as a Court of Criminal Appeal

ART 159 mentions four categories of cases in respect of which appeal to the Supreme Court will lie from "any judgment, final order or sentence of a High Court in Criminal Proceedings" These are —

(1) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life,

(2) if the High Court has withdrawn for trial before itself any case from any Court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as aforesaid,

(3) if the High Court *certifies* that the case is a fit one for appeal to the Supreme Court, and

(4) if the High Court has imposed any punishment on any person for contempt of itself as a High Court

It would appear that the scope of the criminal appellate jurisdiction of *our Supreme Court* is wider than that of the *Indian Supreme Court in that*

(a) the Indian Supreme Court acquires jurisdiction if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to *death* (In other words, if sentence of transportation for life is imposed by the High Court no appeal will lie to the Supreme Court)

(b) This is also true in respect of cases where High Court withdraws for trial before itself any case from any Court subordinate to its authority and convicts the accused person and sentences him to death Unlike the provision of our Constitution if it inflicts a punishment like transportation, no appeal will lie

(c) In the matter of punishments for contempt of itself, unless the matter is certified by the Indian High Court to be a fit one for appeal to the Supreme Court no appeal would lie But in Pakistan it would lie as a matter of right under ART 159(d), and the question of a certificate by the High Court does not arise

The *proviso* to our ART 159, as even to the Indian Article, makes the right of appeal subject to such rules as may be made in that behalf by the Supreme Court and to such other

rules not inconsistent with the aforesaid rules as may be made in that behalf by the High Court.

The Indian Article, however, provides for the power of the Parliament to confer on the Indian Supreme Court any *further* powers to entertain and hear appeals from any judgments, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law. There is no such enabling power vested in our Parliament.

The criminal appellate jurisdiction of the Supreme Court is also to be spelled out from provisions of the next succeeding ART. 160, which confers upon the Supreme Court the power of granting special leave to appeal from "any judgment, decree or order or sentence of any Court or tribunal in Pakistan *other than a Court or tribunal constituted by or under any law relating to the Armed Forces.*" It would thus appear that in the event of any certificate being refused by the High Court under ART. 159(c), an application could validly be made to the Supreme Court for the grant of special leave to appeal and the Supreme Court in appropriate cases would allow such an application granting leave to appeal.

The expression "criminal proceedings" is not capable of precise definition but it would appear that, by and large, if a person is charged with the commission of a crime which *is being enquired into or tried, and the tribunal enquiring into or trying the same*, has power to punish such an offence, the tribunal would be described as being engaged in conducting "criminal proceedings". There are some jurists who seem to consider that the object of civil proceedings is to *enforce rights* while the object of criminal proceedings is to *punish wrongs*. Although there is a great deal of truth in this mode of drawing a distinction between criminal and civil proceedings, it is essential to remember that punishment is not necessarily present in criminal proceedings, nor always absent in civil proceedings. Security proceedings under *S. 107 of Criminal Procedure Code* to bind a person for keeping the peace are criminal proceedings though their primary object is not to imprison the individual proceeded against, and in civil proceedings a defiance of an order of injunction issued by a Court of competent jurisdiction would entail *imprisonment* for the person committing the breach.

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We might next consider the distinction drawn by *Blackstone* between private and public wrongs, which, it is submitted, is of considerable assistance in the determination of the question whether the nature of the judicial process involved is civil or criminal: according to him *private* wrongs are those that result from infringement or deprivation of the *private or civil rights* belonging to individuals considered as *individuals* and are thereupon frequently termed *civil injuries*, whereas public wrongs are a breach and violation of

public rights and duties which affect the whole community considered as a community and are distinguished by harsher appellation of crimes and misdemeanours

It is true that offences like enticing a married woman (*S* 498 *P P C*), or adultery (*S* 494 *P P C*), or defamation (*S* 500 *P P C*), cannot be prosecuted in our courts without the complaint of the husband aggrieved in the first two offences and the person defamed in the third offence, but the fact remains that, that is a procedural bar created by the statute and has nothing to do with the nature of the proceedings in which these complaints when instituted come to be enquired into or tried Civil justice is administered according to one set of forms and criminal justice according to another, and it is the *nature* of the forms employed which will be decisive in the matter of determining whether or not a given proceedings is civil or criminal

The nature of contempt proceedings

The distinction between civil and criminal proceedings is important for the purpose of ascertaining the nature of "proceedings in contempt " There is a great deal of controversy going on in the Indian Courts upon the question whether the proceedings in contempt are civil or criminal In the case of *Zikar v State, AIR* (1952), *Nagpur page* 130, it was held that the proceedings in contempt cannot be regarded as criminal proceedings

> "A proceedings for contempt", said the Court, "cannot be regarded as a criminal proceeding merely because it ends in imposing a punishment on the contemner Contempts have been divided broadly into two classes according to the purpose which is subserved by the proceeding Contempt which is punished for disobedience of an order of the Court with a view to enforcing the rights of private parties is distinguished from contempt which is punished for vindicating the dignity of the Court The latter is regarded as criminal and punitive while the former is regarded as civil and remedial Whatever be the purpose of the proceeding, a proceeding for punishing contempt has been regarded as *sui generis* and of an anomalous nature A proceeding for contempt is not regulated by the ordinary law of criminal procedure "

Under our Constitution, if the contempt partakes of the character of criminal proceedings under provisions of ART 159, the High Court that imposes any punishment on any person for contempt of itself would thereby enable the person so punished as of right to appeal to the Supreme Court But if the contempt partakes the character of civil proceedings it has to certify the matter to be a fit one for appeal under ART 158 before an appeal can be taken In the case of *Sukhdev Singh v Teja Singh AIR* (1954), *Supreme Court page* 186, the *Supreme Court of India* has ruled that proceedings before a High Court under *ART 215 of the Constitution* can be regarded as being in the nature of special jurisdiction Bose J reviewed the entire history of the development of law relating to contempt and came to the conclusion that the Criminal Procedure Code did not apply to matters of contempt triable by the High Court The learned Judge was concerned with the contention raised on behalf of the petitioner S 527 *of the Indian Criminal Procedure* The Court declined jurisdiction to under S 527 was not available for effecting such a transfer since the power of the High Court to institute proceedings for contempt and punish offenders under ART 215 was in the nature of "a special jurisdiction", which is inherent in all the Courts of record and S 1 (2) of the Criminal Procedure Code expressly excludes Courts of special jurisdiction from its scope It is submitted that this authority cannot be invoked for the purpose of establishing that the punishments imposed by High Courts against contemners, who are adjudged as guilty of having committed contempt of the High Court, are not in the nature of criminal proceedings Our ART 159 contemplates that such proceedings can be criminal proceedings To hold otherwise would be to rob clause (c) of ART 159 of all its content

The fitness of a criminal case for appeal to Supreme Court.

"When is a case *fit case* for appeal to the Supreme Court within the meaning of ART. 159", is a question which is incapable of being answered with any degree of precision. The Privy Council practice upon this subject is instructive and would continue to guide the determination of applications that may be filed before the High Court for the purpose of obtaining a certificate of fitness for lodging an appeal under ART. 159, or for obtaining special leave to appeal under ART. 160. The several decisions of the Privy Council upon the subject have been reviewed by the Federal Court of Pakistan in the case of *Sarfaraz Ali v. The Crown, PLD* (1951) *F.C.* 41 *p.* 75, and the student is referred to that case for a study of the relevant pre-constitution case-law. The most important case upon the subject, however, is the one reported in 12 *Appeal Cases* 459, known as *Dillet's Case* where Lord Watson observed (at p. 467):

> "The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

(For a further study the student is referred to the cases of the Privy Council, *e.g., Vaithinatha Pillai's Case*, (1913) 40 *Indian Appeals page* 193; *Arnold v. The King Emperor*, (1914) 41 *Indian Appeals page* 149; *Mohinder Singh & another v. The King Emperor*, (1932) 59 *Indian Appeals page* 233).

Bibhabati Devi v. Ramendra Narayan.

In the case of *Bibhabati Devi v. Ramendra Narayan A.I.R.* 1947 *Privy Council p.* 19, Lord Thankerton, after reviewing the various cases refered to in the judgment, crystallised the essence of the *Privy Council Practice* in the matter of special leave to appeal in the exercise of the prerogative jurisdiction as follows (at p. 26):—

"(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two Courts and not to concurrent findings of the Judges who compose such Courts. Therefore a dissent by a member of the appellate court does not obviate the practice.

(3) That a difference in the reasons which bring the Judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word 'judicial' procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast iron one and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases, which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country.

public rights and duties which affect the whole community considered as a community and are distinguished by harsher appellation of crimes and misdemeanours

It is true that offences like enticing a married woman (*S* 498 *P P C*), or adultery (*S* 494 *P P C*), or defamation (*S* 500 *P P C*), cannot be prosecuted in our courts without the complaint of the husband aggrieved in the first two offences and the person defamed in the third offence, but the fact remains that, that is a procedural bar created by the statute and has nothing to do with the nature of the proceedings in which these complaints when instituted come to be enquired into or tried Civil justice is administered according to one set of forms and criminal justice according to another, and it is the *nature* of the forms employed which will be decisive in the matter of determining whether or not a given proceedings is civil or criminal

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reviewed the entire history of the development of law relating to contempt and came to the conclusion that the Criminal Procedure Code did not apply to matters of contempt triable *by the High Court The learned Judge was concerned with the contention raised on* behalf of the petitioner that certain contempt proceedings be transferred under S 527 *of the Indian Criminal Procedure Code* from Pepsu *High Court* to any other *High Court* The Court declined jurisdiction to transfer the case holding that the power reserved under S 527 was not available for effecting such a transfer since the power of the High Court to institute proceedings for contempt and punish offenders under ART 215 was in the nature of "a special jurisdiction", which is inherent in all the Courts of record and S 1 (2) of the Criminal Procedure Code expressly excludes Courts of special jurisdiction from its scope It is submitted that this authority cannot be invoked for the purpose of establishing that the punishments imposed by High Courts against contemners, who are adjudged as guilty of having committed contempt of the High Court, are not in the nature of criminal proceedings Our ART 159 contemplates that such proceedings can be criminal proceedings To hold otherwise would be to rob clause (c) of ART 159 of all its content

"The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself, and, conversely, it could not allow an appeal on grounds that would not have sufficed for the grant of permission to bring it."

See also *Attorney-General for Ontario v. Daly*, (1924) *A.C.* 1011, (*P.C.*)

The question that arises for consideration in regard to the power of the High Court to certify that a certain case is a fit case for appeal to the Supreme Court is, whether such a power is wider than the power of the Supreme Court to grant special leave to appeal against the decision of the High Court in criminal proceedings. *Prima facie*, Supreme Court will give great weight to the view of the case taken by the High Court as reflected in the reasons it gives for its refusal to grant a certificate to appeal to the Supreme Court. The High Court would weigh every conceivable aspect of the case in an attempt to determine whether or not the case presents any special features which make it a fit case for appeal being taken to the Supreme Court, and it is only where it would come to the conclusion that the case does not present any such special or extraordinary features upon which the Supreme Court may be invited to pronounce its judgment that it will refuse to give the certificate. The primary burden of the administration of justice lies upon the High Courts and it is only in extraordinary cases which involve points of considerable public importance or points that affect the growth of law in this country that the High Courts will certify a case to be a fit case for appeal to the Supreme Court. After giving due weight to the opinion of the High Court that has refused to give a certificate, the Supreme Court would decide whether or not special leave to appeal should be given.

215. Supreme Court and its general jurisdiction to grant special leave to appeal (Art. 160).

ART. 160 of our Constitution provides for what may be described as residual jurisdiction of the Supreme Court: the Supreme Court under this Article may grant special leave to appeal from any judgment, decree, order or sentence of any court or tribunal in Pakistan other than a court or tribunal constituted by or under any law relating to the armed forces. This article corresponds to ART. 136 of the Indian Constitution, with the sole difference that in the Indian formulation the word 'determination' has been used in the context of the expression, "any judgment, decree, order or sentence of any court". The language used in both the articles leaves no manner of doubt but that Supreme Courts in both the countries are competent to entertain appeal from any judgment, decree, order or sentence of any court or tribunal and the only category of tribunals excepted from the sweep of this general power are the tribunals constituted by or under any law relating to the armed forces.

It would thus appear that in all cases determined by the High Courts or any other Judicial Tribunals, whether in the exercise of their civil or criminal jurisdiction or any other "miscellaneous" jurisdiction, the Supreme Court can under this Article by special leave allow an appeal to be brought before it. In the case of *Bharat Bank v. The Employees of Bharat Bank*, *AIR* (1950) *S.C.* 188, the determination by the Tribunal constituted under the Industrial Disputes Act, 1947, was allowed to be questioned in appeal before the Indian Supreme Court in the exercise of its power under ART. 136. The majority judgment considered that the adjudication by the Industrial Tribunals fell within the category of matters with respect to which the appeal under ART. 136 was competent. They overruled the objection to the Court's jurisdiction based on the contention that the Industrial Tribunal in question could not in law be said to be performing judicial or quasi-judicial functions in view of the fact that it was not required to be guided or controlled by any settled rules of substantive law in the matters before it for its adjudication, as also because the adjudications of the Industrial Tribunals were not binding on the Government under S.15 of the Industrial Disputes Act unless declared to be so by the Government. The

(8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court but may be stated as findings on the issues before the Court in the judgments, provided that they are directly related to the final decision of the Court" Pritam Singh v the State

The Supreme Court of India in the case *of Pritam Singh v* The *State*, AIR 1950 *Supreme Court p* 169, has stated the rule it would follow in the matter of granting special leave in criminal matters Fazl Ali J, delivering the judgment of the Court, observed (at p 171)

"On a *careful examination of* ART *136 along with the preceding Article, it* seems clear that the wide discretionary power with which the Supreme Court is invested under it, is to be exercised sparingly and in exceptional cases only and as far as possible, a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article By virtue of this Article, Supreme Court can grant special leave to appeal in civil cases, in criminal cases, in Income Tax cases, in cases which come up before different kinds of Tribunals and in a variety of other cases

The only uniform standard which in our opinion can be laid down in the circumstances *is that court should grant special leave to appeal only in those cases where special* circumstances are shown to exist

(See also the recent case of *Andreas Charilaou Zakos v Queen* in *P L D* 1956 *Privy Council p* 43, wherein the principle of *Mohinder Singh v King Emperor* 59 *I A* 233 and *Muhammad Nawaz v King Emperor* (1941) 68 *I A* 126, have been referred to and affirmed)

With regard to the relevance of the Privy Council practice in respect of the principles controlling the judgment of the Supreme Court when deciding to grant or to withhold special leave the learned Judge remarked

"Though the Supreme Court is not bound to follow the decisions of the Privy Council too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with the Supreme Court yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this court in granting special leave"

The learned Judge then referred to the case of *Kapildeo Singh v King decided by the Federal Court of India*, reported in AIR 1950 *F C p* 80 as containing a review of the *Privy Council Practice*, as it can be gathered from the several decisions rendered by it

The learned Judge also referred to the scope of the appeal once a special leave had been granted (at p 171)

"(The) assumption, remarked the learned Judge, 'that once an appeal had been admitted by special leave, the entire case was at large and the appellant was free to contest all the findings of facts and raise every point which could be raised in the High Court or the trial court, is exceptionally unwarranted Only those points can be urged in the final hearing of the appeal (before the Supreme Court) which are fit to be urged at the preliminary stage when leave to appeal is asked for, and it would be illogical to adopt different standards at two different stages of the same case

Even the Privy Council had to dispel this misconception which Mr Fazl Ali J was exposing in 1914 *Appeal Cases p* 599 in the case of *Ibrahim v Rex* The Privy Council observed in that case as follows

"The Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing (See *Riel's case* 1885, 10 *Appeal cases p* 675, *Ex Parte Deeming* 1892 *A C p* 442)

Supreme Court beyond its scope as contemplated by the Constitution. "That judicial power", the learned Judge went on to say:

"is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most-important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and the law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government."

It was accordingly ruled that any legislative attempt to confer power on the Supreme Court to be able to obtain a judicial declaration from it of the validity of the act of Congress not having been presented in a case or controversy, was not constitutional legislation since it was beyond the scope of "judicial power" conferred upon it by the Constitution. Following this decision the Supreme Court of America refuses to give merely advisory opinions

ationale of the refusal y the U S Supreme Court to exercise Advisory risdiction

In the United States the Supreme Court of that country would decline to answer constitutional questions unless such a decision is necessary for the adjudication of legal rights It would appear that among the factors that have inclined the Supreme Court to decline the exercise of advisory jurisdiction is the one which has reference to its reluctance to adjudicate upon constitutional questions "not growing out of a case before it". Justice Hughes in his *The Supreme Court of the United States, at page 27*, expounded the idea underlying the foregoing observation by remarking that the foundations of the policy by reason of which the Supreme Court declines the tendering of advisory opinion, are the following:

"The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots, the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority, the necessity, if government is to function constitutionally, for each to keep within its power, including the courts, the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement, with all in the paramount importance of constitutional adjudication in our system

"All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which differing decision very often entails On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme For premature and relatively abstract decisions, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure "

e nature of bjection to the ferment of Advisory urisdiction on Courts

The fundamental difficulty, which is really one of principle, in the matter of defending the constitutional propriety of the exercise of this advisory jurisdiction, has been stated in several cases decided in America and in the Commonwealth countries, but the most clear and comprehensive statement of it would be found in the dissenting opinion of Justice Zafrullah Khan who, when a Judge of the Federal Court of the undivided India, de-

minority judgment, to which Mukherjea and Patanjali Sastri were parties, declined jurisdiction holding that the adjudications made by the Industrial Tribunal could not be the subject matter of appeal under ART 136 of the Indian Constitution They interpreted the word 'determination' occurring in ART 136 to imply 'determination by judicial tribunal' and were impressed by the argument that the adjudication by the Industrial Tribunal does not become complete and binding unless and until it was declared to be so under S 15 of the Act by the appropriate Government and further that the decision on appeal rendered by the Supreme Court not only affected the adjudication by the Tribunal but also the *order* of the Government—a thing which could not be validly done by the Court

The Supreme Court of our country has, however, interfered with the determination of the findings of the Industrial Tribunal in the case of *Remington Rand of Pakistan Limited v Pakistan, PLD* (1957) *S C* 170

We have already dealt with the question of the exercise of appellate jurisdiction by the Supreme Court of Pakistan under the powers reserved to it under this Article in relation to adjudications by Election Tribunals despite the existence of ART 146 of the Constitution and no useful purpose will be served in reiterating the same argument in the context of present consideration of the scope of ART 160 (See the statement of law in that respect attempted under the title 'Writ of Quo Warranto, in Chapter VI)

If the view advanced elsewhere by the present writer to the effect that writ jurisdiction" is for the purpose of *certification* neither 'civil' nor 'criminal so as to be covered by ARTs 157 and 158 be cosidered as correct, the only mode in which appeals from orders passed by High Courts on the writ petitions made to them could be taken to the Supreme Court would be to invoke its jurisdiction under ART 160 (See Nature of Writ Jurisdiction' discussed under "Constitutional Remedies" in Chapter VI)

216. Supreme Court and its Advisory Jurisdiction (Art 162)

Ad ory Jur sd ct on

ART 162 enables the President when a question of law has arisen or is likely to arise "which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it" to refer it to that court for consideration and the court may after such hearing as it thinks fit, report its opinion thereon to the President This Article (as did its legislative predecessor *S 213 of the Government of India Act*, 1935) confers what is called advisory jurisdiction upon the Supreme Court in relation to matters referred to it for its opinion by the President *ART* 143 *of the Indian Constitution* corresponds to our ART 162, and in fact both of them are couched in identical language S 4 of the *Judicial Committee Act of* 1833, (3 *and* 4 *William IV, Chapter* 41), too confers advisory jurisdiction on the Judicial Committee for it provides for His Majesty to refer to the Privy Council "any such other matters whatsoever as His Majesty shall think fit ' Similarly the House of Lords has the power of summoning Judges to answer questions necessary for the decision of a particular case It has also the power, in its capacity as the Legislature, to ask the Judges what the law on a given subject is, so that upon having better information it should be in a position to have the law altered Advisory opinion can be sought in Canada not only by the Governor General on the validity or interpretation of Dominion or Provincial Legislation, but the Senate or the House of Commons may also refer to the Supreme Court questions concerning private bills presented in Parliament (see further Laskin's Canadian Constitutional Law p 98 (1951) See also *Attorney General for Ontario v Attorney General for Canada*, (1912) *Appeal Cases p* 571)

The po t on in the U S A

The United States Supreme Court, however, has no advisory jurisdiction conferred upon it In the case of *Muskrat v United States*, 219 *U S* 346 (1911) 55 *Lawyers Edition* 246 *at p* 252, the *United States Supreme* Court speaking through Mr Justice Day referred to the incompetence of the Congress to expand the scope of the judicial power of the

to the same limitations as any other opinion—namely, that the person advised may or may not, at his option, follow the advice; in this case it is not easy to see the advantage of imposing this additional duty on Judges . . . Or, in the alternative, it is (like the fictitious 'advice' of the Judicial Committee) opinion of such a peculiarly authoritative nature that it is not, and is not intended to be, really opinion at all, but judgment disguised as opinion. There seems to be no cogent motive for extracting opinions from the Bench except to give them an authority which cannot belong to any lesser opinion. If, then, this opinion is really judgment, it is open to the extremely serious objection that it is anticipatory of actual facts, which are of infinite complexity, and upon which all judgment, in the sense of the application of principle to circumstances, must depend . . . . No abstract principle of interpretation laid down in advance by the Courts could be, or at all events ought to be, more than a guide for the decision of subsequent cases. It is therefore either superfluous, or else it is a signpost with a pointing finger in which we may read a gesture, not of direction, but of command or of threat."

And the learned Judge summed up his conclusions by remarking that "an advisory opinion is not in the nature of a judicial pronouncement, nor was it appealable to His Majesty in Council, nor again is it binding upon the authority seeking it." He also doubted whether such an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of *S.*212, *Constitution Act* so as to be binding on courts in the country. One of the important considerations that inclined the learned Judge to hold that it was *not a law declared* by the Federal Court was, that in the *Government of India Act*, the subject of advisory opinion was dealt with in a section later than S.212, which dealt with the binding value of the law declared by the Federal Court. It may be remembered, however, that in our Constitution the ART. 163, which provides for law declared by the Supreme Court being binding on all courts of Pakistan, does not precede but follows the Article that confers advisory jurisdiction on the Supreme Court. But of this something will be said later.

The difficulties to which Zafrullah Khan J. referred, were also noticed by their Lordships of the Privy Council in the case of *Attorney-General for British Columbia v. Attorney-General for Canada*, (1914) *Appeal Cases, p.* 153 where *Lord Haldane observed* (at p. 162)

1914, A.C. p. 153.

"Under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied."

In that case their Lordships found themselves unable to answer all the questions put to them and in offering such opinion as they did, they found it "advisable to limit and guard their replies." (See also the case of *Attorney-General of Canada v. The Attorney-General of Ontario*, *AIR* (1932) *P.C.* 36; and *Attorney-General for Ontario v. Hamilton Street Railway Company*, (1903) *Appeal Cases p.* 524).

1955 PLD Federal Court 435.

In a recent case reported in *P.L.D.* 1955, *Federal Court p.* 435, we have the case of a reference made by the then *Governor-General* for the opinion of the *Federal Court* under *S.*213 *of the Government of India Act*. The questions that were referred to the Federal Court, in the first instance, were the following :—

"(1) What are the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation ?

(2) The Federal Court having held in Usif Patel's case that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under *S.*42 *of the Government of India Act*, 1935, nor retrospective effect given to them,

clined to give such an opinion on the ground that any opinion given by him was bound to raise ghosts far more troublesome than any it might serve to slay (See *AIR* 1944 *Federal Court page* 73, in the matter of a reference made under *S* 213 *of the Government of India Act*) A reference to the Federal Court in this case involved the question of a legislative proposal and included questions such as

(1) Whether the Federal Legislature had the power to pass a law "that upon the death of any person there shall be levied any duty in respect of the property other than agricultural land passing upon the death",

(2) [illegible]

by way of enumeration five items of property)

(3) If the Federal Legislature had not the power referred to in questions (1) and (2) was the levy of such duties a matter not included in any of the Lists in Schedule 7 Government of India Act, 1935 ?

(4) If the Federal Legislature had the power referred to in question (2) was the levy of a duty on those classes of property mentioned in question (2) in respect of which it had not such powers a matter not included in any of the Lists in Schedule 7 *Government of India Act*, 1935 ?

Views of Zafrullah Khan

The opinion on these questions was tendered only by Chief Justice *Spens* and *Varadachariar J*, and *Justice Zafrullah Khan* declined to tender any advice whatever He traced the history of the advisory jurisdiction from the days of the *First Stuart Kings of England*, and showed how the consensus of opinion of the text book writers was against the propriety of the conferment of this extraordinary jurisdiction upon courts of law He quoted with approval the following extract from Professor Felix Frankfurter as he then was (37 *Harvard Law Review, page* 1005),

'The whole *milieu* of advisory opinions on proposed bills is inevitably different from that of litigation contesting legislation However much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere The impact of actuality and the intensities of immediacy are wanting In the attitude of Court and counsel, in the vigour of adequate representation of the facts behind legislation (lamentably inadequate even in contested *litigation) there is thus a wide gulf of difference, partly rooted in psychologic* factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law Advisory opinions are rendered upon sterilized and mutilated issues Let any one, for instance, compare the adverse opinion of the *Massachusetts Supreme Court* upon the constitutionality of municipal coal and wood yards with the opinion of the *Supreme Court* sustaining such legislation, the adverse opinion of the *Massachusetts* Court on prohibition of trading stamps with the opinion of the *Supreme Court* sustaining such legislation, the adverse opinion of the *Massachusetts Court* on the *State's power* to provide for dwelling houses with the opinion of the Supreme Court sustaining such legislation These are samples taken from the Court in which, presumably advisory opinions have been rendered under the most favourable circumstances '

He also quoted the following extract from Professor C K Allen from Volume 47, The Law Quarterly Review pages 48 49,

"The whole notion of 'consultation' of the judiciary is, by hypothesis, a contradiction which requires exceptional justification The Judge does not sit in the seat of justice in order to be consulted, but in order to decide an issue If, then, he is to be 'consulted', his advice must be one of two things Either it is mere opinion, subject

is if those facts are true."

It is submitted with respect that, having regard to the reference of the type that was made by the Governor-General, the Federal Court should have declined jurisdiction to advise. In the first place, *S.213 of the Government of India Act*, as even ART. 162 of our *Constitution*, refer to a situation in which "a question of law has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it", and admittedly as to the question, whether Constituent Assembly could or could not legally be dissolved, no such question was, before dissolving the said Constituent Assembly, in the first instance, referred to the Federal Court, and instead an action was taken by the Governor-General in a matter which, to say the least, was not *free* from constitutional difficulty. It was a matter of Public History that the same Governor-General had allowed the Constituent Assembly to carry on its work for nearly four years or so for the whole length of time when he himself was the Governor-General and the majority in the Constituent Assembly was responsible for providing him with the Cabinet whose advice was binding on him.

In the second place, what can be referred to the Federal or Supreme Court is a pure question of law, a question which is capable of being stated in the abstract, and not a question of law which is made to arise from certain assumptions and pre-suppositions. It is submitted with respect that this aspect of the matter, having regard to the text of the opinion rendered by the Federal Court, does not appear to have been specifically or energetically urged in argument. No serious argument seems to have been raised that the opinion sought for by the Governor-General upon a reference made by him to that Court was more or less, in the nature of things, likely to secure a declaration as to the constitutional validity of his own act in regard to the dissolution of the Constituent Assembly. All the facts, on which these assumptions could have been defended, were before the Chief Court of Sind when it decided the writ petition in the case of *Maulvi Tamizuddin Khan v. The Federation of Pakistan & Others* (See *P.L.D. 1955 Karachi p.96*) and it was not possible to state the questions in the abstract before the Federal Court without reference to those *ex-parte assumptions and presuppositions.* The advisory jurisdiction is an extraordinary jurisdiction and cannot be suffered to be invoked in situations in which adjudication of disputes could have been more appropriately gone in for. Upon proper evidence, during the course of appropriate proceedings, the substantial question which was in reality involved in the reference, could have been litigated in ordinary courts.

The Advisory opinion is not "law declared" and is not binding upon Courts.

Care should be taken to remember that the opinion given by a Court in the exercise of its advisory jurisdiction is really no more and no less than the opinion of some sort of law officers for the benefit of the Executive. That opinion does not bind anybody and is not the law declared by the Court in any conceivable sense of that term. Such an opinion is not even required to be given in an open court by the Privy Council.

"The report or recommendation of the Judicial Committee to the Sovereign-in-Council with reference to matters of appeal from any Court or Judicial Officer is a distinct category from the advice to be given in any such matter as he may think fit to refer to them. The manner in which the advice is to be tendered is the same, that is to say, in the same manner as has been heretofore the custom with respect to matters referred by His Majesty to the whole of his Privy Council or a Committee thereof, but in the case of a judicial matter the nature of the report or recommendation must always be stated in open court. No such restriction appears to be placed upon the advice which the sovereign may think fit to seek in other matters. It accordingly is not the practice for the Judicial Committee to make a pronouncement in the nature of a formal judgment showing the

sions taken and other acts done under those laws shall be valid and enforceable and those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of the law of the land until the question of their validation is determined by the new *Constituent Convention?*

And pursuant to a suggestion made in the course of Federal Court's order, dated the 18th April, 1935, the following further questions were also referred for its opinion

"(3) Whether the Constituent Assembly was rightly dissolved by the Governor General?

(4) Whether the Constitution Convention proposed to be set up by the Governor General will be competent to exercise the powers conferred by sub section (1) of S 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

Chief Justice Muhammad Munir, while answering the reference noted ' that the answers have to be given in the context in which and on the assumptions on which the questions have been formulated " The reference incorporated the following averments

"(1) that though the Constituent Assembly functioned for more than seven years it was unable to carry out the duty of providing a constitution, and for all practical purposes assumed the form of a perpetual legislature,

(2) that the Constituent Assembly was dissolved by the Governor General because by reason of repeated representations from the resolutions passed by representative public bodies throughout the country, he formed the opinion that the Assembly had become wholly unrepresentative of the people and,

(3) that the Constituent Assembly from the very beginning asserted the claim that the laws passed by it under sub section (1) of S 8 of the *Indian Independence Act* 1947 did not require the assent of the Governor General Thus the assumptions of fact on the basis of which this Court's opinion is asked are —

(a) the Constituent Assembly's inability to provide a constitution and its assumption of the powers of a perpetual legislature,

(b) its wholly unrepresentative character which it had gradually acquired during the seven years of its existence, and

(c) its claim that it was itself competent to make provisions as to the constitution of the Dominion without obtaining to those provisions the assent of the Governor General "

As to the contention that the Court should go into the facts on which the propriety or impropriety of the dissolution may be determined, the learned Judge remarked (p 461)

"We cannot, on this Reference, undertake this enquiry or record any findings on the disputed questions of facts because any such course would convert us into a fact finding tribunal which is not the function of this Court when its advice is asked on certain questions of law The answer to a legal question always depends on facts found or assumed and since we cannot try issues of fact the Reference has to be answered on the assumption of fact on which it has been made The Privy Council also has, under *S 4 of the Act of 1833 (3 and 4 Williams IV, Chapter 41), similar advisory* jurisdiction but no [illegible] where a refer [illegible] the advisory [illegible] the manner in which the Reference has been made The Governor General has taken the responsibility of asserting certain facts and has merely asked us to report to him what the legal position

review any judgment pronounced, or order made by it. This provision corresponds to ART. 137 of the Indian Article. The Supreme Court of Pakistan under paragraph 3 of Third Schedule has the rule-making power of regulating the practice and procedure of the court *inter alia*, including the power of making rules as to "the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications for such review are to be made or entertained." Any rules made under this paragraph will control the terms and conditions upon which an application for review could be entertained by the Supreme Court.

Order 47, R.1, C.P.C.

The term 'review' apparently has the same meaning as is ascribed to it by Order 47, Rule 1, Civil Procedure Code, which is as follows :—

"Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a court of small causes, and who, from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

The jurisdiction of an ordinary civil court to review is provided for by *S.* 114 *of the Civil Procedure Code, and Order* 47, *Rule* 1, only illustrates the grounds upon which review of judgment or order is competent to a civil court.

The Federal Court of Pakistan, however, had no such express constitutional provision upon which to ground its power for review and it, in fact, adopted precisely the same approach to the review jurisdiction as has been characteristic of the practice of the Judicial Committee of the Privy Council or the House of Lords. Ordinarily, it regarded its own determinations as final and could be persuaded to exercise its power of review only for the restricted purpose of correcting the misprints and obvious mistakes that had crept in its judgments or orders.

In the case reported in *AIR* 1941 *F. C. p.* 1 *Raja Prithwi Chand Lal Chowdhury & others v. Sukhraj Rai & others*, the *Federal Court* reviewed the law on the subject concerning its jurisdiction to review its own decisions and ruled that:

"The Federal Court will not sit as a court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceived himself to be aggrieved by the decision. The rules which govern the practice of the Judicial Committee and of the House of Lords in matters of review govern the practice of the Federal Court as well in India. Consequently no case in the Federal Court can be re-heard and an order once made is final and cannot be altered. Nevertheless, in exceptional circumstances, an application for review can be entertained. The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by misprint in embodying the judgments, or have been introduced through inadvertance in the details of judgments. It can also supply manifest defects in order to enable the decrees to be in force, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done by a court of last resort as where

decision to which they have come before making their report on special reference for the *Sovereign in Council* " (See *Privy Council Practice by Norman Bentwich* 1912 *Ed* p 241)

Under paragraph 3(2), of the First Part of Third Schedule, however, the "Supreme Court is charged with the duty of delivering judgment and of making reports in open court " Assuming the opinion which under *ART* 162 the Supreme Court is to report is itself a report, within the meaning of the paragraph just cited, by the Supreme Court, even that would not make the opinion a 'law declared ' within the meaning of ART 163(1)

It is true, as has been pointed out earlier, that in our Constitution, ART 163, regarding law declared being possessed of a binding value, follows ART 162 which mentions the advisory jurisdiction of the Supreme Court [unlike the Indian Constitution in which Article dealing with the advisory jurisdiction of the Supreme Court (ART 143) follows ART 141 which enjoins that the law declared by the Supreme Court shall be binding on all Courts within the territory of India], but nothing in reality turns upon this scheme or the arrangement of the Articles, and this sequence in which Articles occur cannot

discussion the views in favour of validity expressed by this Court in the said opinion That opinion is not technically binding on the High Court Any opinion of this Court given upon a reference under S 213 can properly be reconsidered at any time by this Court in any litigation coming before it and should be so reconsidered on the proper request of any party, however much respect for the learned Judges responsible for an opinion and a desire to secure continuity and certainty in the pronouncements of this Court may make a member of this Court hesitate to differ '

To accept the view that the referring authority by making some assumptions in a reference is to be in a position to obtain a certain type of opinion from the Supreme Court is to make the Supreme Court helpless in the matter of criticising those assumptions or to doubt its competence to determine whether or not those assumptions are validly grounded on facts it is virtually to convert what *prima facie* is merely advisory jurisdiction into a jurisdiction in the nature of a protective shield which the Executive can any time hold up against the rights of the subjects, which it may have itself violated It is submitted with respect, that a Court that is called upon to exercise advisory jurisdiction is the sole judge of the situation whether or not it should at all tender an opinion and it ought to do so only in the clearest of cases conceivable, that is, cases where a *bona fide* question of law has been referred to it for its opinion

It is doubtful if during the consideration of a reference under Art 162 the Supreme Court can pass any *interim* order or restrain any public authorities from doing anything one way or the other, for an *interim* order is only calculated to restore *status quo* till such time as effective judgment can be given one way or the other Since no judgment which is binding can at all be rendered by any Court that is giving an advisory opinion, it is not possible for it at any stage earlier than the delivery of its opinion to prohibit, by means of an *interim* order, any public authority from doing anything or directing it to do a particular

of a reference
Courts within

217. The Supreme Court and the Power of Review (Art. 161)

ART 161 of our Constitution provides for the Supreme Court's power "subject to the provisions of any Act of Parliament and of any Rules made by the Supreme Court" to

sufficient reason why the proposed new evidence was not timely submitted.

(2) *Mistake or error apparent on the face of the record.*

With regard to the ground that error *must be one apparent on the face of the record*, it is necessary to emphasise the fact that although the error can be both of law or fact, in each case it is the requirement of *the law that the error must be capable of ascertainment from the record itself*. To merely allege that the error of law has taken place because a wrong exposition of the law has taken place, or that the law has been wrongly applied, is not sufficient. It is the *apparency* of error that seems to be the leading feature in the situation to which the exercise of the review jurisdiction could be said to be attracted. (See *AIR 1952 Allahabad p. 318 Keshodass v. Murtaza Ali Khan*, and the observations of the Supreme Court in the *Kamatha's case AIR 1955 S.C. page 233*, See also the discussion on *Error apparent* on the face of the Record, in Chapter VI relating to *Writ Jurisdiction* in *Certiorari proceedings*.)

(3) *Any other sufficient reason* :

As to the expression "any other sufficient reason" occurring in Order 47, Rule 1, their Lordships of the Privy Council in the case of *Chhajju Ram v. Neki, in AIR 1922 P.C. p. 112*, after examining the relevant case law have remarked:

"The expression has reference to those species of grounds that are *analogous to those specified immediately previously before that expression in Rule 1, of Order 47*".

It must be carefully borne in view that there is a fundamental difference between the scope of interference in a *review* as contrasted from that which is countenanced in an appeal.

"Appeal" "Review" proceedings distinguished.

An appeal is a re-hearing of the case and at the stage when the court of appeal is re-hearing the case, it is bound to take notice of the law as it has come to be between the date on which the judgment appealed from was delivered and the date on which the appeal happens to be considered by the court of appeal. A review of the judgment cannot take notice of the law as it has come to prevail after the judgment sought to be reviewed has been rendered. In fact, the happening of any subsequent event in the circumstances is entirely irrelevant to the fate of review proceedings. (See *AIR 1944 Madras p. 238 in re K. Vasudevan*). As soon as an appeal is admitted, the case for re-hearing has been thrown open before the court of appeal. "The hearing of an appeal", it was remarked in the case of *Lachmeshwar Prasad Shukul & others v. Kameshwar Lal Chaudhuri & others AIR (1941) F.C. 5*, "under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal, the appellate court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate court is competent to take into account legislative changes since the decision in appeal was given and its powers are not confined only to see whether the lower court's decision was correct according to the law as it stood at the time when its decision was given."

In this case Varadachariar J., referred to numerous English, Indian and American cases, as also to an earlier judgment rendered by *Federal Court in the case of Shyamakant v. Rambhajan AIR (1939) F.C 74: 1939 F.C.R. p. 193*. (See *1912 A.C. p. 788 (Attorney General v. Birmingham, Tame & Rea District Drainage Board)*; *1882 9 Q.B.D. 672 (Quilter v. Mapleson)*; *36 Madras p. 439 (1910) Kanakayya v. Janardhana Padhi*; *Mukerjee v. Mt. Ramratan AIR (1936) P.C. 49: 63 Indian Appeals page 47*. Lord Thankerton in the last mentioned case remarked that the duty of the court is to administer the law of the land on the date when the court is administering it.)

218. Constitution and the Jurisdiction of the High Courts in Pakistan

There are two High Courts in Pakistan, one for each of the two Provinces of Pakistan, that is the West and East Pakistan Provinces. This is the requirement of *ART.165(1)*

by some accident, without any blame the party has not been heard and an order has been inadvertently made as if the party had been heard But in no case, however, can a re hearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the court "

Their *Lordships* relied on the maxim which is of considerable importance and which in their opinion ought to be observed by all courts of the last resort—*interest reipublicae ut sit finis litium* As remarked in the case of *Venkata Narasimha Apparow versus Court of Wards* (1886) *11 A C page* 660, 13 *Indian Appeals page* 155

"Its strict observance may occasionally entail hardship upon individual litigants but the mischief arising from that source must be small in comparison with the great mis chief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this "

(As to the practice in England as well as in the Privy Council, see further 1 *Moor P C page* 117, (1836) *Rajunder Narain Rae v Bijai Govind Singh*)

The Indian Supreme Court in the exercise of the powers of rule making reserved to it under ART 145, has in the 38*th Order of the Supreme Court Rules* 1950, limited the scope of application for review to the grounds mentioned in *Order* 47, *Rule* 1 of the C P C All the decisions that have interpreted the scope of expressions, like the discovery of new and im*portant matters, or evidence*," or "*mistake or misprint on the face of the record* or any sufficient reason" given by the courts in regard to the provisions of the Civil Procedure Code contained in Order 47, Rule 1, are, therefore, applicable in so far as the practice before the Indian Supreme Court is concerned

The rule in Pakistan upon the subject is as follows —

"Applications for Review shall be filed with the Registrar within 30 days after judg ment is delivered in the cause, appeal or matter, and shall distinctly state the grounds for Review and be accompanied by a certificate of counsel that the petitioner has reasonable and proper grounds for Review " (See *Order XXVI, of the Rules of the Supreme Court*, 1956)

It would be seen that the "grounds ' on which review is competent have not been indicated in the Rule The Rules of the Indian Supreme Court on this subject provide "Th [illegible] dgment or order b t no application for review will be [illegible] 1 *of the Civil Procedure Code* (See [illegible] the Review Jurisdiction of our Supreme Court has yet to be described by that Court and the following comments offered by the present writer as to the Nature of Review Jurisdiction are based on the belief that the Court would adopt the concept of Review as it is known to the *Civil Procedure Code* Grounds of Review

(1) *Discovery of New and Important Evidence* In the case of *Kessowji v G I P Railway*, 11 *C W N* 721 *P C* their Lordships of the Privy Council with regard to the requirement that the Review applications could be entertained on the ground of discovery of new and important matter of evidence emphasized the duty of the Judge in review proceedings to require the facts, as to the absence of negligence to be strictly proved If we have no such evidence forthcoming the review application is incompetent In a later case *Shivalingappa v Revappa* (1915 *P C* 78) *the Privy Council* refused to allow the admission of fresh evidence on the ground that valid reasons for so doing were not available There was no explanation why such new evidence was not made available during the trial The application for summoning additional evidence had been made after a final judgment in a suit which had already lasted over a period of three years and the affidavits failed to disclose to their Lordships any

History of the Powers of Superior Courts.

the powers of the various High Courts ever since the establishmen of British power in the Indo-Pakistan sub-continent. The statement that 'the roots of the present lie deep in the past', is nowhere more true than it is in the case of the orderly development of the jurisdictional aspects of Courts of superior jurisdiction in our country. In the unfolding of the history of the progressive development of judiciary in the country it is not necessary for us to begin earlier than the *Regulating Act of 1773, (13 Geo. III, C. 63)*, which Act, as its title and Preamable indicate, was passed "for establishing certain regulations for the better management of the affairs of *East India Company*, as well in India as in Europe". Quite apart from the far-reaching changes of a political nature, which this Act made in the matter of regulating the affairs of *East India Company* (such as the establishment of the *Government of Bengal* which was to consist of *Governor-General* and four Councillors, and making that Government a superior Government over the administrations of Madras and Bombay, subject of course to the ultimate authority and control of the Court of Directors in England) the importance of that legislative measure lies in its emphasis on the establishment of the *Supreme Court*, which was to be a *King's Court* having jurisdiction over "His Majesty's subjects", a Court the Judges whereof were to be appointed by the Crown. It is in this Act that the ambition of the *East India Company* to establish a system of Courts from the lowest to the highest under its own authority met with its *Waterloo*. It was in pursuance of this Act that by means of the issue of a *Royal Charter, dated March 26, 1774, Supreme Court at Calcutta* was established. For the course of next eighty eight years or so this Court at Calcutta carried on work of administering justice. It had jurisdiction of a Common Law Court as also the powers of the *Court of Equity* analogous to those exercised at one time by the *Court of Chancery in England*. It was constituted also as "the *Court of Oyer* and *Terminer* and *Gaol Delivery* for *Calcutta* and *Fort William* and the factories subordinate thereto, with power to summon grand and *petit juries* to administer criminal justice." It also had the powers of the *Court of Admiralty*. It was to function as *Ecclesiastical Court* too. In matters 'civil' an appeal lay from its decisions to the Privy Council but in criminal cases the right to appeal was made subject to numerous restrictions. Under *ART. 4 of the Charter*, the Judges of the Supreme Court became invested "with such jurisdiction and authority as our Justices of our Court of King's Bench, may lawfully exercise within that part of Great Britain called England by the Common Law thereof". Similarly ART. 21 gave powers of general control and superintendence to the Supreme Court in such sort, manner and form "as the inferior courts and magistrates of that part of Great Britain called England are, by law, subject to the order and control of our *Court of King's Bench* to which end the said *Supreme Court of Judicature* at Fort William in Bengal is hereby empowered and authorised to award and issue a writ or writs of *mandamus, certiorari, procedendo* or error to be reflected in the manner above-mentioned and directed to such courts and magistrates, as the case may require, and to punish any contempt of wilful disobedience thereto, by fine or imprisonment." This power was expressly made available to Supreme Court to be exercised by it over Courts of Request and Quarter Sessions at Calcutta, and Justices, Sheriffs and Magistrates appointed in the Districts.

The Company's judicial system as it was organised by *Warren Hastings*, was known as *Adawlut* system with "Sudder Dewanny Adawlut" at the apex. The Charter that created the Supreme Court was silent as to the relation between that court and the courts established under the authority of the Company. The difficulties arose because the Supreme Court claimed to have jurisdiction over the servants of the Company and the Judges of the Company's Courts, who in the system of administration of justice established under the aegis of the Company, were, of course, the servants of the Company.

The law which was to be applied by the Supreme Court was also not precisely defined in the Charter under which it came to be established. The *Supreme Court* was the successor

of the Constitution, which lays down that "there shall be a High Court for each Province " In clause (2) of the said Article, by a constitutional mandate the High Courts for the Provinces of East Bengal and West Pakistan functioning immediately before the Constitution Day are to be *deemed* to be the High Courts under the Constitution for the Provinces of East Pakistan and West Pakistan respectively

The High Court for the Province of East Pakistan was constituted immediately after the creation of Pakistan and its jurisdiction and authority was described in the Order creating it as being the same as that of the *High Court of Judicature at Calcutta* [See *High Courts (Bengal) Order*, 1947, *dated* 11 8 1947] The High Court for West Pakistan was established immediately after the creation of the Province of West Pakistan, by the *Establishment of West Pakistan Act*, read with the *Establishment of West Pakistan High Court Order of* 1955 *The West Pakistan High Court* created under these pre-constitutional instruments is now to be deemed as the High Court of West Pakistan under the Constitution

In order to be able to appreciate the jurisdictional aspects of the two High Courts it is necessary to make a reference to the pre existing law upon the subject for it is this

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(a) power of the High Courts to issue certain writs under ART 170 and

(b) the power of High Court to transfer cases to itself from subordinate Courts involving "a substantial question of law as to the interpretation of the Constitution the deter mination of which is necessary for the disposal of the case " (ART 171)

These two Articles supplement the jurisdiction and power of the High Courts as defined by the state of the pre existing law

Administrative functions of High Courts

In the Third Schedule to our Constitution, in Part II, are mentioned the administrative functions of the High Court It is provided that

"Each High Court shall have superintendence and control over all courts subject to its appellate or revisional jurisdiction,"

and under clause (2) of paragraph 5, are mentioned the powers of the High Court to

"(a) call for returns,

(b) make and issue general rules, and prescribe forms for regulating the practice and procedure of such Courts,

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts, and

(d) settle tables of fees to be allowed to the sheriffs, attorneys, and all clerks and officers of such Courts "

Importance of High Courts in the scheme of administration of Justice

The High Court in the exercise of these powers virtually becomes a Court of fundamental importance not only as constituting the principal forum in which the major burden of the administration of justice in each Province is to be undertaken and discharged but also as a Court invested with powers of general superintendence and control over all the Courts situated within the Province

The High Courts are superior courts of general jurisdiction and they have far reaching judicial and administrative powers indeed The Supreme Court is a Court of a defined jurisdiction and except that the constitution requires its interference in specified matters it

Outline of Judicial

tween church and commonalty, between common law and civil jurisprudence, which time alone had rendered endurable to the people amongst whom it had grown up, a people widely different in habits, character, and form of civilization from any to be found in the East, was introduced into India, not intentionally as a burden, but for its benefit and salvation." (Pp. 42—43)

The next phase which may be regarded as the milestone in the history of the growth of judicial power is the *Act of Settlement of year* 1781 (21 *George III, Chapter 70*), which, as, has been hinted earlier, was in reality an amending Act—an Act which, to a considerable extent, curtailed the powers of the Supreme Court: in particular, its jurisdiction "in any matter concerning the *revenue* or concerning any acts ordered or done in collection thereof according to the practice of the country" was taken away. Similarly, Governor-General and his Council were rendered immune against the process of the Supreme Court in respect of "any act or order, or any other matter or thing whatsoever, counselled, ordered, or done by them in their public capacity only and acting as the Governor-General-in-Council." By S.17 of the Act, the Court was directed to apply to matters like succession, inheritance of lands and goods and all matters of contract the laws and usages of Mahomedans in the case of Mahomedan litigants and in the case of *Gentoos* by the laws and usages applicable to *Gentoos*. In cases where there was only one party as *Mahomedan* or *Gentoo*, the laws and usages governing the defendant were directed to be applicable. Another important feature of this Act was the recognition which Parliament showed in its 21st, 22nd and 23rd Sections "to the Civil and Criminal Provincial Courts, existing independently of the Supreme Court; and of the Governor-General and Council or some Committee thereof, as the Chief Appellate Court of the country."

It was not until 1861 that the *British Parliament* passed the Indian *High Courts Act* (24 *and* 25 *Victoria, Chapter* 104), which replaced the Supreme Court that had hitherto continued to exist at *Calcutta*, by the *High Court* which came to be established under the *Royal Charters* issued under the said Act.

It should be remembered that before the passing of this Act, both at Bombay and Madras also the Supreme Courts with powers analogous to that of the Supreme Court at Calcutta had been established. The Supreme Court was established in Madras in December 1801, and at Bombay in 1823. The Supreme Courts of Judicature at these two places had replaced what were known as *Recorder's Court* and continued to function—subject of course to such restrictions as were imposed on the jurisdiction of the *Supreme Court of Calcutta at Saint Fort Williams*—till they were replaced by the High Courts constituted under the *Charters* issued under the Indian *High Courts Act* 1861.

The Indian *High Courts Act* (or the *Charter Act of* 1861) was repealed and re-enacted with slight modifications by the *Government of India Act*, 1915, which in turn with certain modifications was repealed by the *Government of India Act*, 1935. In the 1st Section of the said High Cuorts Act, it was said :

"It shall be lawful for *Her Majesty*, by *Letters Patent under the Great Seal of the United Kingdom* to erect and establish a *High Court of Judicature at Fort William* in *Bengal* for the *Bengal Division* of the *Presidency of Fort William*, aforesaid, and by like *Letters Patent* to erect and establish like *High Courts at Madras* and *Bombay* for those Presidencies respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such other Letters Patent may be appointed in this behalf."

And in the 8th Section as a consequence of the establishment of such High Court, as

of *Mayor's Court* which was established in each of the Presidency Towns like Calcutta, Bombay and Madras under the *Charters* granted by *George I in 1726* It was not clear whether the English Law which was being applied by the *Mayor's Court* continued to be applicable when that Court was replaced by the Supreme Court in 1774 The question whether any statute passed in England after 1726 had to be made especially applicable to India before it could apply, could be studied from the case reported in *77 E R* 377, in which it was answered in the negative

The story of the conflict between the two principal organs of political and judicial power in India, that is, between the Supreme Council and the Supreme Court is well known to the students of early judicial history of the Indo-Pakistan sub continent and any student wishing to pursue these studies upon the subject further is advised to read *Mill s History of India*, as also to study the *Early Decisions rendered by Supreme Court*, in which these clashes of authority are fully reflected

Herbert Cowell *Tagore Law Professor*, in his book, *on "History and Constitution of the Courts and Legislative Authorities in India"*, has expatiated upon this conflict of authority and jurisdiction at considerable length and in the following extract, which is taken from that book, the student can witness the extent to which the warfare went on till the *Act of* 1781 was passed to curtail the jurisdiction of the Supreme Court

> "For seven years the conflict between them (i e Supreme Council and the Supreme Court) raged The Court issued its writs extensively throughout the country arrested and brought to Calcutta all persons against whom complaints were lodged zamindars, farmers, and occupiers of land, whatever their rank or consequence in the country Defaulters to the revenue were set at liberty on *habeas corpus*, the government of the *Nabob*, which still remained in the hands of the Company, the effectual instrument for the administration of Criminal Justice, was declared by the Court to be an empty name, without any legal right, or the exercise of any power whatsoever and the production in Court of papers containing the most secret transactions of Government was insisted upon The Court was charged with stopping the wheels of Government by the technicalities of English law, and of effecting a total dissolution of social order (pp 41—42)

The comment of the author on the situation and his analysis of the factors responsible for —

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> or competent skill for the purpose of checking the excesses of administration and of re establishing order on principles totally strange to the inhabitants The essential character and object of that scheme were to weaken the power of the Government by vesting it in the hands of a majority, and to plant in its neighbourhood a Court, framed after the fashion of the existing Courts in England, with jurisdiction over all its executive acts and a veto on all its legislation This tribunal, vested with such extraordinary powers, and so ludicrously unsuited to the social and political condition of Bengal, was not merely to exercise a civil and criminal jurisdiction wholly strange and repugnant to the Indian

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They held their offices at the pleasure of the Governor-General. The Chief Court was the highest Court of Appeal from the Civil and Criminal Courts in the Punjab, over which it had a general supervision and control. Its proceedings were regulated by the civil procedure for the time being in force in the Punjab; and in exercising its jurisdiction it was bound to apply the rules of law or equity and good conscience which the local Court would have applied. It had complete jurisdiction over European British subjects, and it had superintendence over all Courts subject to its appellate jurisdiction." (pp. 232-33).

After the creation of the independent and sovereign Dominion of Pakistan, the High Court at Lahore was continued by G.G.O. 7, (High Court (Lahore) Order 1947,) dated 11-8-1947 and it was provided that it shall, save as otherwise provided by the High Courts (Punjab) Order 1947 (G.G.O. 5 of 1947) have all its original, appellate and other jurisdiction as it had immediately before the appointed day (that is before 15-8-1947).

For the proper understanding of the jurisdictional aspects of the two existing High Courts in Pakistan it is necessary to refer to the following enactments:

As to the High Court for East Pakistan at Dacca.

(1) *The High Courts Act, or the Charter Act of 1861;*

(2) *Letters Patent for the High Court of Calcutta, dated 28th of December 1865; and*

As to the West Pakistan High Court.

(3) *Letters Patent for the Lahore High Court, dated March 21, 1919; and*

(4) *The Establishment of West Pakistan High Court Order, 1956.*

(See further History and constitutions of Courts and Legislative authorities in India by Cowell; *Constitutional History of India (1600-1935) by A. B.Keith—Second Edition 1937, pp. 203-212 etc; as also B.S. Sinha's Legal History of India).*

215. Constitutional Status of the Supreme Courts and the High Courts

Both the Supreme Court as well as the High Court in this country are courts of record and have all the powers of such a court including the power to make any order for the investigation or punishment of any contempt of itself. (ART. 176). It is a common law doctrine that the power to punish for contempt of itself is a power which is inherent in any court that is a court of record. What is and what is not a court of record is, however, not a very simple problem to resolve, having regard to the fact that there are divergent views as to the meaning of the expression "Court of Record" that have been advanced by different textbook writers in England and in America. To advert to Halsbury's Law of England, Volume 9 of the Third Edition, page 346, paragraph 816, this is what one finds: "Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record. In the case of criminal courts, this seems to be the only test. In the case of civil courts, it has been said that courts of record at common law, are such courts as have power to hear and determine, according to the course of common law, actions in which the debt, damages or value of the property claimed is 40 shillings or above. In the case of civil courts, the further distinction formerly existed between courts of record and courts not of record, that in the case of the former, where a judgment was alleged to be wrong, a writ of error lay whereas in the case of the latter the remedy was by way of a writ of false judgment . . . The proceedings of a court of record preserved in its

aforesaid, in the *Presidency of Fort William in Bengal*, it was directed that '*the Supreme Court* and the *Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the same Presidency*, shall be abolished', Further it was provided

"And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder *Adawlut* and *Foujdary Adawlut* in the same Presidency shall be abolished

"And upon the establishment of such High Court in the Presidency of Bombay the Supreme Court and the Court of Sudder *Dewany Adawlut* and *Sudder Foujdary Adawlut* in the same Presidency shall be abolished

"And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency"

As to the jurisdiction and powers of the new High Courts in the 9th Section of the said Act the following was provided

"9 —Each of [illegible] t shall have and exercise all such Ci [illegible] Testamentary Intestate, and Mat [illegible] and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant, and direct subject however, to such directions and limitations as to the exercise of Original, Civil and Criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the *Governor General of India in Council* *the High Court to be established in each Presidency shall have and exercise all* jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts"

The Charters were originally issued in 1862 and, again afterwards new Charters were issued in 1865 constituting the *High Courts* in *Bengal*, *Madras* and *Bombay* Later on in *March* 1866 Letters Patent were issued establishing a High Court pursuant to S 16 of the *High Court and Charter Act of* 1861, in the *North West Provinces of Bengal Presidency* *High Court of Allahabad* was established by Letters Patent, dated *March* 17 1866 In 1916 by Letters Patent, High Court was established at *Patna* The High Court of *Lahore* was established under Letters Patent, dated *March* 21, 1919 The High Court of *Burma* was established at *Rangoon in 1922, by means of a Letters Patent and a High Court for Central Provinces* was established in 1936 at *Nagpur*

The history relating to the establishment of *High Court at Lahore* may now be briefly described It is detailed by Herbert Cowell in the following words

"In the Punjab, prior to the establishment of a High Court by Letters Patent at Lahore in 1919 a Chief Court had been established, constituted very much upon the model of the High Courts [illegible] *Council*, instead of a *Royal* [illegible] *Governor General in Council* [illegible] passed with the previous sanction of the *Secretary of State for India in Council* to amend the constitution of the previously existing *Judicial Commissioner s Court* *Act XVII of* 1877, and later on *Act XVIII of* 1884 c 2 reconstituted it This Act was amended by *Act XIX of* 1895, and *Act XXV of* 1899 The new tribunal was invested with an original jurisdiction for the trial of certain civil and criminal cases It consisted of three or more Judges

the High Court, is a question which does not arise for consideration. The High Courts within the limits of their jurisdiction are supreme and subject to those constitutional provisions whereunder their decisions are thrown open for adjudication by the Supreme Court of the country, their authority is practically untrammelled and is completely independent of all external determinations, by the Supreme Court. ART. 163 contains indications that the Supreme Court has the last word in matters relating to judicial process in this country. All executive and judicial authorities throughout Pakistan are directed to act in aid of the process of the Supreme Court. The Supreme Court has the power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any case or matter pending before it and any such direction, order, decree or writ shall be enforceable throughout Pakistan and shall be executed as if it has been issued by the High Court of appropriate Province. These provisions are analogous to those that were mentioned in S.210 of the Government of India Act and were reviewed in the case of *Fazal Elahi & others v. The Crown, PLD* (1953) *F.C.* 35 decided by the Federal Court of Pakistan. In that case the question to be determined was about the extent to which decisions rendered by the late Federal Court could be deemed binding upon the High Courts and in particular as to the extent to which the High Court could re-open questions of fact found by the Federal Court and made a basis of their judgment. The pre-eminence of Federal Court in that case was held to stem from the following constitutional provisions (at p. 60):

"(i) that all orders of every kind made by a High Court are appealable to this Court, unless an appeal be barred by statute;

(ii) that all courts are enjoined, not only to follow the law laid down by this Court, but in addition, to recognise it as binding, a requirement connoting mental cognition, in the nature of a submission;

(iii) that all authorities, civil and judicial, throughout Pakistan are required to act in aid of this Court; and

(iv) that all its orders made in the exercise of jurisdiction conferred upon it, are enforceable throughout Pakistan, the manner of such enforcement, where not already provided by existing law, being left to be prescribed by rules made by this Court, in accordance with law."

It was further observed that from the highest to the lowest, the courts of the country (at p. 60):

"are all engaged in the same duty, namely that of administering justice in the cases which come before them. For this purpose, the judicial system has provided a gradation of Courts, charged with the duty of ascertaining the facts of such cases, and applying thereto the law as contained in the statutes and judicial precedents which are of binding effect. In this process, which is obviously designed for the elimination of error, the law, in its wisdom, has provided that the determination of facts shall ordinarily be concluded at an earlier stage than the determination of law and legal principles. It is therefore that the courts of highest appellate jurisdiction are frequently restricted either by law or by their own practice in their approach to the facts as found by Courts which precede them in the gradation. But in regard to the legal principles which are ascertained as applying to these facts, and any further legal principles which may, conformably to relevant statutes, be drawn from the case, the view of the highest Court of appellate jurisdiction must necessarily prevail. This does not connote anything in the nature of subordination of the Courts which dealt with the case at earlier stages, but on the other hand, can only rightly be regarded as the last product of a fruitful collaboration by all such Courts including the highest appellate Court, for a common end, namely the application of reason to the resolution of problems arising out of human affairs, according to the due process of

archives are called records, and are conclusive evidence of that which is recorded therein "

The power to punish in respect of contempt of itself would seem to flow from the status of a court as a court of record, and if this power has been specially mentioned in the Constitution at all it has been done so out of abundant caution in order to meet a possible argument, namely, the doctrine of English common law whence the power of punishing for contempt is derived, may not be relevant in respect of a court which is a creature of statute

The value of distinction between superior and inferior courts is immense since it helps to resolve the question of jurisdiction with particular reference to the onus cast upon the party denying it. Inferior courts are established to carry justice to every man's door The superior courts are courts of general jurisdiction In the words of the Editors of Halsbury's Law of England, Paragraph 820, 9th Volume, 3rd Edition, "*Prima facie*, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of a particular court An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of actions and cannot be deprived of its ascendency by showing that some other court could have entertained the particular action In an inferior court, other than a county court, unless the proceedings show on their face that the cause of action arose within its jurisdiction, the action cannot be maintained, and even in inferior courts with a local limit of jurisdiction it must appear that such limit is not being exceeded (See also *Peacock v Bell*, 1 *Saund* 69 cited *in London v Cox L R 2 H L* 239, where it was said, "Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an [illegible]"

Relationship of Supreme Court with the High Courts

continent ever since the days of East India Company's rule, as also by the analysis of their jurisdictional aspects as they are disclosed by our Constitution

A few remarks of a somewhat general nature on the relationship between the two categories of the superior courts in this country may now be offered

The constitutional status of Supreme Court and its superiority over all High Courts can admit of no doubt · that the Court is Supreme in every conceivable sense of the term, appears to be indicated by the provisions of the Constitution which we have discussed so far We have seen, for instance, that it is a Court of ultimate jurisdiction and the law declared by it is binding on all our Courts in Pakistan It is essential that this status of the supremacy of the Supreme Court should be fully respected in the letter and in the spirit in which it would appear to be the intention of the framers of our Constitution that it should be so respected The maintenance of the supremacy of the Supreme Court is essential for securing proper administration of justice in the country and for the due safeguarding of the constitutional rights of the citizens as also for ensuring the orderly implementation of those constitutional processes which are so essential for the smooth working of democratic institutions within the framework of the Constitution and the law Whether the High Courts are Courts *subordinate* to the Supreme Court of Pakistan in the sense in which all the Courts in the country other than the Supreme Court are declared by the law to be subordinate to

had *explained* this decision of the Federal Court with reference not to the facts found by the Federal Court but with reference to facts that were supposed to have been established on the record: in fact, while engaged in the discharge of this undertaking, a re-statement of facts was attempted by the High Court. "It is necessary", said the High Court, "to examine the whole position with special reference to the facts of and the principles deducible from the Federal Court Judgment in *Ali & Bashir v. The Crown*, (1952 *P.L.D. Federal Court p.* 71), in order to decide the claim for a retrial." As to whether such a course would be deemed permissible, the Federal Court ruled in *Fazal Elahi's* case as follows (at p. 58):

"It has been repeatedly laid down by the Privy Council, and we take the opportunity of declaring the rule to be applicable to the pronouncements of this Court as well, that their judgments were not to be construed as laying down the law generally, but only as declaring the law in relation to the precise findings of fact reached or accepted or assumed by them. It is in this limited sense that *Section* 212 *of the Government of India Act* is to be understood. For, if the words of that section be understood in their widest import, they undoubtedly purport to invest the Federal Court with a legislative power, which, at any rate, could not be resisted by 'all courts' mentioned in the section. That is clearly not the true interpretation of the Section, for it would be contrary to the clear division of function between the legislature and the judicature, which is rightly and universally recognised as inherent in *British Constitutional* practice, and which it was one of the purposes of the Government of India Act, 1935, to provide. But the sole limitation which can conceivably be placed upon the power clearly vested in the Federal Court by means of this Section, is that of laying down the law for each particular case, that is to say, in respect of the facts found in that case. It is obvious that the recognition which is required of the courts must extend both to these facts, as well as to the law laid down thereon, if the Section is not to be deprived of its effect. That is to say, it is not open to any court, whether in the same or in any other case, to revise, or re-examine, or otherwise attempt to reach a different finding upon, any matters of fact on which the Federal Court has reached or accepted a finding or made an assumption in relation to which it has been declared the law. This prohibition applies irrespective of whether such court eventually finds that the principle of law laid down by the Federal Court is, or is not, applicable to the case before it."

220. The Privy Council as a Court of Indian Appeals

The jurisdiction of the *Sovereign-in-Council* is founded on the Crown prerogative and the common law. King being the fountain source of justice in the eye of the English law and constitutional practice, unless a statute duly passed by *King-in-Parliament* curtails or limits in express terms this prerogative to administer justice, it is supposed to exist. In the case of *Hull v. M'kenna*, (1926) *I.R.* 402 *P.C.*, *Lord Haldane* stated the constitutional position of the Privy Council as follows:

"The *Privy Council* is an *Imperial Body* representing the *Empire* and is no more *English* than it is for instance, *Indian*, *Canadian* or *South African*. The *Sovereign* is everywhere throughout the *Empire* in the contemplation of the law and it is only for convenience that the *Committee* sits in *London*."

There have been, however, two principal statutes, namely (1) *The Judicial Committee Act of* 1833 (3 & 4 *William IV, Chapter* 41), and (2) *The Judicial Committee Act*, 1844 (7 & 8 *Victoria, Chapter* 69), that have defined and regulated the jurisdiction of the *Judicial Committee of the Privy Council*. The first statute directed the hearing of appeals by a special Committee of the Privy Council who were to advise the Crown upon the determinations that had to be rendered in the cause. Material portion of *S.*3 *of the Act of* 1833, which provides for the jurisdiction of the *Judicial Committee*, is as follows :—

law That indeed furnishes the clue to the bond which exists between the Courts constituting the gradation referred to above Each in its place doing justice according to its lights, in conformity with law and the limitation upon its functions, is bound to its inferiors as well as its superiors by a single tie, namely, of that amenability to reason applied for the purposes of justice in accordance with law "

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Courts before which the judgment is placed as a binding precedent In that case the question to be considered was the effect of the rule laid down in the famous case of *Allen v Flood*, (1898) *A C* 1 In the opinion of Lord Halsbury the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision, was really what was to be looked at and then he made those observations, which are often cited in our country

"Now before discussing the case of *Allen v Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found The other is that a case is only an authority for what it actually decides I entirely deny that it can be quoted for a proposition that may seem to follow logically from it "

The Federal Court then stated its approach to these matters as follows (at p 72)

"We trust that this instance of a Lord Chancellor, accepting with grace and dignity a view of the facts of a precedent case with which he himself did not agree at all for the purpose of appreciating and limiting the law laid down thereon by the majority of the judges who decided that case, will serve not only to establish that, in the recognised mode of treatment of judicial precedents of Courts of ultimate jurisdiction the hypothesis of fact upon which the law has been laid down is no less sacrosanct, in relation to Courts which are obliged by law to follow such precedent, than the law which has been laid down, but will also assist such Courts in the realization that any resistance, by the exercise of powers vested in them, for the purpose of asserting their own varying views either of the facts or the law, is neither consistent with judicial tradition and decorum nor to *be recommended as likely to produce any result, much less a useful result* "

It would be useful, at this stage, to remind the reader of what has been stressed earlier *Professor Goodhart* in the long extract cited at page 610, has answered the point raised in *Fazal Elahi's case* To the question, can the Judge, by making a mistake as to the state of real facts before him, give himself the authority to decide "what in fact is a hypothe*tical case", the learned author makes the following answer*

" The whole doctrine of precedent is based on the theory that as a general rule Judges do not make mistakes either of fact or of law In an exceptional case a Judge may in error base his conclusion on a non existent fact, but it is better to suffer this mistake, which may prove of benefit to the law as a whole, however painful its results may *have been to the individual litigant, than to throw doubt on every precedent on* which our law is based "

In the case before the Federal Court, the judgment of the High Court, which was the

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the case should involve a value of over 1000 *pagodas*, and in the latter £5000 before appeal could be taken. Later on, by an Order-in-Council, the amount was rendered uniform and was fixed at Rs. 10,000. Special leave to appeal, however, could be taken from the Privy Council in any case irrespective of the amount of the claim involved in the case. In the case of *Chartered High Courts* established under the High *Courts Act of* 1861, the conditions precedent for the exercise of right to appeal to the Privy Council from "any final judgment, decree or order" rendered by them was that the claims involved be not less than Rs. 10,000 although regardless of the value involved the High Court was empowered to certify that the case was *fit* one for appeal to the Privy Council, in which case the appeal would lie as of right. When the Code of Civil Procedure was enacted the provisions relating to the right of appeal to the Privy Council were incorporated in it, and for this the student is referred to Ss. 109, 110 and 112 of the Civil Procedure Code.

In criminal matters, however, no appeal lay as a matter of right, but upon obtaining a special leave to appeal the Privy Council could entertain an appeal subject, of course, to the well known self imposed limitations enunciated by the Privy Council in several cases, referred to earlier and in particular in the case of *Dal Singh v. King-Emperor*, (1917) 44 *Calcutta* 876 *(P.C.)*, where it was observed:

"According to the practice of the Judicial Committee in dealing with an appeal in a criminal case, the general principle is established that the *Sovereign-in-Council* does not act in the exercise of the prerogative right to review the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below."

When the *Government of India Act*, 1935, was passed it envisaged the creation of the Federation of India and in order to provide for a judicial forum where Federal disputes and questions relating to the interpretation of the Constitution could be adjudicated, it established the Federal Court of India. Upon a certificate being given under S.205 by the High Court the appeal lay from its judgment, decree or order, to the Federal Court. The right to appeal to the Privy Council, however, was not affected. For in S.110(3) of the said Act it was provided:

"Nothing in this Act shall be taken to empower the Federal Legislature or any Provincial Legislature to make any law derogating from any prerogative rights of His Majesty to grant special leave to appeal from any Court, except in so far as is expressly permitted by any subsequent provisions of this Act."

In S.206(2) of the Government of India Act, the Federal Legislature was invested with the power to enlarge the appellate jurisdiction of the Federal Court. No such enlargement of the jurisdiction of the Privy Council took place before the establishment of the two independent Dominions of India and Pakistan, but both in India as well as in Pakistan, legislation was passed by the two Dominion Legislatures enlarging jurisdiction of the Federal Court in respect of certain matters. The student is referred to the *Federal Court Enlargement of Jurisdiction Act (I of* 1948) passed by the Indian Constituent Assembly as also the *Federal Court Enlargement of Jurisdiction Act* 1949 *(Act No. I of* 1950) passed by the *Pakistan Constituent Assembly* in the exercise of its legislative powers on 13th of January 1950, for a study of the extent to which in India and Pakistan the enlargement of the jurisdiction of the Federal Court took place in civil cases. *The Constituent Assembly of India* abolished appeals to the

"All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or by any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any Court, Judge, or Judicial officer, and all such appeals as are now pending and unheard shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommenda thereon shall be made to His Majesty-in Council for his decision thereon "

The history of the jurisdictional aspects of the Judicial Committee of the Privy Council as a Court of Appeal is given by *Viscount Sankey* in the case of *British Coal Corporation v. The King*, (1935) *Appeal Cases page 500* British Coa Corp v King

"*The Judicial Committee* is a statutory body established in 1833 *by an Act of* 3 *and* 4 *William IV, Chapter* 41, entitled an Act for the better administration of justice in *His Majesty's Privy Council*. It contains (*inter alia*) the following recital 'And whereas, from the decisions of various courts of *Judicature* in the *East Indies*, and in the plantations, *colonies, and other dominions of His Majesty* abroad, *an appeal lies to His Majesty in Council*.' The Act then provides for the formation of a Committee of His Majesty's Privy Council, to be styled 'the Judicial Committee of the Privy Council', and enacts that all appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act or of any law, statut

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report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court The Act con

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is made to give effect to the report of the Committee is made But according to con stitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appel late court of law, to which by the statute of 1833 all appeals within their purview are referred In this way the functions of the Judicial Committee as a Court of law were established The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeals should be permitted But outside these limits there had always been reserved a discretion to the King in-Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law this discretion to grant special leave to appeal was in practice described as the prerogative right it was, indeed, a residuum of the Royal prerogative of the Sovereign as the fountain of justice "

The development of the considerable bulk of law which now prevails in India and Pakistan could be traced to the influence wrought by the decisions of the Privy Council rendered in cases taken to it from the Courts of final jurisdiction within the country The conferment of the right of appeal to the Privy Council from the judgments of the Indian Courts could be traced back to the *year* 1726, the year in which, under the *Charter* issued in the reign of *George I*, the *Mayor's Courts* in the three *Presidency Towns of Calcutta, Madras and Bombay* were first established In the *Judicial Committee Act of* 1833 the right of appeal to *the Judicial Committee* of the *Privy Council was* provided in respect of cases decided by Supreme Courts in India and also from *Sudder Dewany Adawlut* in the former case it was decided that Historical Review of the growth of P C Jurisdiction

upon a particular subject is. These decisions would continue to be regarded as models of scholarship and legal reasoning worthy of emulation by the highest tribunal in any civilized country of the world.

The Privy Council was required to give, what is called 'advice', to the sovereign and this was tendered in one judgment pronounced by it in open court. This was followed by an *Order-in-Council*, upon the publication of which the decision of the Privy Council became merged in the *Order-in-Council* and thus became effective. There was no minority judgment or minute of dissent appended to the leading judgment.

The Privy Council never granted leave just for the sake of deciding merely an abstract or academic point of law, that is a point which did not fully and squarely arise in the case before it. (See *R. v. Louw, Ex. Parte Attorney-General for the Cape of Good Hope*, (1904) *A.C.* 412 *P.C.*). Nor did Privy Council ever give speculative opinions on questions that did not arise upon the facts of the case submitted for its determination. (See *Attorney-General for Ontario v. Hamilton Street Railway*, (1903) *A.C. p.* 524; as also *Attorney-General for Ontario v. Attorney-General for Canada*, (1916) 1 *A.C. p.* 598).

One could only fervently hope that the glorious and noble tradition of the *Juristic Thought* and *Practice* that has been left by the Privy Council in the matter of interpreting and applying law and of doing justice, will continue in the days that lie ahead, to be a never-failing source of guidance and inspiration to the Judges in this country.

Privy Council as from the 10th of October 1949, investing the *Indian Federal Court* in addition to its previously assigned jurisdiction with the same jurisdiction which was hitherto enjoyed in this behalf by the Privy Council In Pakistan also the *Privy Council (Abolition of Jurisdiction) Act*, 1950, was passed by the *Constituent Assembly of Pakistan* on 20th of April 1950, whereby under S 3 it was provided

> "As from the appointed day the Federal Court shall, in addition to the jurisdiction conferred on it [illegible] *Jurisdiction Act*, [illegible] tion to entertain [illegible] has, whether by virtue of His Majesty's prerogative or otherwise, immediately before the appointed day "

Thus it was that the Privy Council ceased absolutely to exercise any jurisdiction in relation to the adjudication of legal disputes in this country

Chief Justice Md Munir's Tribute to the Privy Council

The tribute paid by the Chief Justice of Pakistan to the Privy Council in the case of *Noorul Hassan and others v The Federation of Pakistan, reported in P L D 1956 S C p* 331, merits to be quoted in this context as it, in the opinion of the present writer represents a just appreciation of what that august tribunal has done to exemplify the spirit and manner in which law has to be applied by a *Judicial Tribunal* for securing administration of justice It will be recalled that *Chief Justice was* dealing with the contention of Mr Manzur Quadir the *Counsel* who appeared for the appellant, namely that the Privy Council's decision in *Venkata Rao's case* (64 *Indian Appeals p* 55), was not rightly decided and is not good law The contention was rejected Here are the words of the *Chief Justice* (at p 359)

> "He addressed us no arguments in support of his contention and contented himself with the mere assertion that the rule laid down in that case, having been enunciated when India was still under the British domination, no longer holds good and that we are entitled to dissent from it He also said something which I did not quite follow about imperialistic considerations influencing judgments of the Privy Council in such matters I agree that decisions of the Privy Council are no longer binding on us now but being expositions of the law by one of the highest judicial tribunals in the world composed of distinguished men who had special knowledge of our public law they are entitled to the greatest respect and we are not to disregard them merely on the ground of changed conditions because the recognition of any such ground for departure from well settled and fundamental principles would be tantamount to imputing judicial dishonesty to that Tribunal Since Mr Manzur Qadir persisted in his assertion it becomes necessary to consider whether the several decisions of the Privy Council, which form important landmarks in the exposition of the law governing the tenure of office of servants under the Crown and their right to seek redress from Courts, proceeded on correct principles which are applicable to present conditions, no change by the new Constitution having been made in that respect in the law "

Then the learned Chief Justice examined practically all the cases decided by the Privy Council on that subject and came to the conclusion (at p 363)

> ' I cannot, therefore, accept the contention that a breach of the rule requiring the holding of a formal inquiry was actionable and that the Privy Council was wrong in ruling to the contrary '

It is not necessary for the present writer to say anything more about the value of the decisions of the Privy Council In fact in the present book his bias if it can be so described for quoting as authority the decisions of the Privy Council, is so patent that it needs no specific pointing out The present writer considers the decisions of the Privy Council as the last word in that difficult art of saying decisively in few words what the law

High Court exercises its jurisdiction, the High Court acquires jurisdiction to exercise its power of superintendence over such courts or tribunals. In our country, however, the condition precedent for the exercise of power of superintendence and control over courts is the requirement that those courts must be *subject to High Court's appellate or revisional jurisdiction.* So wide is the power of superintendence conferred upon the Indian High Courts by ART. 227 that in the 4th clause of that Article that power had to be expressly delimited, and the tribunals constituted by or under any law relating to Armed Forces had to be especially taken out from the reach of High Court's jurisdiction. The paragraph 5 of Third Schedule of our Constitution merely refers to the *administrative function* of High Courts whereas ART. 227 *of the Indian Constitution* confers power of *superintendence over all courts and tribunals, and the power is not only administrative, it can be judicial as well.* (See *Sukhdeo v. Brij Bhushan, AIR* (1951) *All* 667; *Israil Khan v. State of Assam, AIR* (1951) *Assam* 106; *A.R. Sarin v. B.C. Patil, AIR* (1951) *Bombay* 423).

Broad ...ers of ...inate ...urts.

The subordinate courts established by law for the purpose of administering justice may be divided into two broad categories: (1) courts of civil subordinate jurisdiction, and (2) courts of criminal jurisdiction established by the Code of Criminal Procedure and under other special and local laws.

...m of Civil ...inate ...urts.

Confining our attention to courts of civil jurisdiction, we notice that the 3rd Section of the Code of Civil Procedure defines their relative status for the purposes of that Code as follows:

"The District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

The High Court, with reference to civil proceedings, is the highest Court of Appeal. [See S.3 (25) of the General Clauses Act, 1897]. The District Courts and courts subordinate to them shoulder the main burden of administering civil justice. The internal organization of these subordinate Civil Courts is often regulated by the provisions of local and special laws. Certain kinds of causes, as for instance suits relating to immovable property, etc., cannot be taken cognizance of by Courts of Small Causes whether they be established under the Provincial Small Causes Courts Acts or they be in any other category of "Small Causes Courts" established by special legislation. The original jurisdiction of subordinate courts is invariably determined with reference to the pecuniary value involved in the suit to be tried by it and appeals from the decrees passed by them are taken to superior courts in accordance with the requirements of the provisions enacted in that behalf.

...neral ...tion Civil S. 9 C. P. ...ode.

The Code of Civil Procedure in its 9th Section sets-forth the jurisdiction of these Civil Courts in the following terms:

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The Section has an Explanation appended to it which says :

"A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

It would be noticed from the language used in this Section that it is only the suits of civil nature that can be adjudicated in Civil Courts: and what is, and what is not, a suit of a civil nature is by itself a highly involved and a difficult question indeed. The explanation to the 9th Section reproduced above shows that, *if the principal or the only question in the suit is a caste question or a question relating to religious rites or ceremonies, the suit is not of a civil nature;* the argument being that such matters do not involve determination of civil right as sub-

SECTION — IV

Outline of the General System of the Law and Courts of our Country

221. Subordinate Judiciary

The courts subordinate to the High Court are established by or under several enactments (some of them are set up under special, and others under, local laws) having well defined jurisdiction to administer justice, civil as well as criminal The tenure of office, as also the conditions of service of the personnel of subordinate judiciary, are regulated by several Acts of National and Provincial Legislatures

Terms and conditions of subordinate Judiciary not mentioned in the Constitution

Unlike the *Government of India Act*, 1935, which made special provisions with regard to judicial officers (see Ss. 253, 254, 255 and 256, provisions relating to the appointment of *District Judges*, *Subordinate Civil Judicial Service*, as also the *Subordinate Criminal Magistracy etc*), our Constitution does not make any special provision with regard to these matters In the Chapter relating to Services of Pakistan, there are general provisions affecting members of the Civil and Armed Services of Pakistan, including provisions with regard to the Constitution of All-Pakistan Service, etc No reference, however, is to be found in that Chapter with regard to the Subordinate Judicial Service (The Indian Constitution in Chapter VI, of Part VI (ARTS 233 to 237), makes a provision for "Subordinate Courts")

It would thus appear that all these matters will now be governed by organic law to be enacted for the purpose by the National and Provincial Legislatures, and, until these laws are so made, the conditions of Subordinate Judicial Service will be regulated by pre-Constitutional legislative provisions (See ART 232)

It is however to be regretted that there are no constitutional provisions of the sort that existed in the Government of India Act, 1935, for ensuring that appointments to subordinate judiciary be made in the case of District Judges by the Governor of the Province *after consulting the High Court* Similarly, the *Subordinate Civil Judicial Service* was under the *Government of India Act* regulated by rules made by the Governor of the Province *after consultation with the Provincial Public Service Commission* and *with the High Court* These rules used to define the standard of minimum qualifications that had to be attained by persons desirous of entering the *Subordinate Civil Judicial Service of the Province* and thereby ensure the maintenance of proper standards of recruitment to that Service Even the question of the posting and promotion, as also the question relating to the grant of leave to persons belonging to the *Subordinate Civil Judicial Service* of the Province, were in the hands of the High Court (See Section 255(3) of the Govt of India Act 1935)

High Court's Power of general superintendence and control of subordinate Courts.

The High Court undoubtedly has the power of superintendence and control over all courts subject to its appellate or revisional jurisdiction and can (a) call for returns, (b) make and issue general rules, and prescribe forms for regulating the practice and procedure of such courts; (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts, and (d) settle tables of fees to be allowed to sheriffs, attorneys and all clerks and officers of such courts, etc (*See Paragraph 5 of Part II of Third Schedule*). [illegible] *of the Indian Constitution* with one [illegible] e over [illegible] n, our [illegible] *subject* [illegible] more [illegible] Courts has been circumscribed territorially with the result that by reason of the mere fact of a court or a tribunal exercising jurisdiction within the territories over which a

There is, to begin with, a presumption in favour of the jurisdiction of a Civil Court, the general rule being that statutes barring the jurisdiction of Courts are to be construed in such a way as to avoid *as far as possible* the effect of transfering the burden of securing determination of rights and liabilities of persons from ordinary courts to special tribunals and authorities. (See *Winter v. Attorney-General*, (1875) *L.R.P.C.* 380). Therefore, it would be for the party, who is contending that the jurisdiction of the Civil Court is ousted, to establish his contention. [See *Suraj Narain v. Jamil Ahmad, AIR* (1946) *Patna* 385, as also *Ali Muhammad v. Hakim, AIR* (1928) *Lahore* 121]. And even if the jurisdiction of the Civil Court is to be excluded because there is an express bar enacted in any special or local law with respect to a matter which is to be decided in a special way, *it is still open to the Civil Court to enquire into the allegation, should it* come to *be made, that the tribunal has not acted within the four corners of the statute* and/or has not complied with the provisions of law relating to the exercise of its own jurisdiction, and also to see if the tribunal has acted in conformity with the fundamental principles of judicial procedure. (See *Secretary of State v. Mask & Co., AIR* (1940) *P.C.* 105: 67 *I.A.* 222, and *Nur Mohammad v. Solaiman*, (1947) 1 *Calcutta* 339).

ystem of ordinate Criminal Courts.

We may next turn our attention to Criminal Courts. As regards the Courts of criminal jurisdiction, the Code of Criminal Procedure, after making a due allowance for the existence of Courts of Special jurisdiction, establishes the following Courts under its 6th Section:

> "Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in the Provinces and the Capital of the Federation, namely :—
>
> I. Courts of Session,
> II. Presidency Magistrate's Courts, (deleted by Adaptation Order 1949);
> III. Magistrates of the first Class;
> IV. Magistrates of the second Class ;
> V. Magistrates of the third Class."

Every Province is divided into several "Sessions Divisions", and "every sessions division" shall, for the purpose of that Code, consist of 'districts', (see Section 7). The Provincial Government have the power to *alter* the limits or number of such divisions and districts, (Section 7) and also the power to divide any district into sub-divisions or make any portion of any such district a sub-division and may alter the limits of any sub-division (See Section 8). The Provincial Government appoints a Judge of the Sessions Court for every Sessions Division and can also appoint Additional Sessions Judges, Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. (See Section 9). The Provincial Government also appoints in every District, a Magistrate of the first class, who shall be called the "District Magistrate" and it can appoint Additional District Magistrates having all or any of the powers of the District Magistrate under the Code or under any other law for the time being in force, (Section 10). Similarly, the Code establishes Magistrates of various classes and defines their jurisdiction to inflict sentence of varying degrees of severity.

Criminal ocedure.

Under its 28th Section, the Code empowers *any offence* under the Penal Code to be tried by a *High Court* or by the *Court of Session* or by any other Court by which such offence is shown in the 8th column of its Second Schedule, to be so triable; in its 29th Section the Code describes the procedure with respect to offences under *any law* other than the Penal Code and declares that where no particular Court is mentioned in any such law, the offence is to be tried in accordance with the requirements contained in the 8th column of the Second Schedule, but where the Court is mentioned, then by such Court. Sections 31 and 32 describe the extent and the kinds of punishment which the High Court, the Sessions

stantially the issue is of a purely social character But when these questions become sub sidiary questions to determine with reference to another *principal* question affecting plaintiff s rights to property or to any office then the suit becomes one which would be adjudicated in the Civil Courts (See *Sarda Kunwar Mt v Gajanand A I R* (1942) *Allahabad* 320, see also *Thiruvenkata Ramanuja v Venkatacharlu*, 73 *I A* 156 *AIR* (1947) *P C* 53

Primary of the ordinary Civil Courts Jurisdiction over Courts and Tribunals of Special Jurisdiction

If a determination made by an authority that professes to act under a special law in the exercise of a power conferred upon him by statute is challenged in a Civil Court the plain tiff in order to succeed will have to show that (a) such authority has in fact acted without jurisdiction, or (b) its orders are *mala fide* or have been made on a wrong basis or that (c) the order passed is *ultra vires* If he could show any of these things, the Civil Courts would have the jurisdiction to interfere and set aside the orders complained of (See *Kasandas v Ankleshvar*, (1901) 26 *Bombay* 294 *Secretary of State v Hughes* (1914) 38 *Bombay* 293 *Dhuplal v Ramdhani*, *AIR* (1943) *Patna* 353) It is also possible to attack in Civil Courts the order passed by an authority who has *not conformed to the procedure* enjoined by the Act under which it has purported to act (See *Municipal Council of Tanjore v Umamba Bai Saheb* (1900) 23 *Madras* 523) The jurisdiction of the Civil Courts to decide these matters is derived from the Common Law doctrine that it is in the last resort for the ordinary civil courts f the country to determine what the limits of the powers of the Courts of special jurisd ction are (See *Mohammad Nawaz v Bhagata Nand*, *AIR* 1938 *P C* 219) If a question arises in respect of the legal right of a person to hold a certain office the issue thus raised would have to be further investigated to see if the right to such office carried any remuneration If there is no such right to remuneration, the Civil Court will have no jurisdiction—for the Civil Court cannot deal with a situation resulting from the mere exclusion of a particular person from the enjoyment of a social privilege that carries with it no right to property

for damages (See *Jagannath v Akali*, (1894) 21 *Calcutta* 463) But before a plaintiff can succeed in such an action he must show that the rules of natural justice were not complied with before the decision in a domestic forum to expel him took place The Courts would upon such an issue being raised be mainly concerned to see whether or not there was a due enquiry and that the plaintiff was heard in his defence before decision adverse to him was [illegible]

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taken place (See *Krishnasami v Virasami*, (1887) 10 *Madras* 133)

Thus it would be seen that the Civil Courts have a comprehensive and all embracing jurisdiction to entertain suits of a civil nature, and that such a jurisdiction which is defined [illegible]

be found clauses which take away expressly or impliedly the jurisdiction of the Civil Courts to question the validity of acts done by the authorities charged with the duty of determining people s rights and liabilities (See for instance *S* 97 *of the Income Tax Act S* 4 *of the Pensions Act*, S 57 *of the Bombay Co operative Societies Act*) The question that often arises in such cases is What are the limits within which the ordinary Civil Court can, despite these clauses relating to ouster of its jurisdiction, interfere with the orders passed by these specially constituted authorities, tribunals or bodies?

The requirement of *mens rea* as an essential constituent element of the crime in such cases is reduced to the barest minimum if not completely eliminated.

Mens Rea d offences f absolute liability.

It is by now well accepted that where the Legislature has created either expressly or impliedly an offence of absolute liability, it is irrelevant for the Court to enquire into the defendant's state of mind. In offences of such a kind proof of *mens rea*, (of a guilty mind) is not necessary and all that is required of the prosecution is to show that the accused intentionally did the prohibited act. Some Judges have gone so far as to say that, "This in itself gives full scope to the doctrine of *mens rea*". (See *R. v. Maughan*, (1934) 24 *Cr. Appl. R.* 130; *R. v. Wheat* (1921) 2 *K.B.* 119 *at p.* 126; *Kat v. Diment*, (1950) 2 *All. E.R.* 657 *at p.* 661; *Reynolds v. G.H. Austin Co. Ltd.*(1951) 2 *K.B.* 135: 1951, 1 *All E.R.* 606; *Lamb v. Sunderland and District Creamery Ltd.*, (1951) 1 *All E.R. at p.* 923; *Browning v. Watson*, (1953) 2 *All E.R.* 775; *Harding v. Price*, (1948) 1 *K.B.* 695. And see, also on the subject of '*Mens Rea* in Statutory Offences' a book of that name by *J.LL.J. Edwards*.) Many of the modern statutes use as a part of the definition of the offences they create, the words like 'unlawfully', 'wilfully', 'knowingly' or use expressions 'permitting', 'suffering', 'causing', 'allowing', in respect of the thing which is prohibited to be done etc. and a criminal court is invariably called upon to interpret and apply the varying shades of meaning which the doctrine of *mens rea* is supposed to impart to them.

> "A statute", says *Glanville Williams* in his recent book on 'Criminal' Law, at p. 711 "sometimes requires an offence to be committed 'knowingly' and sometimes leaves the requirement of knowledge to be implied under the general law of *mens rea*. It has been judicially thought that the omission of 'knowingly' shifts the burden of proof of absence of knowledge to the accused; but the better view is to the contrary. All that the word 'knowingly' does is to say expressly what is normally implied. (See *Roper v. Taylor's etc. Ltd.* (1951) 2 *Times L. R.* 284). Even where the word 'knowingly' is in the statute, the prosecution may be aided by an evidential presumption; for instance, there may be a conviction of knowingly receiving stolen goods on evidence of possession of goods recently stolen. Similarly there may be a conviction of knowingly harbouring uncustomed goods on proof only of the harbouring, if the defendant gives no explanation of his possession which raises a doubt in the jury's mind as to his guilty knowledge that the goods were uncustomed. (See *Cohen* (1951) 1 K.B. 505) (C.C.A.)".

Meaning of Burden of Proof in glish Law.

Closely allied with the recent developments in the definition of statutory offences of absolute or quasi-absolute criminal liability is the legislative revolution that has been brought about in the law relating to burden of proof; onus of proof is not infrequently now-a-days seen to be statutorily cast upon the accused to prove a negative.

The question of burden of proof and presumptions have thus become closely linked up with the intricacies of criminal substantive law itself.

> "These matters", says *Glanville Williams*, at p. 691 "are in a difficult state, partly because of contrariety of opinion as to the law and partly for lack of a precise terminology. The phrase 'burden of proof' means two things, which have not always been kept distinct. It means, in the first place, the risk of not persuading the jury, and, in the second place, the duty of going forward with evidence to satisfy the judge."

He further goes on to say:

> "To begin with the first, it is a cardinal rule that the general burden of proof in a criminal case is upon the prosecution. Moreover, the quantum of proof required is a high one, for the tribunal must be satisfied beyond reasonable doubt that the accused is guilty . . . If the prosecution does not prove its case beyond reasonable doubt, the verdict must go for the accused. The philosophy underlying the criminal rule is

Judge, the Additional Sessions Judge or the Assistant Sessions Judge or the Magistrate of the first class, second class or third class would be able to pass under the law

With us Substantive Criminal Law is a creature of Statute

Since the substantive criminal law of this country is codified, there is no such thing with us as a 'crime' recognised by common law The problem of deciphering the nature of a particular crime with which an accused person is charged is, accordingly, a simple one indeed, all we have to do is to see the statutory definition of that crime just to see what the ingredients of the given offence are The Pakistan Penal Code deals generally with the law of crimes and mentions in Chapter IV general exceptions that are available as defences to the criminal liability In other words, the whole of the Penal Code is to be read subject to the general exceptions contained in its Fourth Chapter, and the word 'offence' which is defined by S 40 of the Penal Code shows that the word 'offence' occurring in Chapter IV denotes "a thing punishable under *this Code or under any special or local law* " The result is that all offences created by special or local law also attract the application of general exceptions contained in Chapter IV of the Penal Code

Relevance of Study of English Criminal Law

The student of criminal law of our country will derive much benefit from the study of the state of criminal law of England, because it is only too true to say that the basic principles of that law have more or less received statutory recognition in the criminal law of our country in the Penal Code It is for this reason that the knowledge of English criminal law is necessary for the proper understanding of the statutory language employed by the Penal Code or by any other special or local law that creates and punishes a crime

Concept of Crime in Law—*Mens Rea* and *Actus Reus*

To constitute a crime two ingredients of the criminal act, namely *mens rea* (that is criminal state of the mind) and the *actus reus*, are essential ' So long as an act rests in bare intention", said Lord Mansfield, "it is not punishable by our laws " (See *Scofield*, 1784 *Cald* 402)

A tribunal cannot punish for what it cannot know And the mere intention, in the words of *Chief Justice Brian*, is not triable "The thought of man is not triable for the devil himself knoweth not the thought of man" Therefore criminal state of the mind must reflect itself in acts and omissions to provide evidence of its own existence before it can be culpable Even *omissions* for the purpose of criminal law are *acts* (See S 32 and also S 33 of the Penal Code, which says, "the word 'act' denotes as well a series of acts as a single act the word 'omission' denotes as well a series of omissions as a single omission ") Macaulay, the author of this Code stated the underlying reasoning of this rule as follows

> "It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours In general, however, the Penal Law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good *It is* evident that the attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation " (*Lord Macaulay*, *works*, *ed Lady Trevelyan*, *vii* (1866) 497)

There must thus be a positive statutory duty to act, before omission to act with respect to it can become illegal This rule is recognised by the sections of the Penal Code quoted above read with S 43

In the modern statutes we often have species of crimes or offences created by the legislature that more appropriately should be described as wrongs of absolute liability

also of three kinds as indicated by the terms 'may presume', 'shall presume' and 'conclusive proof'. This is how the Evidence Act defines them:

"May presume'—"Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

'Shall presume'—"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

'Conclusive proof'.—"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

Now the provisions relating to the burden of proof come in the 3rd *Part of the* Evidence Act which is entitled 'Production and Effect of Evidence', and following Sections from 101 to 106 take up the question of general statement of law regarding the burden of proof and the remaining Sections (107 onwards to 114) deal with some specified aspects of this general doctrine in special cases. Sections 101 to 114 along with the illustrations given by the Legislature are reproduced here-below for ready reference:

"101.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations(a). 'A' desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed *the crime*

(b) 'A' desires a Court to give judgment that he is entitled to certain land in the possession of 'B', by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts.

"102.—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.—(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.

(b) A sues B for money due on a bond. The execution of the bond is admitted but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

"103.—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration. (a)

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A. must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

"104.—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

the oft quoted maxim that it is better that ten guilty persons should escape than one innocent suffer

"In *Woolmington's case*, (1935 *A C at* 481), the *House of Lords* explained the rule by saying that 'it is sufficient for (the prisoner) to raise a doubt as to his guilt' " (See also the following cases, *Mancini v Director of Public Prosecutions* (1942) *A C* 1 *at p* 11, *Rex v Kritz* (1950) 2 *K B* 82 (C C A))

With regard to the second meaning of the expression 'burden of proof' it is more or less the same thing as saying that the burden of *introducing evidence* is on the side on whom the onus has been cast by the law to prove a particular fact This kind of burden of proof is to be distinguished from the burden in the first sense which may be characterised in the felicitous phrase of *Glanville Williams* as 'evidential burden' If the prosecution gives no reasonable evidence the case must fail, but where, the accused *introduces* evidence which suggests a defence, evidence which if true, would either minimise or negtive his liability at law, he need not prove the existence of those facts to the degree of probative certainty which is required of the prosecution, in such a case then it will be for the jury to take such evidence as has been tendered by the accused in conjunction with the rest of the evidence

acquitted on the view that under the circumstances the State has failed to discharge the overall burden imposed on it by law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner (See (1914) 84 *L J K B* 396 *case cf Rex v Schama*)

Our Law of evidence is codified

We have so far stated the common law rules with regard to the burden of proof as these are applied in England in the decision of criminal cases It is necessary to remember that the legal position on this question in this country is somewhat different, since we have here a codified law of evidence, an Act in which the Legislature has used the expression 'burden of proof' not with a view to indicating the varying shades of the meaning of that expression suggested by the distinction drawn by the English lawyers but in one and the same sense—whether it be the evidential burden or burden of introducing evidence It is doubtful if we are entitled to read into our law of evidence, which has been as pointed out earlier, reduced to the form of express statutory propositions, the distinctions that have been drawn in England with regard to the meaning of the expression 'burden of proof —meaning of that expression being different accordingly as the burden is cast upon the pro secution or upon the accused who are called upon to discharge it

Ss 3 101 to 114 of Evidence Act

'burden of proof The word 'proof' is defined thus "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its exis

... of the particular case,

"A fact is

ither believes

that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstnces of the particular case, to act upon the supposition that it does not exist " In between these two attitudes of judicial belief lies the no man's land which is taken over by the term 'not proved' "A fact is said not to be proved", says the Evidence Act, "when it is neither poved nor disproved " The presumptive proof is

Illustrations :

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

"112.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

"113.—A notification in the official Gazette that any portion of British territory has before the commencement of Part III of the Government of India Act, 1935, been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

"114.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case

Illustrations.

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence,

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases,

(g) that evidence which could be and is not produced, would if produced, be unfavourable to the person who withholds it;

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

As to illustration (a)—A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a

Illustrations

(a) A wishes to prove a dying declaration by B A must prove B s death

(b) A wishes to prove, by secondary evidence the contents of a lost document A must prove that the document has been lost

"105 —When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the court shall presume the absence of such circumstances

Illustrations

(a) A, accused of murder, alleges, that by reason of unsoundness of mind he did not know the nature of the act The burden of proof is on A

(b) A accused of murder, alleges that by grave and sudden provocation he was deprived of the power of self control The burden of proof is on A

(c) Section 325 of the Pakistan Penal Code provides that whoever except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 325 The burden of proving the circumstances bringing the case under section 335 lies on A

"106 —When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him

(b) A is charged with travelling on a railway without a ticket The burden of proving that he had a ticket is on him

"107 —When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it

"108 —Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it

"109 —When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it

"110 —When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner

"111 —Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence

"The position therefore is as I see it, that the Court shall regard as proved the absence of the circumstances pleaded by the accused person unless, upon a review of all the evidence, the Court either believes that such circumstances did exist or considers the fact of their existence so probable that a prudent man should act upon the supposition that they did exist. I can find nothing in any of these provisions of the Evidence Act to support the proposition that the introduction of evidence or the eliciting of facts which create a reasonable doubt but which fall short of satisfying the above mentioned *conditions, will entitle the accused person to an acquittal on a* plea of a right of private defence under S.96—or any other exception—of the Penal Code.

"It is contended that notwithstanding the above-mentioned specific provisions of the Evidence Act relating to exceptions, the Court must acquit an accused person if it entertains a reasonable doubt as regards his guilt; and this contention is based on the principle that the onus never shifts from the Crown to prove the prisoner's guilt. The onus is certainly on the Crown to prove all the facts which constitute the elements of the offence, and if there is any reasonable doubt left in the mind of the Court as to whether these facts have been established, the accused person is entitled to the benefit thereof; but in my opinion this general onus is subject by statute to the special onus which S.105 imposes on the accused person, and when the Legislature has enacted specific provisions in the Evidence Act as to what amounts to proof or disproof, I do not think that the Court will be justified in falling back on the general principle that the Crown must prove the prisoner's guilt. So far as the Courts in this country are concerned, the law of Evidence is embodied in the Evidence Act, and in my judgment the Courts in India are strictly bound by its provisions when considering the question of the onus of proof and its discharge. It is perfectly true that the Indian Evidence Act was based on the English law modified to suit conditions in India; but it was enacted as long as 1872 when the law in England on this particular subject was by no means as clear as it is now . . . . . .

"*It is our duty to interpret the Indian Statute as it stands. If its meaning is plain,* as I deem it to be, we must follow its plain meaning. If the intention of the Legislature was in fact different from what appears, it is open to the Legislature to amend the Act. I certainly prefer the law as enunciated in (1935) *A.C.* 462 (Woolmington's case), and I can see no reason why the law in India as regards this branch of burden of proof should differ from the law in England; but it is our duty to say what the law is, not what it ought to be."

It is submitted that if the Evidence Act is to be interpreted in accordance with its plain and natural meaning, there is no scope here of introducing the conceptions of English law relating to evidence and burden of proof. It is for the Legislature to alter the law to bring it in conformity with the recent trends as they are noticeable in the English case-law upon the subject, and until the Legislature does that our Courts are duty bound to interpret and apply such law as they find upon the subject in the Evidence Act. Our Federal Court, however, has ruled that the law with regard to the onus of proof as laid down in *Woolmington's case* is the law that is applicable here. And since that is the law declared by the highest Court of our Country the principle of those decisions is binding upon our Courts. Reference in this behalf should be made to the cases of :—

(1) *Safdar Ali v. Crown, P.L.D.* 1953 *F.C.* 93;

(2) *Sultam Muhammad v. Crown, P.L.D.* 1954, *F.C.* 29.

The following cases may also be seen on the same subject :—

(1) *Rex v. Carr-Briant*, (1943) 1 *K.B.* 607.

person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself

As to illustration (b)—a crime is committed by several persons A, B and C, three of the criminals are captured on the spot and kept apart *from* each other Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business B, the acceptor, was a young and ignorant person completely under A s influence

As to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might *change its course*

As to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances

As to illustration (f)—the question is, whether a letter was received It is shown to have been posted, but the usual course of the post was interrupted by disturbances

As to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family

As to illustration (h)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked

As to illustration (i)—a bond is in possession of the obligor, but the circumstances *of the case are such that he may have stolen it* "

From a study of these provisions it would appear that the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Pakistan Penal Code or within any special exception or proviso contained in any part of the same Code or any law defining the offence is upon the accused and *the Court shall* presume the absence of such circumstances

The observations of *Viscount Sankey* relating to the burden of proof in *Woolmington v Director of Public Prosecutions*, (1935) *A C* 462 at p 481, cannot in terms apply the decision of criminal cases in our country to the extent they have been deemed applicable *by* our Courts Woolmington s Case

These words are —

"Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception"

The expression 'subject also to any statutory exception' is important and if the statutory law of evidence in this country employs a sort of language which is *only* capable Observation of Collister J in 1941, All, 402 supported

perusal of the relevant provisions of the *Evidence Act*, *Collister J* in the *Full Bench case of Parbhoo v Emperor*, *A I R* (1941) *Allahabad* 402, put his analysis as follows (at p 413) —

advocate's duty to his client: Lord Brougham has overstated the case for the inculcation of that desirable sense of devotion to duty which the advocate must be possessed of before he could be deemed to be worthy of being a member of the noble profession. But as Lord Chief Justice Cockburn has pointed out, there has to be added to this statement a qualifying rider:

> "My noble and learned friend Lord Brougham", said Lord Chief Justice Cockburn, "whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client, but I couple that with this qualification and this restriction—that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client *per fas*, but not *per nefas*: it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice." (*See 19 California Law Review page 521 of the year (1931).*"

Ethics of the profession has not as yet prescribed a well settled norm in regard to the duty of the lawyer to the courts when the performance of that duty brings him in conflict with the advancement of the cause of his client's case. The American Bar Association in its very first article of the Canons of Professional Ethics has laid down:

> "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

And in the 15th and 22nd Articles, his duty to his client and towards the court are set forth as follows :—

"15. *How Far a Lawyer May go in Supporting A Client's Cause.*

> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.
>
> It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.
>
> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defence. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."

(2) *Hasan Din v Emperor, A I R* (1943) *Lahore* 56

(3) *Emperor v U Damapala*, 14 *Rangoon* 666 (*FB*) *A I R* (1937) *Rangoon* 83 (*FB*)

(4) *Rex v Ward*, (1915) 3 *K B* 696

(5) *Shrinivas Pannalal v State of M P , A I R* (1951) *Nagpur*, 226

222 Professional Services of the Bar and the Administration of Justice

The advocates' role in the administration of justice and development of law ha reference to the nature of judicial process which, as has been argued elsewhere is no "slot machine operation" but presents a great deal of scope for choice not only in the sphere of the exercise of judicial discretion but also in the mode of construing statutes of grappling with precedents and extracting from the labyrinth of case law the principle which is to control the judgment of the court It is in this area of choice that the pro fessional assistance which the advocates render in the administration of justice finds its fulcrum such is the system of law which we have to work in this country that unless there is active co operation between the Bar and the Bench it is not possible to expect that the wheels of administration of justice will ever run smoothly and give to us the results that are expected of it It is thus to the professional advocate that even judiciary must grate fully turn for that much assistance without which it cannot be expected t perform creditably its difficult duty of administering justice "according to law

The lawyer s role as a legal practitioner in our courts is a difficult one ind ed On the one hand, his loyalty to his client demands of him the adoption of an approach t the question under adjudication which is consistent only with the interest of his client and on the other hand, as an officer of the court and as a serviceable gear in the mechanism of the total legal order, he has a duty which may, at times, bring him in sharp conflict with that very interest which he, by the nature of his professional engagement is committed to

The predicament of the Professional Advocate

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ence he owes the importance of his office, a duty to see that in the process of administering justice law is not violated, and to be able to realise that what emerges as a temporary triumph *for the cause of his client is not drawn into an evil precedent which will continue* to be a source of menace the administration of justice for all time to come It is very difficult, by and large to resolve this dilemma and, considered in terms of a rational principle, it is hardly possible to offer a satisfactory solution of the difficulties posed by the paradoxical position in which the professional advocate finds himself In a well known speech of Lord Brougham, made during the course of an argument in his defence of Queen Caroline before the House of Lords with respect to the devotion with which an advocate is supposed to do his duty to his client, we have been told that "An advocate by the sacred duty which he owes to his client, knows in the discharge of that office but one person in the world, that is his client and none other To save that client by all expedient means to protect that client at all hazards and costs, to all others and among others to himself is the highest and most unquestioned of his duties, and he must not regard the alarm the suffering the torment the destruction which he may bring upon any other Nay,

This mode of regarding the role of an advocate, as later commentators and critics have pointed out, is somewhat vitiated by the placing of an exaggerated emphasis on the

with the oath of their office is to be the correct rule that should govern their decision in the controversies before them.

urrent prejudice against profession of law examined.

The image of the lawyer, "as one who watches for his prey, darts on it at the proper moment with alacrity, and when he has got his victim, delights to play with him but never lets him escape from his clutches", brings him very near to the ferocious members of the feline race and exhibits him as a callous, hard-hearted and a wicked man. As has been often noticed, "no personal excellences, no intellectual ability, no moral probity on the part of an individual advocate can succeed in eradicating from the mind of public their instinctive mistrust of his profession."

There are grounds in support of the current prejudice against the legal profession and in this connection it is necessary to point out that it is largely because of the existence of some *base pretenders to this noble calling of the law* that this popular judgment down the ages has gained general acceptance.

As to the defence about the existence of the profession of advocacy as a public institution, the author cannot do better than summon the evidence of Hugh Macmillan, for his are the words that can hardly be improved upon.

> "Ever since", says he, "the State decreed that men must cease to settle their disputes with the vigorous arguments of fist and club, the administration of justice has been the prime concern of the State. In order to enable this primary function of government to be efficiently discharged, the experience of every civilised community has shown that it is indispensable to have a class of men skilled in advising and aiding the citizen in the vindication of his rights before the Courts to which the State delegates the task of dispensing justice in accordance with the law of the land. As social life grows more and more complex, as the relations of men grow more and more manifold, as the enactments by which the legislature seeks to keep pace with and regulate the constantly developing progress of the community become more and more elaborate and technical, the value of the part which the advocate is called upon to play in the social system becomes more and more apparent. The danger indeed in a democratic State is that his value may be over-estimated and the sphere of his activities unduly extended, so that he is tempted to take upon himself functions for which the very excellence of his technical aptitudes unfits him."

The duties of an advocate are thus important in the contemporary scheme of things. So long as courts have to decide questions of facts submitted to them upon admissible material, it will always be necessary to subject that material to a searching analysis in an attempt to discover what precisely its probative force is. And who can render better assistance to the Bench in this behalf than the professional advocates? Apart from the disputed questions of fact, there are complicated questions of law, and an ordinary citizen who gets involved in the net-work of the highly complicated legal provisions cannot hope to present to the court his point of view as effectively as can a professional advocate. All the *fair* means which can be resorted to in submitting a favourable view of the case on behalf of a particular client are the exclusive preserve of a skilful advocate and it is his duty to do his best for his client in that direction. Even in cases where men are charged with the gravest of offences, like that of subverting the Government established by law, the accused is entitled, as of right, to the professional services of an Advocate of his choice.

> "From the moment that an Advocate", says Lord Erskine, "can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the Advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge, nay, he assumes it before the

"22 *Candor And Fairness*

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook, or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed, or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to argu [illegible]

It is unprofessional and dishonourable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for [illegible]

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice "

To the straight question Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and *unknown to his adversary*, the American Bar Association Committee on 'Professional Ethics and Grievances' has returned the following answer

"A lawyer is an officer of the court His obligation to the public is no less significant than his obligation to his client His oath binds him to the highest fidelity to the court as well as to the client It is his duty to aid the court as well as his client It is his duty to aid the court in the due administration of justice The conduct of the lawyer before the Court and with other lawyers should be characterised by candor and fairness We are of the opinion that this Canon (namely 22), requires the lawyer to disclose such decisions to the court He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case "

To the same effect are the remarks of Lord Birkenhead, Lord Chancellor, in the case *Glebe Sugar Refining Co Ltd v Trustees of Port and Harbours of Greenock* (1921) 125 *L T* 578

The matter, however, is not free from difficulty and the wisdom of the rule laid down above has been seriously questioned upon several considerations and the best statement of the counter viewpoint would be found in an article contributed by *Tunstall*, on *Ethics in Citation, in 35 American Bar Association Journal of the year 1949*

On the whole it would appear to be a fair summing of the conflicting viewpoints to state that in each case as it comes up before an advocate for his professional assistance, it is up to him *to strive to secure consistency* between his duty to the court and his duty to the client, and while pressing for the acceptance of the court the approach to the case which may be favourable to the cause of his client, he should not omit stating, as objectively as it may be practicable, considerations in support of a contrary point of view before the court so that the judges are assisted in the performance of their duties of deciding what, in accordance

Mill on [illegible] "good".

A Judge must not surrender his right to judge at the altar of prevailing prejudices, nor again must he take any notice of "what the World will say of his decision". A great deal could be said by way of elaboration upon this chief virtue of the Judicial valour, but the present writer would forego the privilege of doing so, for the most effective argument as to this has been preserved for us in that well known passage from the writings of J. S .Mill, where that famous "Apostle of Rationalism" of the nineteenth century in his dissertation on "Liberty" speaks of the honest but undignified and iniquitous judgments delivered against those for whom posterity his chosen to show greater respect than it has for those who were called upon to judge their conduct, and in his inimitable manner has exhibited the folly of a judge assuming the joint infallibility of himself and the multitude.

"Mankind can hardly be too often reminded, that there was once a man named Socrates, between whom and the legel authorities and public opinion of his time there took place a memorable collision. Born in an age and country abounding in individual greatness, this man has been handed down to us by those who best knew both him and the age, as the most virtuous man in it; while we know him as the head and prototype of all subsequent teachers of virtue, the source equally of the lofty inspiration of Plato and the judicious utilitarianism of Aristotle, "*i maestri di color che sanno,*" the two head-springs of ethical as of all other philosophy. This acknowledged master of all the eminent thinkers who have since lived—whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which made his native city illustrious—was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the gods recognized by the State; indeed his accuser asserted that he believed in no gods at all. Immorality, in being, by his doctrines and instructions, a "corruptor of youth". Of these charges the tribunal, there is every ground for believing, honestly found him guilty, and condemned the man who probably of all then born had deserved best of mankind to be put to death as a criminal.

"To pass from this to the only other instance of judicial iniquity, the mention of which, after the condemnation of Socrates, would not be an anticlimax; the event which took place on Calvary rather more than eighteen hundred years ago. The man who left on the memory of those who witnessed his life and conversation such an impression of his moral grandeur that eighteen subsequent centuries have done homage to him as the Almighty in person, was ignominiously put to death, as what? As a blasphemer. Men did not merely mistake their benefactor; they mistook him for the exact contrary of what he was, and treated him as that prodigy of impiety which they themselves are now held to be for their treatment of him. The feelings with which mankind now regard these lamentable transactions, especially the latter of the two, render them extremely unjust in their judgment of the unhappy actors. These were, to all appearance, not bad men—not worse than men commonly are, but rather the contrary; men who possessed in a full, or somewhat more than a full measure, the religious, moral, and patriotic feelings of their time and people: the very kind of men who, in all times, our own included, have every chance of passing through life blameless and respected. The high-priest who rent his garments when the words were pronounced, which, according to all the ideas of his country, constituted the blackest guilt, was in all probability quite as sincere in his horror and indigation as the generality of respectable and pious men now are in the religious and moral sentiments they profess; and most of those who now shudder at his conduct, if they had lived in his time, and been born Jews, would have acted precisely as he did. Orthodox Christians who are tempted to think that those who stoned to death the first martyrs must have been worse men than they themselves are, ought to remember that one of those persecutors was Saint Paul.

hour of judgment and in proportion to his rank and reputation puts the heavy influence of perhaps of a mistaken impression into the scale against the accused in whose favour the benevolent principles of English Law makes all presumptions and which commands the very judge to be his counsel "

duce perjured testimony in court, nor is he permitted to become a party to the suborning of false evidence in a court There is that honourable type of Advocate who could always be expected to assist the court in its task of reaching a correct conclusion on the facts and law of the case And consistently of course, with his duty to his client, it is the duty of every advocate to do so The trouble, however, is that there are many who do not conform to this high standard of professional probity—and it is they who have, by their presence, defiled the sanctity of the legal profession Here are the eloquent words of an Irish Judge uttered in the case of *The Queen versus O'Connell* (1844) 7 *Irish L R* 304 *at page* 313), and these are the words the author would like every one of the members of the Bar never to forget

"He (the advocate)", says Mr Justice Crampton, 'is a representative not a

individual, and retained and remunerated (often inadequately) for his valuable services yet he has a prior and perpetual retainer on behalf of truth and justice, and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer "

That is the ideal of Advocacy which advocates all over the civilized world are called upon to reflect in their day to day practice in courts It is only the weak and the foolish ones who disdain to strive for this ideal—but then here as elsewhere the weak and the foolish must be left to their folly

Bench and the Bar—and the qualities that count

In conclusion, it is necessary to stress that *courage, intellectual honesty* and *moral independence* ought to be the chief ornaments of the advocate's personality Legal learning by itself is not enough Above all, an advocate should have a mind of his own so much is this true that it is better to be wrong sometimes than never to have a mind of one s own In the court, of course, an advocate can only make *submissions* at the bar, and he cannot make a *present of his personal opinions* All that is required of him is *advocacy*, not his *judgment* The judgment is to be of the court which it should be his endeavour to procure as far as practicable in favour of his client And as to this, the judges too have an obligation to assist the Counsel at the Bar in serving the institution of the law

"Judges", *says Bacon*, "*ought to be more* learned than witty, more reverend than plausible and more advised than confident Above all things, integrity is their portion and proper virtue

[illegible] rt of justice, and an overspeaking

Judge first to find that which he

show quickness of comment in

cutting of evidence or counsel too short, or to prevent information by questions, though pertinent "

The Judge has the last word on the case and a great Judge recognises that until that last word is delivered it is the advocate who must have the last but one word

"Let us add one more example, the most striking of all, if the impressiveness of an error is measured by the wisdom and virtue of him who falls into it If ever any one, possessed of power, had grounds for thinking himself the best and most enlightened among his contemporaries, it was the Emperor Marcus Aurelius Absolute monarch of the whole civilized world, he preserved through life not only the most unblemished [illegible] heart [illegible] while [illegible] publy, [illegible] This man a better [illegible] of the ostensibly [illegible] y Placed at the [illegible] lettered intellect [illegible] tings the Christian ideal, he yet failed to see that Christianity was to be a good and not an evil to the world with his duties to which he was so deeply penetrated Existing society he knew to be in a deplorable state But such as it was, he saw, or thought he saw that it was held together, and prevented from being worse, by belief and reverence of the received divinities As a ruler of mankind, he deemed it his duty not to suffer society to fall in pieces and saw not how, if its existing ties were removed, any others could be formed which could again knit it together The new religion openly aimed at dissolving these ties [illegible]

and a system which purported to rest entirely upon a foundation to him so wholly unbelievable, could not be foreseen by him to be that renovating agency which after all abatements, it has in fact proved to be, the gentlest and most amenable of philosophers and rulers, under a solemn sense of duty, authorized the persecution of Christianity To my mind this is one of the most tragical facts in all history It is a bitter thought how different a thing the Christianty of the world might have been, if the Christian faith had been adopted as the religion of the empire under the auspices of Marcus Aurelius instead of those of Constantine But it would be equally unjust to him and false to truth to deny, that no one plea which can be urged for punishing anti Christian teaching was wanting to Marcus Aurelius for punishing, as he did, the propagation of Christianity No Christian more firmly believes that Atheism is false, and tends to the dissolution of society, than Marcus Aurelius believed the same things of Christianity, he who, of all men then living, might have been thought the most capable of appreciating it Unless any one who approves of punishment for the promulgation of opinions flatters himself that he is a wiser and better man than Marcus Aurelius—more deeply versed in the wisdom of his time, more elevated in his intellect above it—more earnest in his search for truth, or more singleminded in his devotion to it when found, let him abstain from that assumption of the joint infallibility of himself and the multitude, which the great Antoninus made with so unfortunate a result (pp 86 88)

With this long quotation from John Stuart Mill as an epilogue to the Chapter on the *Nature, Structure and Reach of Judicial Power*, we are now in a position to conclude our survey of the Constitution of Pakistan There remain, however, some provisions of the Constitution which have been deliberately kept out by the present writer since they, in his opinion, more appropriately fall to be considered in the final chapter of the book which deals with *Ideological, Religious & Ethical Implications of our Constitution—and to that task we might now turn our attention*

That no bearer of burden shall bear the burden of another, and that man shall have nothing but what he strives for.

Qur'an Chapter LIII, V. 38-39.

O you who believe! be maintainers of justice, bearers of witness for Allah's sake, though it may be against your own selves or (your) parents or near relatives; if he be rich or poor, Allah is most competent (to deal) with them both; therefore do not follow (your) low desires, lest you deviate; and if you swerve or turn aside, then surely Allah is aware of what you do.

Qur'an Chapter IV v. 135

Surely Allah does not change the condition of a people until they change their own condition.

Qur'an Chapter XIII v. 11

O you who believe! be upright for Allah, bearers of witness with justice, and let not hatred of a people incite you not to act equitably; act equitably, that is nearer to piety, and be careful of (your duty to) Allah; surely Allah is aware of what you do.

Qur'an Chapter V v. 8

Surely Allah enjoins the doing of justice and the doing of good (to others) and the giving to the kindred, and He forbids indecency and evil and rebellion; He admonishes you that you may be mindful.

Qur'an Chapter XVI v. 90

And fulfill the convenant of Allah when you have made a covenant, and do not break the oaths after making them fast, and you have indeed made Allah a surety for you; surely Allah knows what you do.

Qur'an Chapter XVI v. 91

And those who respond to their Lord and keep up prayer, and their rule is to take counsel among themselves, and who spend out of what We have given them.

Qur'an Chapter XLII v. 38

You (Believing Moslems) are the best of the nations raised up for (the benefit of) men; you enjoin what is right and forbid the wrong and believe in Allah; and if the followers of the Book had believed it would have been better for them; of them (some) are believers and most of them are transgressors.

Qur'an Chapter III v. 109

CHAPTER VIII

RELIGIOUS, ETHICAL AND IDEOLOGICAL IMPLICATIONS OF OUR CONSTITUTION

some such transcendental basis is, in a measure, due to the very constitution of the human mind, for, as explained by Harold J. Laski, the *human mind* "*revolts from jurisprudence* as bare and as formal" as the one referred to above. To quote our author further:

> "It (that is, *the human mind*) remembers the long medieval effort to identify law with the will of God, the stoic notion of law as the voice of universal reason, the famous phrase of Ulpian which makes of law the science of distinguishing between right and wrong in human conduct. It rejects the idea of law as that behind which there is found the sovereign power of the State because, as the eminent Jesuit jurist Cathrein has said, '*then one must regard every statute, however absurd, contrary to* reason, or despicable, as a true statute, and one no longer becomes entitled to complain of injustice.' Law, to be law, it is widely felt, must correspond with something more valid than the will of an authority which grounds its claim to respect upon nothing more than the coercive power at its disposal."

(See his 'The State in Theory and Practice', 1956 Ed. page 32.)

Besides all this, even the Austinean law-giver within the State, who claims to speak *on behalf of the State, must have some inspiration* and guidance from a source higher than himself for the purpose of laying down the law. Even the will of such a law-giver must have some reference to a transcendental norm. The law-giver commands that a certain rule of conduct be followed because it is right—and not because, what is commanded by him acquires the attribute of being right from the mere circumstance that it is commanded by the law-giver. Importance of stressing this approach to the philosophic conception of law will become apparent as we proceed to deal with some of the meta-jurisprudential questions that are raised in the pages that follow.

224. Declaration in the Preamble that Sovereignty over the Universe belongs to God:

The Constitution of Pakistan begins "In the name of *Allah*, the *Beneficient*, the *Merciful*," and in its Preamble acknowledges that "sovereignty over the entire Universe belongs to *Allah Almighty* alone", and further recognises that "the authority to be exercised by the people of Pakistan *within the limits prescribed by Him is a sacred trust*." In making all these assertions, as any one can see, a great deal is assumed, and what is more, what is asserted upon the footing of those assumptions, is somehow believed to be relevant for the purpose of founding a Government and distributing the sovereign power within the State.

State of Pakistan as a Juridical entity.

The "State" of Pakistan, as a juridical entity, undoubtedly is a creation of the Constitution—and as to this Constitution it is said, that it is the people of Pakistan who "in their Constituent Assembly on the 29th day of February 1956, and the 17th day of Rajab 1375 A.H." have adopted, enacted and *given the same to themselves*. An enunciation of the pre-suppositions upon which the assertions like (a) "the sovereignty over the entire universe belongs to *Allah*", and (b) "the authority to be exercised by the people of Pakistan within the *limits prescribed by Him being a sacred trust*" are sought to be based, require a great deal to be said before the relevance of the principles they embody could be rendered plain and easy of comprehension. In fact, as it will more clearly appear as the argument proceeds, it is not possible to avoid metaphysical reflections upon the general validity of the ideas like 'Natural Law', 'Higher Reason' etc., *in any discussion concerning* the religious and ideological foundations of our State.

Basic Philosophic conception of Law is the same everywhere.

Students of history are fully aware that the basic philosophic conceptions that underlie man's creative effort to live under law are practically the same, no matter whether you see them displayed in the *writings of the ancient Egyptians*, the Greeks, the Hindus, the Chinese or see them asserted in a somewhat different vernacular in the pages of some of the recent writings of our thinkers.

RELIGIOUS, ETHICAL AND IDEOLOGICAL IMPLICATIONS OF OUR CONSTITUTION

223. The discussion of Ethico-religious Basis of the State is not strictly relevant in a study like the present one.

The present writer is constrained in this study to deal with some of the outstanding ideological implications of the Constitution of Pakistan that stem from those of its provisions that deal with and describe its "religious" character, or present, what may be regarded as, a manifesto of its economico social policy and programme Considered strictly from the legal stand point, these matters are hardly relevant, and if they have been adverted to at all, it is for the reason that, over and above the juridical aspect of our Constitution, its political and ethico religious aspects also fall to be considered in any study that professes to be comprehensive Much of what will be said in the sequel will have reference to the *preamble*, to the provisions contained in the Chapter relating to the *Directive Principles of State Policy*, as also to what the Constitution describes as the *Islamic provisions* (See Chapter I of Part XII of the Constitution, ARTs 197 and 198)

Natu Meta juris questi prove stu ly

The ideas that are about to be presented in this chapter have little or no direct relationship with the theory of law which is relevant for the purposes of analytic jurisprudence The questions that form the subject matter of the present discussion are a part of the province of the study, which in Maitland's happy phrase, may well be called "Meta jurisprudence" Meta-jurisprudence studies questions like the ultimate basis of political obligation, or the nature of the transcendental sanctions that underlie and account for our obedience to the rules of conduct prescribed by the law etc A consideration of these and other allied questions has become somewhat important in the study of the Constitution of our country, if only because of what is mentioned in the salutary paragraphs of the Preamble to the Constitution Besides, even the name we have given to our polity directly involves an examination of issues that are quite extraneous to the study of analytic jurisprudence

Relat I the the st

For the purposes of analytic jurisprudence, the relationship of the law to the State is easily stated: considered purely from the formalistic stand point, once the idea of the State as sovereign is accepted, law becomes indistinguishable from the will of the State Law is just *that* which the State is prepared to enforce, and from this it follows automatically that *what* it enforces as law is the manifestation of its will The *content* of the law considered strictly from this juristic point of view, becomes a matter of no consequence it may be a *wise*, *mistaken* or *foolish* rule of conduct which may have been sanctioned by the State as law, but all these criteria are totally irrelevant once it is realised that what is law is law only because the State has ordained it Its claim to obedience is derived simply from the circumstance of the source whence it emanates Were it otherwise, the State would not any longer be considered as sovereign for the simple reason that there would be then *ex hypothesi* some other sovereign whose will would have an overriding effect in the determination of what should be the law in respect of a given subject matter—in which case, again, it would be this higher source of law that would be called the State, for the State, by definition, as we have seen earlier, is a sovereign association having an exclusive claim to coerce a political society and the individual members composing it, into doing that which is in conformity with its will

State a agent c Higher

But, as we shall presently see, this conception of the relationship of law to the State, though important for the study of analytic jurisprudence, ceases to be relevant once the State itself is defined as an agent or instrument of a higher law, be that law conceived as the natural law or the religious law The necessity of grounding jurisprudence on

its votaries that the values man aspires for count in the scheme of things and are conserved in the sense that sooner or later they will be realised.

225. Revealed Religion as a means of securing the overall Education of the Human Race.

It is the claim of the Qur'an, which book the Muslims all over the world regard as the 'Revealed Word of God', that this institution of universal religion has *grown* with the growth of man himself, and that the Cosmic Power that has created man in its own image and appointed him as "Vicegerant" on earth, has, through a series of Prophets that were from time to time sent down to Earth, helped him to outgrow the state of his moral and spiritual immaturity. The Qur'an claims that there is not a clime nor again any age in Man's History in which God's messengers have not come to inspire people to do the right and to avoid the evil. (See Ch. 16:37; Ch. 35:25; Ch. 40:79 of the Qur'an). This *process of revelation* was essential because during the period of the childhood of our race, the infantile age of humanity demanded that it be helped to discriminate between what was right and what was wrong, between what was helpful and what was injurious; the process of education of the race went on till the advent of Islam when the religion was perfected. (cf. Qur'an: Says God to Muhammed: Today I have perfected for you your religion and fulfilled my favour unto you, and willed that Islam should be your religion. (Surah 5: 3) Humanity was thus virtually declared to have reached a phase of maturity whereafter its evolution was to be directed through the efforts of creative individuals. With the Man's coming of Age, there was no need any more for the Prophets to come: Revelation was not needed any more now that the forces of reason were liberated in the soul of man to help man to work out his destiny. By observing the courses of nature, by reflecting over its mysteries and by understanding the secret of its power, its beauty and appeal, man was to find enough guidance from the Book of God's Creation to perform his tasks here below and thereby be in a position to take up the problem of his own evolution, of his unfolding, into his own hands. Man was commanded to read the Book of Nature and so reach from Nature to Nature's God. Between his inner world and the laws that control its evolution and the outer world and the laws that control its historic manifestations there was to be an inter-action—and man was to be a spectator of this contact between the two worlds—and he was called upon *to realise by means of thought, belief and action the unity between the two.*

Islam—a Natural Religion.

The realisation of the unity of creation is the highest ideal. And man was commanded, to use the words of the Qur'an: "Then set your face upright for religion in the right state—the *nature* made by *Allah* in which He has made *man*; there is no altering of *Allah's* creation:—that is the right religion, but most people do not know." (Chapter XXX, verse 30). In the above verse is set-forth the root of the matter: the religion that has been taught to man is in the image of nature, made by God; and what is more, man himself has been made in the image of that nature, that is, nature, the laws of which do not alter and in fact are incapable of being altered. The obedience to the law which is reflected in nature constitutes the religion of man. Islam merely establishes this truth and prepares a ground for man's recognition of this law, initially on the authority of revelation but ultimately and fundamentally upon man's own inward realisation of the truth of this law, through right thought, through right belief and through right action. Even thought and belief in a sense are action: in whatever form man wills, he acts; and thinking is action as much as is believing. The sage, the highly evolved soul, reflects by his very being, the supremacy of this law—law which is writ-large in the skies and the truth of which is attested by the very nerve and fibre of Man's own inner-most being.

Man's finitude *posits as a*

Man's moral consciousness that prescribes the norm in relation to which he could view his acts as being either right or wrong, is of practical assistance to him in the realisa-

Turning to the ancient times, we can still hear the voice of Cicero telling us all about the essential nature of law. His words, strange to say, possess a touch of modernity about them. We read, for example, in his *De Republica*:

Views of Cicero stated

"True *law is right reason conformable to nature* (a Stoic phrase), it is universally diffused, unchanging, and eternal; it summons men to their duty by its commands, and deters them from crime by its prohibitions, but while it affects the good by its commands and its prohibitions, it fails to move the bad. *No rule may be made in substitution for* this law, no rule can be made in derogation from it, nor can it be utterly abrogated; we cannot be released from it either by the senate or by the people; nor is any commentator or interpreter of it other than itself to be sought. There will not be one law at Athens and another at Rome, or one law now and another in the future; all nations (*gentes*) at all times, will be bound by the one eternal and immutable law; there will be one God who is common to all men and, as it were, their master and ruler (*imperator*), and He it is *who devises, debates, and enacts this law, the which if a man disobeys he will be a run* away from himself, and rejecting thereby the nature of man he will pay the utmost penalty *by that very act of rejection, even if he escapes other punishments which men believe he* will incur."

Ernest Barker attributes idea of Natural Law to an *old and indefeasible movement of the mind*

And to the same effect are the views of a contemporary English scholar of the eminence of Sir Ernest Barker, contained in the following passage which is taken from his book "*Traditions of Civility*". He has no difficulty in explaining the emergence of the doctrine of natural law and its development down to our times as being "an old and indefeasible movement of the human mind". In his words:

"The origin of the idea of natural law may be ascribed to an old and indefeasible movement of the human mind (we may trace it already in the *Antigone* of Sophocles) which impels it towards the notion of eternal and immutable justice; a justice which human authority expresses, or ought to express—but does not make; a justice which human authority may fail to express—and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command. This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe—from the Being of God and the reason of man. It follows that law—in the sense of the law of the last resort—is somehow above the law making. It follows that law makers, after all, are somehow under and subject to law."

Higher Law and the religious hypothesis

Of course, if by the expression "movement of the human mind" is to be understood *all that seemingly flows from man's creative thought, it is easy to explain the entire development of our civilisation and culture as being man's creation.* But in an attempt to explain this very same phenomenon, the universal religion of mankind teaches us that there is a divine ground that underlies man's effort to reflect those higher ideals and to realise those spiritual values that are not demanded merely by the logic of Earthly Necessity, that is, the logic of "here" and "now". Beyond what we see here and now, there is a something which religion postulates as the 'Here after',—and even the conception of Nirvana of the Buddhists *is no exception to this—which we are told, upon the testimony of the* Teachers of Universal Religion, to bear in view before our earthly pursuits can be fruitful. And according to this teaching, man's preoccupation with the immediate present, derives its meaning only from this wider context of "eternal life" in which the experience of his every "now" continually seems to involve him. Religion is, from this point of view, an explanation of man's deepest yearnings, needs and aspirations; it is a *hypothesis* by appeal to which man can secure consistency between the demands that earthly life makes on him on the one hand *and those deeper vaticinating pulsations which seem to animate* all his higher thoughts and utterances and inspire all his heroic ventures here below, on the other. It also assures

authority; after all that is an undertaking which, as any one can see, involves the mere management of our earthly affairs and not the holding of any concourse with the Heavenly Powers. One may as well argue: Cannot one have, irrespective of the acceptance of the Sovereignty of this Transcendent Law, a secular Constitution just to be able to establish the institutions which must ensure the orderly working of political processes and set up organs of the state-power charged with the duty of making, executing and enforcing the laws required for securing just relations between man and man.

The answer to this question must depend not on any of the abstract considerations of a philosophical character, but upon the practical question of understanding the people, in relation to whom, a machinery of constitutional government is sought to be designed and established. And having said that much, it is necessary, in order to avoid misunderstanding, at once to add that, in the ultimate analysis, it is impossible to escape the logical necessity of affirming a transcendental ground in terms of which sanctions for the due exercise of all earthly authority could be imposed. And a religion is after all only a hypothesis regarding this transcendental ground; and it is in this sense that Macaulay regarded Religion as "the last restraint on earthly power and the last solace of earthly misery". And Religion thus regarded is a Universal Institution of mankind and is inescapably the foundation of all our social and political institutions.

De Tocqueville's views:

"There is hardly any human action", says *De Tocqueville* in his *Democracy in America*, "however particular it may be, that does not originate in some very general idea men have conceived of the *Deity*, of his relation to mankind, of the nature of their own souls, and of their duties to their fellow creatures. Nor can anything prevent these ideas from being the common spring from which all the rest emanates.

"Men are therefore immeasurably interested in acquiring fixed ideas of God, of the soul, and of their general duties to their Creator and their fellow men; for doubt on these first principles would abandon all their actions to chance and would condemn them in some way to disorder and impotence.

"This, then, is the subject on which it is most important for each of us to have fixed ideas; and unhappily it is also the subject on which it is most difficult for each of us, left to himself, to settle his opinions by the sole force of his reason. None but minds singularly free from the ordinary cares of life, minds at once penetrating, subtle, and trained by thinking, can, even with much time and care, sound the depths of these truths that are so necessary. And, indeed, we see that philosophers are themselves almost always surrounded by uncertainties; that at every step the natural light which illuminates their path grows dimmer and less secure; and that, inspite of all their efforts, they have discovered as yet only a few conflicting notions, on which the mind of man has been tossed about for thousands of years without ever firmly grasping truth or finding novelty even in its errors. Studies of this nature are far above the average capacity of men; and, even if the majority of mankind were capable of such pursuits, it is evident that leisure to cultivate them would still be wanting."

Having thus explained the need for *having* those fixed ideas about God and Human nature, without which mankind would find it difficult to do their day's work here below, *De Tocqueville* proceeds to advance the thesis that this *need is adequately satisfied by Religion*. In his words:

"The first object and one of the principal advantages of religion is to furnish to each of these fundamental questions a solution that is at once clear, precise, intelligible, and lasting, to the mass of mankind. There are religions that are false and very absurd, but it may be affirmed that any religion which remains within the circle that I have just traced without pretending to go beyond it (as many religions have attempted to

tion of this transcendental law Having regard to man's *finitude* and his location in the context of a given set of space and time conditions, he cannot, from the very nature of the case, perceive the total scheme of creation to be able to see the cosmic purpose in the fullness of its majesty, its splendour and its glory The life of instinct, no doubt, to some extent helps him to adjust himself to his immediate environment, but with the emergence of intelligence, the burden of freedom descends heavily on him and the difficulty of choosing the right course of conduct and of rejecting the evil begins to make the problem of living highly complicated As creatures of instinct, all children are already cast into a mould in

re-action the existence of the infinite

born entire in all its limbs or without defect, do you see one born maimed and mutilated? Whenever he used to say this he used to cite as authority for the truth of what he was asserting the present verse ' The nature made by *Allah* in which he has made man there is no altering of *Allah*'s creation that is the right religion

Islam thus is the natural religion of man and enjoins three basic principles to be freely accepted and adopted by him —

Essentials of Islam

(a) unity and all comprehensive authority of one sovereign power who is Creator reflects himself in creation, and is yet independent of it and further that the entire creation endures in the Law and its continued existence is made possible by the sustenance it derives from the Law,

(b) the universality of divine revelation of pre Islamic period of human history belief in Muhammad's Mission and the acceptance of the entire pre Islamic development of Religion, and

(c) man's direct responsibility and accountability for all actions that he may do or omit doing here below (It thus rules out the dogma of intercession by intermediaries and declares that nothing belongs to Man except his effort Chap LIII V 38 39)

In a recent study *The Ideas of Arab Nationalism* by *Dr Hazem Zaki Nusiebeh* of Princeton University (Cornell University Press, Ithaca, New York) the following has been offered as the definition of Islam —

Dr Zaki's Definition of Islam cited

' It is of course a religion, a body of doctrines and beliefs clustered around the principle of *Tawhid* ("asserting oneness) which teaches that God is the ultimate spiritual basis of all life It is a universal and not a national religion Its message is addressed to mankind in its entirety and not to any one nation even though the Prophetic Revelation is through the instrumentality of Arabic Language
'"O Mankind! — Lo! We have created you male and female and have made you nations and tribes that you may know one another The noblest of you in the sight of God is the best in conduct' (Quoran tr by M M Pickthal New York 1953 (Sura XLIX verse 13) and as a creed Islam is unequivocally hostile to the sort of divisive contentions that are an endemic features of nationalism' '

In the opinion of the present writer, the foregoing definition of Islam is a valid one and its importance lies in the fact that it states correctly in a nutshell what the relationship of Islam to the gospel of Nationalism is like—and the importance of this approach would be made manifest as the argument in this chapter proceeds

226. Relevance of Religious hypothesis to the establishment of a Constitutional Set-up

But what has Islam got to do, one might well ask with the settlement of questions which confront us when we set out to establish the institutional framework of an earthly

Man's deepest strivings for what are *prima facie* unearthly objectives. And the need for doing so ostensibly is not attested by any immediate experience but is a function of man's instinctive perception of the operation of a higher law to which Man freely declares his allegiance.

Transcendental basis of American Constitution

The impact of the Doctrines of Natural law upon the development of American constitutional jurisprudence has been assessed elsewhere in the book (see Chapter on Fundamental Rights p. 306) and in this context, it now remains only to refer to the historical factors that were responsible for the assimilation of the ideas of Natural Law in the minds of those who were the pioneers of the Movement for American Independence. As to the sort of intellectual climate that inspired, nourished and sustained the beliefs of those who waged the war of American Independence, Mr. Commager points out that:

> "The doctrines of natural law were deeply rooted, plausible, and tenacious. They derived from Greek and Roman philosophy, were fortified by medieval Christianity, and vindicated by Newtonian science; tested in the crucible of seventeenth-century English and eighteenth-century American revolutions, they appeared to justify themselves. Intellectually their appeal was almost irresistible, for they taught that law was rooted in the very nature of things, articulated to the framework of the universe, and expressive of the will of God, that it operated with the mathematical certainty of the axioms of Euclid, and that conformity to it was a duty of Reason. Emotionally, too, their appeal was persuasive. They offered a formula at once simple and conclusive and asserted the harmony of man with the universe; in a world of change they provided permanence, and in a world of disorder security.
>
> "The Fathers of the Revolution and of the Constitution embraced the tenets of natural law as a matter of course. A generation trained on the classics could quote Aristotle's definition of law as "reason unaffected by desire" and Cicero's conclusion that "law is the highest reason implanted in nature, which commands what ought to be and forbids the opposite . . . A generation still deeply imbued with Puritanism knew that religion itself dictated conformity to the laws of Nature, for, as Jonathan Mayhew put it, 'God himself does not govern in an absolutely arbitrary and despotic manner. The power of this Almighty King is limited by law—by the eternal laws of truth, wisdom, and equity, and the everlasting tables of right reason.' A generation which read the Commentaries of Blackstone recalled that 'upon the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these,' and rejoiced that the laws of England, happily transferred to America, were patterned on the laws of nature. A generation bathed in the Enlightenment pledged its lives, its fortunes, and its sacred honor to the conviction that the laws of Nature and Nature's God required American independence and justified faith in the unalienable rights of life, liberty, and the pursuit of happiness. It was not surprising that Americans wrote natural law into their constitutions, enshrined it in their Bills of Rights, and pronounced it from their judicial tribunals."
>
> (See "The American Mind" by Henry Steele Commager 1955 Edition Chapter XVII pp. 366-7.)

Impact of Religious outlook upon the writings of American Founding Fathers.

Any one reading the writings and utterances of some of the leading figures from among the Founding Fathers would be struck by their deeply religious tone. They were truly God-inspired men. *A. Hamilton* could write: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written so, as if with a sunbeam, in the whole volume of Human Nature, by the hand of Divinity Itself, and can never be erased or obscured by mortal power". So we have *Jefferson* saying: "The God who gave us life gave us liberty at the same time". Was that not also an Ameri-

do for the purpose of restraining on every side the free movement of the human mind), imposes a salutary restraint upon the intellect, and it must be admitted that, if it does not save men in another world, it is at least very conducive to their happiness and greatness in this

"This is especially true of men living in free countries When the religion of a people is destroyed, doubt gets hold of the higher powers of intellect and half paralyses all the others Every man accustoms himself to having only confused and changing notions on the subjects most interesting to his fellow creatures and himself His opinions are ill defended and easily abandoned, and, in despair of ever solving by himself the hard problems respecting the destiny of man, he ignobly submits to think no more about them Such a condition cannot but enervate the soul, relax the springs of the Will, and prepare a people for servitude "

The foregoing extracts from *Democracy in America* Vol II, pp 20 21, 1953 (Alfred A Knopp, New York) may be regarded as an elucidation of what *Carlyle* meant when he said, "All great ages are ages of Faith " Religion saves its votaries against the paralysis of the Will that must ordinarily set in if there be no settled philosophy about man s place in the scheme of this mysterious universe

Religious Law as the underlying principle of Constitution governments

There is no constitutional Government in the modern world that does not *in some significant sense, owe its inspiration to the teachings of those who were deeply imbued by what may be called, the sense for religious values*, and the present author would not admit an exception to this general statement even in the case of a communist State which, as will be argued later, despite the protestations of its founders, does not escape from the necessity of accepting the Religious hypothesis—and this despite the fact that it is only too true to say that communism establishes another kind of religion altogether This is so because in the words of Disraeli, "The most powerful principle which governs man is the religious principle And in the same strain said that savant and saint, Edmund Burke, "We know and what is better, we inwardly feel, that Religion is the basis of civil society, and the source of all good and all comfort "

Constitution of the United States and the Religious Hypothesis

To take the Constitution of the United States as a case in point, we have, to begin with, to notice in its preamble the following —

"We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for common defence, promote general welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America "

emotion and refers us to values like justice, general welfare of mankind and blessings of liberty etc A rational mind would like to ask, *why* were these things considered valuable worth treasuring and fit for being incorporated in the text of the Constitution The answer to this can only be that those values transcend the logic of man's immediate interests and practical expediencies, that their appeal to us is to be traced to their being rooted in the very constitution of man And in fact, the evidence of history which shows up to us the virtue of courage, of the spirit of self sacrifice, nay the very spectacle of the martyrdom of Man, is a pointer to the same truth, and such is the stuff out of which man is made that he would ceaselessly toil and labour and make all the sacrifices he can in order to perpetuate his heritage In Man, as has been truly said, the river of life rises beyond its source This philosophy of self transcendence is itself religion—for it offers an ultimate explanation of

(b) every religious denomination and every sect thereof has the right to establish, maintain and manage its religious institutions."

Religious freedom admissible to all citizens

It is a remarkable feature of our Constitution that the right to profess, practise and propagate any religion is reserved to every citizen: it is reserved as much to a Muslim as to a non-Muslim, and the right is available to all under identical conditions. So also every religious denomination and every sect has the right to establish, maintain and manage its religious institutions. There is no Article or provision anywhere in the Constitution which recognises the establishment of any official religion, and what is more, all such laws as will be made by the Legislature in Pakistan will have to be considered and voted upon by all the legislators—Moslems and non-Moslems alike—and all their implications and the question concerning their relevance to the economic-political situation of the time, will have to be examined in the light of what might be found to be for the good of the country as a whole.

228. Implications of the name "Islamic Republic of Pakistan"

We have already seen that the very first Article of the Constitution says that "Pakistan shall be a *Federal Republic* to be *known* as the Islamic Republic of Pakistan." It is the view of the present writer that upon the plain construction of the language used in the Article under question, the legal character of the State of Pakistan is no other than that it is to be Federal Republic and it is only its *name* that is "Islamic Republic of Pakistan". And for the purpose of law, nothing depends on what name you give to the State so long as the provisions of the Constitution confer upon it a character which is at variance with, or is in any sense different from, the one that is connoted by its name.

It is difficult for a lawyer, having regard to what is contained in the Constitution, to see *how* and *in* what *sense* Pakistan can be described as an *Islamic State*. Its provisions do not in any manner establish the possibility of the State being regarded as Islamic. Assuming for the sake of argument, but without conceding, that such a concept as *Islamic State* or *Islamic Republic* can be deduced from anything that is contained in the holy Quran or the Sunnah, the all important question is: what are the distinguishing features of "Islamic State", and how far does the State, established by our Constitution, conform to that pattern.

Summary statement of the religious provisions contained in our Constitution

Before commenting any further on the alleged Islamic character of the State of Pakistan, it becomes necessary to summarise the several provisions contained in our Constitution which could conceivably have a bearing on the settlement of the claim that our Constitution establishes a theocratic State. The following provisions are stated in the order in which they appear in the Constitution with a view to laying a foundation for a proper appreciation of the claim that the State established by the Constitution is a religious one.

Preamble.

(a) *Preamble*: In the name of *Allah*, the Beneficent, the Merciful

WHEREAS sovereignty over the entire Universe belongs to Allah Almighty alone, and *the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust*;

WHEREAS the Founder of Pakistan, *Quaid-i-Azam Mohammad Ali Jinnah*, declared that Pakistan would be a democratic State based on *Islamic principles of social justice*:

AND WHEREAS the Constituent Assembly, representing the people of Pakistan, have resolved to frame for the sovereign independent State of Pakistan a constitution;

WHEREIN the State should exercise its powers and authority through *the chosen* representatives of the people;

can who as far back as 1764 uttered the most decisive of all the truths upon the subject of the alleged omnipotence of Parliament

> "To say the Parliament is absolute and arbitrary is a contradiction The Parliament cannot make 2 and 2, 5, Omnipotency cannot do it The supreme power in a State is *jus dicere* only—*jus dare*, strictly speaking, belongs alone to God Parliaments in all cases, are to declare what is good of the whole, but it is not the declaration of Parliament that makes it so There must be in every instance, a higher authority, viz God Should the act of Parliament be against any of His Natural Laws, which are immutably true their declaration would be contrary to eternal Truth, Equity and Justice and consequently void · and so it would be adjudged by Parliament itself when convinced of their mistake (See *James Otis —Rights of the British Colonies asserted and proved*, p 67)"

The above quoted extract is one out of the many expressions of that idea with which Qur'an has made us so familiar viz that there are the prescribed limits within which man must act, limits imposed by the Divine law, limits beyond which mankind cannot go forward with impunity

Significance of the First Amendment of the American Constitution

The First Amendment of the American Constitution rightly warns us against the perils of establishing "official religion" but at the same time it has very wisely declared that the Congress shall make no law prohibiting the free exercise of religion Most of those who constituted the American citizenaire of the day when the Constitution was framed were those who had suffered from religious persecution, persecution which made it impossible for them to stay in the land where they were born, they were therefore alive to the danger of all institutionalised religions and in particular of the State religion—for whatever else it is, a State religion is not a religion, but a caricature of it They were aware, however, of the supreme importance of permitting the fullest measure of freedom possible to those who wished to profess and practice any religion

227. No place under our Constitution for an "official" or "State-Religion"

It would be obvious from the study of our Constitution that in it too there is no room for the establishment of any *official religion* There is no provision anywhere in our Constitution which says that Islam shall be the *official religion* of the State As to the requirement that the Head of the State shall be a Muslim or that the name of the State shall be the Islamic Republic of Pakistan, all that could be said in this context is that they do not — no matter what other interpretation is placed on them —constitute Islam as an official religion of the State of Pakistan From the very nature of the case Islam cannot be a [illegible]

that will inspire those who are to be in charge of governmental affairs, but that is not the same thing as saying that the Constitution denies to citizens of Pakistan not professing the Islamic faith, the right to pursue and practise articles of their own faith and realise [illegible]

"Subject to law, public order and morality—

(a) every citizen has the right to profess, practise and propagate any religion, and

The Commission shall submit its final report within five years of its appointment, and may submit any *interim* report earlier. The report, whether *interim* or final, shall be laid before the National Assembly within six months of its receipt, and the *Assembly after considering the report shall enact laws in respect thereof.*

(4) *Nothing in this Article shall affect the personal laws of non-Muslim citizens, or their status as citizens, or any provision of the Constitution.*

Explanation.—In the application of this Article to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as *interpreted by that sect.*"

It should be noticed that Part II of our Constitution, that deals with fundamental rights, does not so much as use the word *Islam* in any of its provisions, to say nothing of the fact that it extends religious freedom to all and it also concedes the right to maintain and establish religious institutions to every citizen and to every religious denomination and every sect thereof; thus the right to profess, practise and propagate any religion subject to law, public order and morality is constitutionally guaranteed. (See Art. 18). And Arts. 24 and 25 are mere Directive Principles of state-policy and are not enforceable in any court (See Art. 23).

President of our State to be Muslim. But he has no real power.

With regard to the President of the State being a Muslim, it is pertinent to point out that in his absence or in the other contingencies visualised by Article 36, the functions of his office are to be exercised by the Speaker of the National Assembly. The Speaker of the National Assembly is not required under the Constitution to be a Muslim and in the event of his becoming an Acting President, compliance with the constitutional requirement, viz., that the President shall be a Muslim, is to a considerable extent compromised with. Having regard to the fact that about 85 per cent of the population of Pakistan is Muslim, it would be a matter of course that the Head of the State would be a Muslim. Consequently the incorporation of this provision at best may be regarded as having some sort of a symbolic value and cannot, by any means, be regarded as something to which serious exception can be taken. The more so, when it is realised that the President, as the constitutional Head of the State, possesses practically no political power—as, by and large, the entire executive authority of the Federal Government, is controlled by the advice of the President's Cabinet. Neither the Prime Minister nor the Members of the Cabinet are necessarily to be Muslims and as it is, in the Cabinet which is under our own Constitution to be the repository of all political powers, the minorities are not precluded from playing an important or predominant role in determining the questions relating to the administration of the affairs of the State. Governors of the Federating Units are not necessarily to be Muslims and it is quite possible for a non-Muslim to be appointed either as a Governor of a Federating Unit or a Member of the Central Cabinet or of a Cabinet of a Province.

Religious Provisions in some other Constitutions.

If we look at some other Constitutions of the World we find that there too, religious preferences and predilections have been given legislative recognition and effect. A few samples of this practice might as well be exhibited to illustrate the point of these remarks:

Ireland

(a) The Constitution of *Ireland* has in its preamble the words: "We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ......"

Sweeden

(b) The Constitution of *Sweden* provides in Article 2 that "The King shall always belong to the pure evangelical faith, as adopted and explained in the unaltered Augsburg Confession and in the resolution of Upsala Synod."

Norway

(c) Article 2 of the Constitution of *Norway* provides that "The Evangelical-Lutheran religion shall remain the public religion of the State. The inhabitants professing it shall be bound to bring up their children in the same. Jesuits shall not be tolerated";

WHEREIN the principles of democracy, freedom, equality, tolerance and social justice as enunciated by *Islam*, should be fully observed,

WHEREIN *the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and Sunnah* "

(b) *Art* 1—"Pakistan shall be a Federal Republic to be known as the *Islamic Republic of Pakistan* " Art 1

(c) *Art* 24—"The State shall endeavour to strengthen the bonds of unity among *Muslim countries*, to promote international peace and security, to foster goodwill and friendly relations among all nations and to encourage the settlement of international disputes by peaceful means " Art 24

(d) *Art* 25—"(1) *Steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and* Sunnah Art 25

(2) The State shall endeavour, *as respects the Muslims of Pakistan* —

(a) to provide facilities whereby they may be enabled *to understand the meaning of life according to the Holy Quran and Sunnah*,

(b) *to make the teaching of the Holy Quran compulsory*

(c) *to promote unity and the* observance of *Islamic moral standards* and

(d) *to secure the proper organization of Zakat, wakfs and mosques*

(e) *Art* 32—This Article provides for the President of the Republic to be a *Muslim* Art 32

(f) *Art* 197—"(1) The President shall set up an organization for *Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis* Art 197

(2) Parliament may by Act provide for a special tax to be imposed upon Muslims for defraying expenses of the organization set up under clause (1), and the proceeds of such tax shall not, notwithstanding anything in the Constitution form part of the Federal Consolidated Fund "

(g) *Art* 198—"(1) *No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah* hereinafter referred to as Injunctions of Islam, *and existing law shall be brought into conformity with such injunctions* Art 198

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in clause (3)

(3) Within one year of the *Constitution Day*, the President shall appoint *a Commission*—

(a) to make *recommendations*—

(i) as to the measures for *bringing existing law into conformity with the Injunctions of Islam*, and

(ii) as to the stages by which such measures should be brought into effect, and

(b) *to compile in a suitable form for the guidance of the National and Provincial Assemblies such Injunctions of Islam as can be given legislative effect*

all inhabitants of the country, provided that such forms of worship do not conflict with the maintenance of order and discipline or public morality."

Syria

4. Article 3 of the Constitution of *Syria* provides that "The religion of the President of the Republic will be Islam. Muslim Law is the principal source of legislation."

Other religious provisions are directory.

All other provisions contained in our Constitution, detailed above, are merely directory: they are not judicially enforceable and are not inconsistent with the policy of allowing religious minorities to freely profess and practise their religion or to establish and maintain their religious institutions. Even the Organisation of Islamic Research and Instruction which the President is required to set up under Article 197, is to be financed by means of a special tax to be imposed by an Act of Parliament upon Moslems alone. Similarly, the personal laws of the non-Moslems are constitutionally declared immune from any legislation that might be passed to give effect to the principle of Article 198, namely, the principle of avoiding conflict between the Injunctions of the Islamic Teaching and the laws to be passed by the Legislatures in Pakistan. Legislatures of Pakistan have to pass laws on the basis of majority vote and membership of the legislature is open to the Moslems and non-Moslems alike. The laws are thus not to be made only by the Moslems: the non-Moslem representatives also participate in the law-making activities of the State.

229. What is an Islamic State? Views of the Authors of the Martial Law Court of Inquiry Report.

Munir Enquiry Report.

In a well-known document, called the Report of the Court of Enquiry (constituted under Punjab Act II of 1954), we have a scholarly analysis of the legal and political implications of the concept of the Islamic State given by Chief Justice Muhammad Munir and Mr. Justice M. R. Kayani, the President and the Member of the Court of Enquiry, respectively and it would be useful to refer to their observations in this context in an attempt to place the question relating to the alleged religious character of the State of Pakistan into its *proper perspective*.

It should be recalled that the Court of Enquiry was constituted under a law passed by the Province of the Punjab to enquire into the widespread disturbances that broke out in that province in March/April 1953. These disturbances had taken "such an alarming turn" and assumed "such a menacing form" that in several places Military Forces had to be called in, and in the city of Lahore, Martial Law had to be proclaimed, which remained in force till the middle of May 1953. Before the clamping down of the Martial Law, the Police had to resort to firing in several places and a number of lives were lost and many more were injured. And the amount of property looted and burnt was also enormous. These disturbances were the direct result of a religious controversy between the *Ahmadis* and *non-Ahmadis*, a controversy the precise nature of which has been discussed in the Report at page 187 onwards. The religious differences between the Ahmadis and the Musalmans have been set-forth in the Report comprehensively and any one wishing to understand what these doctrinal differences are would be well advised to read the Report. Among the things to which the authors of the Report advert in the course of their Report is the concept of the Islamic State (See page 201). According to the authors of the Report, the Constitution of an Islamic State "must contain the following five provisions":—

(1) That all laws to be found in the *Quran* or the *Sunnah* shall be deemed to be a part of the law of the land for Muslims and shall be enforced accordingly;

(2) that unless the Constitution itself is framed by *Ijma'-i-ummat*, namely, by the agreement of the *ulama* and *mujtahids* of acknowledged status, any provision in the Constitution which is repugnant to the *Quran* or *Sunnah* shall to the extent of the repugnancy be void;

and in Article 4, is provided that "The King shall always profess the Evangelical Lutheran religion, and maintain and protect the same '

(d) Article 3 of the Constitution of *Denmark* provides that "The Evangelical-Lutheran Church is the Danish Established Church and is, as such, subsidized by the State", and Article 5, that "The King shall be a member of the Evangelical Lutheran Church " Denmark

(e) Article 50 of the Constitution of *Switzerland* guarantees free exercise of religion but forbids the erection of any See within Swiss territory without the approval of the Confederation, and Article 51 bans the order of Jesuits and provides that the ban may be extended "to other religious orders whose activity is dangerous to the State or disturbs the peace between the various religious bodies " Similarly, Article 52 borbids the founding of new religious houses or religious orders, and the re establishment of those which have been suppressed Switzerland

(f) In the Constitution of *Greece* also it is mentioned in the Preamble In the name of the Holy Consubstantial and Invisible Trinity", and the Second National Assembly of the Greeks in Athens decress in Articles 1 and 2 that the established religion in Greece is that of the Eastern Orthodox Church of Christ other religions are tolerated and protected but proselytism and all interference with the established religion is prohibited The doctrine of the church is stated, supervision over the ministers of religion State as well as others, is provided for, and the text of the Holy Scriptures is required to be maintained *unchanged* Greece

(g) The Constitution of the *Argentina* Republic (of March 16, 1949) in its 77th Article, provides "To be eligible to the office of President or Vice President of the Nation, a person must have been born in Argentine territory, must belong to the Catholic church and must possess the other qualifications required to be chosen a Senator Argentina

In some Muslim countries, too, similar provisions are to be found

1 In Afghanistan, the Constitution provides "In the name of God the Merciful, the Forgiving, the Faith of Afghanistan is the sacred faith of Islam, and the official religion and that of the population in general is the Hanafi religion The King of Afghanistan should be a follower of this religion Followers of other religions also enjoy protection ' Afghanistan

2 *In Iran, the Constitution begins with the words 'In the name of God, the* Merciful, the Compassionate", and after reciting the establishment of a National Council to give effect to the enactments of the Sacred Law of His Holiness the Prophet, provides, in Article 11, that Members of the Assembly on taking their seats shall take an oath on the Quran The Supplementary Fundamental Law further provides, in Article 1 that The official religion of Iran is Islam, according to the orthodox Ja'fariya doctrine of the Ithna Asharriyya (Church of the twelve Imams) which faith the Shah of Iran must profess and promote " Iran

Article 2 provides for the election of an ecclesiastical committee of not less than five *mujtaheds* from a panel of twenty whose decision shall be binding, so that no ' legal enactment of the Sacred National Assembly" shall "be at variance with the sacred principles of Islam or the laws established by His Holiness, the Best of Mankind (on whom and on whose Household be the Blessings of God and His Peace)", and ordains that "This Article shall continue unchanged until the appearance of His Holiness, the Prophet of the Age (may God hasten his glad Advent) "

3 The Constitution of *Iraq* begins with the dedication "In the name of God, the Merciful, the Forgiving ", and provides in Article 13 that Islam is the official religion of the State Freedom to practise the rites of the different sects of that religion, as observed in Iraq, is guaranteed Complete freedom of conscience and freedom to practise the various forms of worship in conformity with the accepted customs, is guaranteed to Iraq

imposed by the Constitution. It is true that the Constitution can be amended and another Constitution improvised: to this extent, of course, it is true that the sovereign people of the U.S.A. are capable of undoing the limitations which they have imposed upon themselves. But in so far as they have limited the constitutional authority of the Legislature and the Executive, it is submitted that, from the point of view of constitutional principle, the resulting position is precisely the same as would be in a case where the limitation upon the authority to administer the State is imposed in the name of a religious or, what is the same thing as, transcendent law. At no point does this analogy break down: the limitations imposed by the framers of the U.S. Constitution were inspired by their respect for the Higher or Transcendent Law and the distrust they had for all Earthly Authority that was not confined within the limits of that Law. But, as between the Higher or Transcendent Law, on the one hand, and the Religious Law, on the other, there is a thin partition wall indeed: in fact these are substantially the facets of one and the same principle—only the means of perception involved in the recognition of their reality are different. What is forgotten is that whatever even the transcendent law has enjoined has to be appreciated, understood and applied by Man. To that extent, the words in which the religious law has been revealed have to be interpreted, and so long as the final interpretation of the law remains with man, each time the limitation is applied by man in relation to the functioning of any institution which he may design to administer the affairs of a State, a certain amount of flexibility is introduced even in the operation of the transcendent law. Practically the same is true about an endeavour to change a Constitution by a sovereign people: there would be some limits which such a sovereign people would lay down in the matter of designing State-machinery for the purpose of making and administering the laws. Of course, there is nothing to prevent the "sovereign people" from saying that the Constitution or any portion of it will not be liable to amendment and in fact the French Constitution explicity provides against the possibility of changing the Republic form of Government it has established. In such a case, the authors of the Report, would not, it would seem, concede that the French Constitution accommodates or conserves democratic values. The very fact that you have a *written* Constitution shows that you mean to limit the power of the Government. Why have a constitution at all if the Government is not to be an agency with limited powers.

What is suggested in this argument is that in deciding to follow the law, man is still left with the liberty of interpreting the law and applying it to the concrete situations of life presented to him by the changing conditions of society in which he lives. Islam merely provides for a frame-work of those absolute limits which are acknowledged even by the secular law with perhaps one difference, namely, that whereas in the establishment of the secular law a man draws upon the wisdom of the ages which in itself is a contribution of the development of universal religion, his belief in the code of behaviour enjoined by revealed religion is based on faith, and ultimately grounded upon the trust that that man reposes in the personality of the Founder of a given religion.

Islam is not the exclusive preserve of a 'group' of people.

It is true that a universal religion cannot be so construed as to narrow it down to being the preserve, and an exclusive preserve at that, of a given group of people. A religion of humanity, such as Islam, is not the property of any group of people, and it is not up to those self-styled professors of the creed of that universal religion, to dispute with the rest of the world as to what are and what are not the essentials of universal religion. Unless Islam is taken to be a natural religion in the sense stressed by the present author it is not possible to make it universal, that is, make it, its teaching and its injunctions, valid for all time to come and relevant for all the people that inhabit our globe. Those scholars of Islam who see in Islam merely the juridical provisions concerning the details of the actual working of the Government, that is, the specific modes in which the sovereign power within the State

(3) that unless the existing laws of Pakistan are adopted by *ijma i ummat* of the kind mentioned above any provision in the existing law which is contrary to the *Quran* or *Sunnah* shall to the extent of the repugnancy be void
(4) that any provision in any future law which is repugnant to *Quran* or *Sunnah* shall be void, and
(5) that no rule of International Law and no provision in any convention or treaty to which Pakistan is a party which is contrary to the *Quran* and the *Sunnah* shall be binding on any Muslim in Pakistan (See pp 209 210)

Without commenting on the correctness of the approach of the authors of the Report in regard to the constitutional requirements inherent in the idea of Islamic State it is sufficient to remark that none of these requirements is reflected in the text of our present Constitution—and to that extent at any rate it cannot conceivably be characterised as ' Islamic

Similarly, the authors of the Report after a careful examination of the mass of opinion that was advanced before them during the course of the Enquiry by the *ulama* (Doctors of the Religious Law of Islam) observe

' That the form of Government in Pakistan if that form is to comply with the principles of Islam will not be democratic is conceded by the *ulama* We have already explained the doctrine of sovereignty of the *Quran* and the *Sunnah* The Objectives Resolution rightly recognised this position when it recited that all sovereignty rests with God Almighty alone But the authors of that Resolution misused the words sovereign' and democracy when they recited that the Constitution to be framed was for a sovereign State in which principles of democracy as enunciated by Islam shall be fully observed It may be that in the context in which they were used, these words could not be misunderstood by those who are well versed in Islamic principles but both these words were borrowed from western political philosophy and in that sense they were both wrongly used in the Resolution When it is said that a country is sovereign the implication is that its people or any other group of persons in it are entitled to conduct the affairs of that country in any way they like and untrammelled by any considerations except those of expediency and policy An Islamic State however cannot in this sense be sovereign because it will not be competent to abrogate, repeal or do away with any law in the *Quran* or the *Sunnah* Absolute restriction on the legislative power of a State is a restriction on the sovereignty of the people of that State and if the origin of this restriction lies elsewhere than in the will of the people then to the extent of that restriction the sovereignty of the State and its people is necessarily taken away In an Islamic State sovereignty in its essentially juristic sense can only rest with Allah (p 210 of the Report)

It is impossible to controvert the reasoning contained in the foregoing extract from the Report cited above and the only comment one can reasonably make upon it is to dispute the premises on which the reasoning of the authors of the Report is based Assuming that the sovereignty lies with God and assuming further that the *Quran* and the *Sunnah* contain some absolute restrictions upon the power of the people to make laws and to administer them it does not follow as the authors of the Report assume that it does that within the frame work of such limited authority as is available to man to legislate and to administer law he cannot found a Sovereign or a Democratic State To illustrate this idea let us take the case of United States of America At present the authority of the sovereign organs of the United States like the Legislature the Executive and the Judiciary is *limited* in the manner indicated by the Constitution of that country To that extent then such democratic processes as are to be witnessed in America are admittedly confined within the limitations

A Comment on the view of the Court of Enquiry

3. No temporal legislation, mandatory or permissive, shall be valid if it is found to contravene any stipulation of the *Shari'ah*.
4. The Head of the State (*Amir*) shall be a Muslim; he shall be elected to his office by the community; and, on being elected, he shall declare that he would govern in obedience to the Law of Islam.
5. The legislative powers in the State vest in the *Majlis-ash-Shura*, the members of which shall be freely elected by the people. The Majlis is entitled to legislate in respect of all matters not covered by the *Shari'ah*, and is presided over by the *Amir* or a delegate to be chosen by him from among the members of the Majlis. The laws passed by the Majlis are binding on the Executive.
6. Self-canvassing by any person desirous of being appointed to an administrative post or of being elected to a representative assembly, shall automatically disqualify that person from being elected or appointed.
7. The Head of the State (*Amir*) shall be Head of the Government as well, and he alone shall be responsible to the *Majlis-ash-Shura* for the activities of the Government. He shall appoint and dismiss his Ministers at his own discretion; they shall act as his Secretaries of State, and shall be responsible to him alone.
8. The guardianship of the Constitution is vested in the Supreme Tribunal, the members of which shall be elected by the *Majlis-ash-Shura* on the advice of the Amir. This Tribunal shall have the right (a) to arbitrate, on the basis of the *nass* ordinances of *Qur'an* and *Sunnah* in all cases of disagreement between the Amir and the *Majlis-ash-Shura* referred to the Tribunal by either of the two parties, (b) to veto, on the Tribunal's own accord, any legislative act passed by the *Majlis-ash-Shura* or any administrative act on the part of the Amir which, in the Tribunal's considered opinion, offends against a *nass* ordinance of *Quran or Sunnah*, and (c) to order the holding of a referendum on the question of the Amir's deposition from office in case the *Majlis-ash-Shura* prefers, by a two-third's majority, an impeachment against him to the effect that he governs in flagrant contravention of the *Shari'ah*.
9. Every citizen has the right to express his opinions, in speech and in writing, on any matter of public concern, provided that such an expression of opinion (a) does not aim at undermining the peoples' belief in Islam, (b) does not amount to incitement against the Law of Islam or to sedition against the established Government, and (c) does not offend against common decency.
10. Whereas non-Muslim citizens shall be free to preach their religious beliefs within their own community and among communities belonging to other non-Mulsim religions, all missionary activities directed at converting Muslims to another religion shall be deemed a cognisable offence and shall be punished by law.
11. The State guarantees to all its citizens full freedom and protection in the expression of their religious beliefs and in the exercise of their religious practices, as well as in the pursuance of all their legitimate, cultural interests. No non-Muslim citizen shall be compelled, directly or indirectly, to embrace Islam against his will and conscience; and forcible conversion of a non-Muslim to Islam shall be deemed a cognisable offencee and shall be punished by law.
12. Throughout the domains of the State, education shall be free and compulsory for every citizen, male and female, from the age of . . . to the age of . . . years, and the Government shall make suitable provision for the establishment

is to be distributed, and who go to the length of saying that for almost every situation of our individual and collective life, not merely the principles but actual, detailed practical injunctions in a clear cut form are to be found contained in the *Quran* or *Sunnah*, are only attempting to make of Islam what it is not, and thereby converting a universal religion which Islam admittedly is, into something local and particular, and therefore, one that is available only for a certain type of people in a certain historical setting The moment you make an attempt to reduce the spirit of a universal religion to specific and particular injunctions you must, in logic, concede that in the very process you have robed that religion of its universal character

230 Concept of Islamic State—Reference to other Authorities

Lest it should appear that the members of the Martial Law Court of Enquiry laid undue stress on, what may be regarded as, accidental traits of an Islamic State it is necessary to refer to two other recent attempts that have been made in this field by those who claim that they understand Islam and have given some thought to the problem of improvising Islamic Constitution for Pakistan

The present writer would like to refer the student to an article that appeared in 'Arafat' (March 1948) published by the Department of Islamic Reconstruction Government of West Punjab, Lahore, under the authorship of Muhammad Asad on the subject of [illegible] ued in support of the establishment of an [illegible] form of the polity that may be validly [illegible] typed one so that a deviation from that [illegible] of the State He considered such an idea as erroneous and stated (A) M I I A I

"If we critically examine the political laws and ordinances forthcoming from *Qur an* and *Sunnah* we find that in reality there is no "specific form of the Islamic State The *Shari'ah* does not prescribe any definite pattern to which a state should conform nor does it elaborate in detail a constitutional theory, but, on the contrary allows for a great latitude in governmental methods and administrative procedures The Political Law laid down in the context of *Qur an* and *Sunnah* is nevertheless no illusion It is very real and self contained, and gives us the outline of a political scheme which is capable of realisation at all times and under all conditions of human life but precisely because it was meant to be realised at all times and under all conditions that scheme has been given to us in an *outline* only and not in details—for man s political social and economic needs are time bound and therefore variable Being a Divine Ordinance, the *Shari'ah* duly anticipates all possibilities and necessities of historical evolution and confronts man with no more than a very limited number of fundamental political laws to which any constitution must conform if the State is to be Islamic beyond that, it leaves a vast field of constitution making activity (and of legislation generally) to the *ijtihad* of the time concerned

"In other words, there is not only one form of Islamic State but many and it is for the people of every period to discover the form most suitable to their needs

He then proceeded to crystalise in the form of 14 propositions what *he* thought were the cardinal features of the sort of state that he would have established in Pakistan and these are reproduced here below

"1 The State holds power in trust from God so that the people may live in accordance with the Law of Islam

2 The laws of the *Shari'ah* bearing on matters of public concern form the inviolable, basic Code of Public Law

9. That the *Qadianis* shall be included in the list of non-Muslim minorities and their seats shall be reserved according to their population, through separate electorate." (see pp. 6-7 and also at p. 190 & pp. 197-200).

Needless to say that none of these articles is incorporated or reflected in our Constitution with the possible exception of Nos. 6 and 7, which, however, are the kinds of articles that would be discovered even in the secular Constitutions of India and the U.S.A. Besides, Maulana Maudoodi holds that according to *Quranic* injunction *Ar-rijal-o-qawwamoona-Alin-nisa* (which he translates as, 'Men are in charge of women'—IV.34), the women should not be allowed the right of election to Legislature or appointment to responsible posts. "According to the Teachings of Islam, politics and administration are no concern of women. They belong to man's sphere of responsibilities and it is un-Islamic to drag women into these affairs" (See page 86 of his Islamic Law and Constitution). Considering that our Constitution recognises the right of women to vote and to be returned to the legislature, it would appear that the *Maulana* would find our Constitution un-Islamic even on this score.

231. Concept of Islamic State—Conclusion of the argument

Sufficient has been said to indicate that the conception of Islamic State as it is propounded by those who claim that they understand it, is not a clear-cut one and there would appear to be as many variations on the theme of Islamic State as there are the expounders of it. In respect of one thing, however, there appears to be a concensus of opinion and that is, that the *State and the law in Islam stem from the law of God, and that religion has a paramount influence on the establishment of the State and in the making of law*.

Religious Foundation of Law is not a distinctive feature of the Law of Islam

But even as to this, it may, in the first place, be pointed out that, although this view of Islam is true, it cannot by any means be regarded as a distinctive feature of the institution of law in the religion of Islam for, as has been remarked by Tyabji in his book on *Muhammadan Law*,

"That religion has a paramount influence on Muhammadan law is not a point in which that system differs from the systems of law governing the nations of the West. The Greeks spoke of law "as a discovery and gift of God." The priestly colleges moulded the Roman law. In 1456, Chief Justice Prisot declared, in England, that "Scripture was the Common Law on which all classes of Laws were founded." And it would probably be difficult to produce anything in the texts of Muslim law equalling the following dialogue in quaintness or the power and confidence with which religious sanctions are wielded. Argument of Counsel: "There is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor." The Chancellor answers: "I know that every law is, or ought to be, according to the law of God. And the law of God is, that an executor who is badly disposed shall not waste all the goods, &c.; and I know well, that if he does so, and does not make amends, if he has the power, unless he repents, he shall be damned in hell." As late as in 1857, Chief Baron Kelly in the Court of Exchequer laid down that "Christianity is part and parcel of the law of the land." This decision was overruled only in 1917, and then not without the dissent of the Lord Chancellor." (p. 23).

Islam emphasises the development of the character of Individual

In the second place, if the predominant emphasis in the creed of Islam has reference to the ideal of producing a highly evolved man, a fully integrated individual and a balanced society, then the emphasis has necessarily to be placed on the ethical and moral principles enjoined by that religion, with a view to organising the life of the individual and society. But if Islam is, on the other hand, taken as something synonymous with the body of laws and regulations enjoined by that religion, that is, laws and regulations that have to be meti-

and the running of schools Islamic religious instruction shall form an integral, compulsory part of the curriculum in so far as Muslims are concerned, while in all schools controlled by the Government arrangements shall be made as well for the instruction of non Muslims in the tenets of their religions, provided that the community or communities concerned so desire

13 The lives, persons and possessions of the citizens are inviolable and none shall be deprived of his life, freedom or property, except under the law

14 It falls within the responsibility of the State to ensure to every one of its citizens to (a) productive and remunerative work while of working age and in good health (b) free and efficient health service in case of illness and (c) a provision, by the State, of adequate nourishment, clothing and shelter in cases of disability arising from illness, unemployment due to circumstances beyond individual control, old age or under age No citizen shall suffer undeserved want while others have more than they need and every citizen shall be protected from such undeserved want by means of a free and compulsory State Insurance carrying an equitable subsistence minimum to be determined by Law in accordance with conditions prevailing '

It would appear that judged by these standards the present Constitution of Pakistan would not be characterised as Islamic by this scholar and of the 14 propositions detailed above, with the possible exception of No 13, all other Articles are not only not reflected in our Constitution but are contradicted by it, and as to the 13th Article it is fully reflected in so many other secular Constitutions of the civilised world like India U S A Ireland etc , and on that account it cannot validly be made into any distinctive attribute of a Muslim polity

Another spokesman of the claim that the state of Pakistan should be an Islamic one, and in fact one of its ablest defenders, is Maulana Maudoodi who is the founder of a politico religious movement in this country, called the *Jamat e Islami* In his book entitled *Islamic Law and Constitution*, the following 9 propositions are detailed by him which propositions, in his opinion, ought to be embodied in the Constitution of Pakistan before it can lay a valid claim to being considered "Islamic" (B) Views of Maulana Maudoodi

1 That the Islamic *Shari'ah* shall form the law of the land,

2 That there shall be no such legislation as would contravene any of the dictates or principles of the *Shari'ah*,

3 That all such laws as are in conflict with the dictates or the principles of the *Shari'ah* shall be abrogated,

4 That it shall be incumbent upon the State to eradicate all such vices whose eradication Islam demands and to uphold and stabilize all such virtues which should be upheld and stabilized according to Islam,

5 That none of the basic civic rights of the people—security of life and property, freedom of speech and writing and freedom of association and movement—shall be forfeited except when *a crime* has been proved in an open court of law after affording due opportunity of defence,

6 That the people shall have the right to resort to a court of law against transgression on the part of the legislative or the executive machinery of the State,

7 That the Judiciary shall be immune from all interference from the Executive,

8 That it shall be the responsibility of the State to see that no citizen shall remain unprovided for in respect of the basic necessities of life, viz (food, clothing, shelter, medical aid and education, and

"To discover the order which inheres in things rather than to impose an order upon them; to strengthen and perpetuate that order rather than to dispose things anew according to some formula which may be nothing more than a fashion; to legislate along the grain of human nature rather than against it; to pursue limited objectives with a watchful eye; to amend here, to prune there; in short, to preserve the method of nature in the conduct of the state—because nature, as Burke observed, is wisdom without reflection and above it: this is Conservatism. Its method is Aristotelian, its temper sceptical. It has none of the dogmatic flavour of Continental parties of the 'Right'. It abhors the use of force as a political weapon by majorities and minorities alike: salutary experience as a proscribed minority taught English Toryism the value of the rule of law and the futility of *coup d'etat* in the hard school of Jacobitism in the eighteenth century. It takes men as they are, children of nature under Divine Providence, finite being, prone to error, capable of becoming something decent with discipline, but more than likely to become something less than men without it. While concerning itself with improvement, it never forgets that a very considerable part of human effort and energy must always be expended in preventing things from getting worse. To say that the Conservative is distinguished by a profound attachment to the theory of Original Sin would be an over-simplification. It is enough to say that he sees that a theory of progress is a delusion unless it is accompanied by a proper awareness of the ever-present forces of degeneration which afflict man's imperfect will.

"Once you have accepted man for what he is, once you have replaced perfectionism by improvement, once you have learned to postpone the Kingdom of God to the timeless place of *Civitas Dei*, then the principles of Conservatism become clear. They are three in number. The first is the radical inadequacy of the political as a final account of man; the second is the organic conception of society; the third is the rejection of 'Will' as the sanction, or sanctification, of law. All Conservative political thinking, and all Conservative policies, spring from these original concepts." (See *Conservative Tradition* Edited by R. J. White, Nicholas Kaye, London 1950).

Similarly, a bare perusal of the programme of the Labour Party in England too would serve to point out the truth of the foregoing contention, namely that the Ideals, Values and Teachings of Islam have found acceptance at the hands of several political parties all over the civilised world.

It is in this sense that, as a matter of fact, Islam has to be acknowledged as a decisive and an all-pervading force of Modern History. God's light has spread all over the world and has influenced everywhere man's approach to the problems of state-craft.

Gladstone quoted.

As far back as 1838, Gladstone much in the manner of a Muslim, could write about the ethics of political power as follows:

"In fulfilment, then of his obligations as an individual, the statesman must be a worshipping man. But his acts are public; the powers and instruments with which he works are public: acting under and by the authority of the law, he moves at his word ten thousand subject arms; and, because such energies are thus essentially public and wholly out of the range of mere individual agency, they must be sanctified not only by the private personal prayers and piety of those who fill public situations, but also by public acts of the men composing the public body. They must offer prayer and praise in their public and collective character, in that character wherein they constitute the organ of the nation, and wield its collected force . . .

"Whenever there is power in the universe, that power is the property of God, the King of that universe—his property of right, however for a time withholden or abused. Now this property is as it were realised, is used according to the will of the owner, when

culously observed by *all people* and *at all times* and in *all plac s*, some explanation is due from those who take this view of Islam to tell the world *how it is possible to have a rigid system of practices, observances, rules and regulations which would cover the entire sphere of man s individual and collective life and yet not be amenable to any change due to the changes that may overtake the individual and society with the passage of time* It is difficult to have it both ways—for it is inherent in the nature of things, as has been remarked earlier, that *what is lost in length is necessarily gained in breadth* Either you have a universal religion, a religion which is valid for all time and for all places, or you have a localised, ephemeral religion a religion which is valid only for a limited span of time and is available to a people belonging to a certain localised and fixed formations A universal religion like Islam must, therefore be elastic enough to accommodate within its philosophy varying and different needs of the people and to that extent it could only validly afford to provide for us the frame work of essential beliefs and practices, leaving the rest to be worked out in accordance with its principles of inner dynamism and growth

We must then draw a line somewhere between what are to be regarded as the essentials of Islam as opposed to what may be regarded as constituting the mere details of the *way* in which those essentials have to reflect themselves under the stimulus of different historical conditions For instance, when the Quran says (II 177)

> "Righteous is he who believeth in Allah and the Last Day and the Angel and Scripture and the Prophets, and giveth his wealth, for love of Him to kinsfolk and to phans and the needy and the wayfarer and to those who ask, and to set slaves fr e and observeth proper worship and payeth the poor due And those who keep th ir treaty when they make one, and be patient in tribulation and adversity and time of stress Such are they who are sincere Such are the God fearing (See Translati n by Mohammed Marmaduke Pickthall in "The meaning of the Glorious Qu an a Mentor Book, New American Library, 1053)'

—its message may be looked at from a broad and liberal point of view The religion of Islam may be then regarded as enjoining upon man the duty of conforming to righteous conduct that is the sort of conduct the idea of which is contained in the foregoing verse In a society where slavery in the conventional sense has been abolished the expression to set slaves free" occurring in the above quoted verse would on this view be construed as applying to *Man's duty to redeem those who are staggering under the weight of economic and political tyrannies and other social injustices For such persons too are slaves who have to be rendered free* The ideal before man is to be God fearing—in other words negatively it consists in not doing anything which will injure anyone of His creatures, and put positively it enjoins that we are, at all events, to promote the general good

When Islam is seen in this perspective it would at once be appreciated that it is a creed that places before man the ideal of developing a large and liberal outlook The catholocity and universality of the spirit of Islam as Iqbal has testified in his Lectures on the Reconstruction of Islamic Thought", is practically limitless and it is due to this that it can lay a valid claim to be considered as the religion for Modern Man

Besides all this it should be realised that historically considered the Quranic values have anyhow found general acceptance all over the world To illustrate this truth one could usefully make a reference even to as mundane an affair as the philosophy, the policy and programme which sustain the conservative tradition in English politics In the words that follow, the essentials of that tradition have been set forth by H J White and any Muslim reading them would hardly find any ground of objection which could be effectively urged from the view point of Islam to any of the principles on which that creed is grounded

Isla n—as a decis ve de facto Histor cal Force of our t me

The foregoing descriptions that have been taken from Gilbert Murray's essay on "The Anchor of Civilization" have provoked the author of that essay to observe:

"If that is what Fascism is, and democracy is what Mr. Agar says it is, one hardly sees why they should go to war. One would rather expect them to join hands in promoting a 'rebirth of faith', a rejection of materialism, and a crusade for the abolition of slackness, indifference to truth, and the worship of the 'bitch-goddess', and the building up of a generation of heroes.

"It would be easy to collect similar descriptions of other pairs of opposites; for instance Catholicism and Communism as being each essentially an uncompromising rejection of wordly values and a championship of the poor and oppressed. Is it that both the controversialists are more intent on claiming for their own party an ideal which all good men would approve than on describing objectively its real tenets? Or would it be fairer to say that there is some high and true aim by which they are both fascinated but which they see only in fragments and dimly, and which they state all wrong when they translate it into political language?"

Conflict between our 'professions' and 'practices'.

It is important that this dilemma between the profession of almost identical view-points and ideologies, on the one hand, and the actual conflicting practices on the part of those who implement them, on the other, should be clearly perceived. The moral to be learnt then is, that it is not so much in the declaration of man's loyalty to the higher ideals in the abstract, as in his failure to articulate rationally those ideals, that the explanation of man's false approach to the problems that are confronting him seems to lie. This is because:

"The immorality", says Dr. Robert Briffault, "which has afflicted humanity is not a matter of sentiments, of broken commandments, of moral insensibility; it resolves itself into intellectual ignorance, into irrationality which renders possible the uncritical foundations of wrong. It is in that supposedly 'intellectual' field that the real moral reform takes place; progress in morality takes place through the overthrow of some view or theory which in itself is regarded as having nothing to do with morality. We are not under the influence of a higher ethical code than our forefathers, we are not animated by a more intense and loftier moral purpose than Sir Thomas Browne, or Melanchthon, or John Calvin, but the field of rational thought has enlarged. If Dominicans no longer burn heretics, judges no longer use the 'question', tyrants no longer exercise fantastic forms of oppression, it is not because we have received some sublime moral enlightenment. Our morality has improved because our intellectual development and rationality has advanced." (See p. 326 of his, *Making of Humanity*, George Allen and Unwin, *1928*).

That then takes us to the problem of heightening our intellectual powers, of developing our capacities for clarity of thought and of strengthening our stamina for grappling with the problems that confront us, with a view to finding out solution to these problems—solutions which will be in accord with our deeper aspirations and strivings. It is reason and reason alone that will come to our rescue. On Earth the destiny of Man is ruled by forces of reason.

232. Theory of the State and the Law in Islam

There is no word in the Holy Quran which may be said to convey the idea underlying the term 'State', as it is understood in the science of Modern Politics. But it is also abundantly clear that much of the text of the Quran concerns itself with the establishment of a politico-social order that has its ultimate foundation and source in the Will of God. *Muhammad*, the Prophet of God, merely was, so at least the Moslems believe, the mouthpiece of *God's Will* and his call to people around him to become believers had its orientation

it is used for the purpose he has ordained, and in the temper of mercy, justice, truth and faith, which he has taught us But those principles never can be truly never can be permanently, entertained in the human breast, except by a continual reference to their source and the supply of Divine grace The powers, therefore, that dwell in individual acting as a government, as well as those that dwell in individuals acting for themselves, can only be secured for right uses by applying for themselves can only be secured for right uses by applying to them a religion The principle of an established religion is a natural and legitimate consequence of the mere fact of government however defective the idea of religion entertained by the governors

' Political power is equally the property of God men are equally bound to sanctify it, whether it be derived to the governors immediately or through the people Where the government is democratic and the majority are of a given religion, the ...unded on paternal principles, there the function of choice is that of our own country But if there be those who would class it with the former still the national estate of religion (for we are not yet concerned with it as the church) represents in its present form the religion of the majority of the people and it is their duty to sustain it in its position " *(See his The State in its relations with the Church)*

The trouble with the modern man is not to be traced to the groundless accusation often made against him namely, that he is lacking in loyalty to higher ideals morality of faith, but, in the present writer s opinion only to what may be called partial perception of truth on his part and the resulting failure to give to its demands a rational recognition in the formulation of political programmes and policies A word of explanation about this is necessary Modern Man s lack ... capacity ... Rational thought and ...

The Second World War we are told was fought between the defenders of democracy, (who are supposed to be freedom loving people) on the one hand and the apostles of Fascism (who believe in brute force and the regimentation of the individual in the ... r what terms like Democracy ... Here is the description of Democracy ... journalist and Major Barnes the ... Agar

"Democracy is first of all a code of conduct It is a rigorous way of life beginning with morals It begins with an act of faith about the nature of man and about the dignity of his soul and with a determination to build institutions which will fulfill that nature and uphold that dignity To be true democrats we must conquer within ourselves the slackness the indifference to truth the acquiscence in what stupid men call 'practical , the worship of what William James has called 'that bitch goddess Success'

And says Major Barnes

"Fascism is a definite revolt against materialism It is determined to educate the new generation into one of believers in Divine Providence the hearalders of an age of faith, to make it a generation of heroes who know no fear because of their faith who would exalt the spirit of sacrifice gladly fly to face any danger in a worthy cause and welcome martyrdom with a smile This is no exaggeration This is the root of the Fascist Revolution God is to become once more the central principle of our conscious life, with an objective didactic moral law, founded on reason recognized as paramount a law that sums up and harmonizes all our loyalties, dethrones both the individual and the state from the position they would usurp from God "

parents of confusion and disaster. The one important lesson of our time is to transcend frontiers of thinking and feeling and to live as a citizen of the world. No force in our times, not even the United Nations, has that much decisive influence in the matter of securing international understanding and concord as Islam . . .

233. Value of early Experiments by Muslim Administrators assessed in the light of conditions then prevailing.

Such experiments in the art and science of governing the affairs of the country, regarded as a territorial state, as the study of the early history of development of polity in Islam familiarises us with, have to be viewed in the light of the conditions under which they came to be improvised. It would appear that the approach of the early administrators of Islam to the problem of state-craft was conditioned by two main factors:

(a) All around the community of the believers lay, scattered about, organised religious groups like those of the Jews and the Christians and other 'non-believer' groups who, taken in their totality, were viewed by the early administrators of Islam as constituting a grave source of danger to the continued existence of the infant Muslim community under their care. The Muslim society was in a state of nascent growth, and was surrounded on all sides by religious communities that could not conceivably have contemplated its existence with equanimity. There was a suppressed sense of indignation against the Prophet and his band of believers who had, by their crusade against idolatory, questioned the very foundations of a form of society that pre-existed the advent of Islam: there were, on all sides, to be seen the forces of hostility, threats of subversion—and all these had to be counteracted. Every precautionary measure had, therefore, to be taken to fortify the frontiers of the territories in which the Muslim Administrators had undertaken to establish the law of God, and steps had to be taken to ensure that the Muslim community was not harassed or destroyed by the scheming villainies and machinations on the part of the non-believers. Seen in this light, many of the provisions of the covenants drawn up by the early statesman of Islam between themselves and the non-Muslim communities could be appreciated as reflecting this anxiety on their part to secure, by all appropriate means, the stability of the growing community of believers and to safeguard it against all the possible assaults from the non-believers. It was thus, from the point of view of our early statesmen, a state of *emergency* that they had to deal with, and the code of political behaviour prescribed by them had reference to their understanding of the practical methods whereby that emergency could, under those circumstances, have been faced by them.

(b) That all the early administrators of Islam were profoundly convinced that the religion of Islam was bound, at not a very distant day, to girdle up the whole of the globe, thus encompassing within it at once the whole of humanity: they felt that until such time as the whole world actually came under the banner of Islam they could afford to wait: they therefore proceeded to make *ad hoc* and *interim* political arrangements to continue the administration of the countries that came under their authority—these arrangements were provisional and were to continue till such time as they felt free to devise ways and means of providing a well-considered framework of governance on a world-wide scale.

They had not, in short, the *time* to sit back and design a form of polity which would be in accord with the spirit of the teaching of Islam. The more so, when such a thing could not have been considered even as important: it has been hinted earlier that basically the Islamic teaching had much to do with the development of the individual character of the believers and less to do with the establishment of particular forms of governance

in the Will of God The obligation to obey this call stems from the belief enjoined by Islam that man is created to do God s Will, and in showing obedience to His law he finds the fulfilment of his destiny There is also a reference in the Quran to the primaeval contract or convenant between God and the Soul of man "Am I not your Lord? asked the Lord and the Soul replied "Indeed, Thou art The context in which this appears is the following "When the Lord drew forth from the children of Adam—from their loins—their descendants and made them Testify concerning themselves (saying) Am I not your Lord (Who cherishes and sustains you)? They said 'Yes We do testify (This), lest you should say on the day of Judgment Of this we were Never (duly) warned Q 7 172

This acknowledgment by man of the supremacy of the power of the Lord is the central idea that animates the whole system of juridical and political relationships that according to Islam ought to exist between man and man The idea of the contract as being the foundation of society is so succinctly stated by Ibn Khaldun a Moslem Thinker of the 14th Century, in his 'Prolegemena' that in this he may be regarded as a precursor of that class of writers like Locke Hume, Rousseau and others who nearly three hundred years *later developed the same idea in a somewhat greater detail*

Transforming the Character of Individuals the primary concern of Islamic Teaching

The foundation of the socio political order in Islam could only be the individual who is endowed with a certain type of character Quran aims at making men into *Salehin* (the Righteous ones), *Muttaquin* (Self controlled ones) *Muttehirin* (those who reform the Society), the *Sadiqueen* (those who relentlessly adhere to the call of Truth) etc and it is out of this community of men that it wants to make a nucleus of that organised group of God fearing people who will by their deed and thought provide an example to the world even as the Prophet has been an example unto them

Islam engenders a move towards a Supra national synthesis of Mankind

Islam engenders a move towards a Supra national synthesis of mankind—a synthesis achieved not so much upon the emotional level induced by racial kinship territorial or tribal loyalty, as being inspired and animated by the life of the spirit The consummation of Islamic way of life could be seen in two directions—(a) in the life of individual purification and self controlled behaviour fostered by prayers fasting and the giving away of ones wealth as a measure of love for one s fellow men, and (b) in the total life of *Humanity* as symbolised by those who annually assemble at the eve of pilgrimage at Mecca Both the life of individual and the collective life of the community are thus taken care of by the Islamic Ideals *Such a group of organised believers who practise these ideals responds to the concept of Ummate-wustan*—that is, then they form spiritual fraternity a community that avoids the extremes and endeavours to reconcile the claims of individuality with those that the life of the whole of mankind as a social synthesis makes upon its component members In short such a community of believers becomes the torch bearer of our Evolution

Moslem Community cemented by the tie of faith

This community is cemented by the tie of faith a faith that emphasises the common origin of all men and points to the common destiny of the entire mankind The ideal political structure of society is thus according to the *teaching of Quran a mere reflex of the way in which an individual lives in peace with himself and in peace with the world of external relations*

Islam being a religion of the whole of Humanity can alone be the foundation of international or rather supera national synthesis basically be it noted Islam is not opposed to the creation of a political state on the premises of territorial loyalties of its subjects as is the fashion of our time when the gospel of nationalism has been claiming our allegiance far more than the ideal of universal brotherhood of man but Islam is essentially an International Force [illegible]

are regarded as representing as ends in themselves they can be, and indeed in fact are, the

"The weapon with which men defended themselves against wild beasts obviously cannot serve as a restraint, since each man can make equal use of them. There must exist accordingly a restraining force . . . which must be sought from one man who will be entrusted with power and authority so that no longer will an individual be attacked by another. This is what is implied in the term *mulk* (sovereignty or statehood) which exists by nature in man and is necessary for his existence."

Thus the society which is necessary for man also leads up to the idea of some restraining force so that by resort to it, it may be possible to keep each man within the sphere of his permissible activity. That is how the state, which, as Marx pointed out later, was in substance no other than an apparatus of coercion, arises in society.

In the modern political theory the legal order assumes the existence of the sovereign who issues the commands which must be followed by the subjects. It also involves the idea that those who actually exercise the sovereign power, be they individuals or impersonal organs or institutions established within society, must, in turn exercise the power vested in them *in accordance with the conditions and limitations* they have agreed to impose upon themselves while drawing up the charter of the government. There are, therefore, in reality two covenants: (1) covenant by the several members who compose society to create an authority whose commands will be obeyed, and (2) a covenant by the authority with the people that in the exercise of the power vested in the authority it will be regulated by the conditions and limitations prescribed by those who created that authority. Now in the strict theory of the Muslim law the submission of the individual to the Will of God is absolute and unqualified—and the legal order itself is a manifestation of that Will—and therefore even those who are in charge of the management of public affairs or in control of the political processes within the community are equally bound to submit to the Will of God—that is, as that will is manifested in the legal order. In other words, there is no direct covenant between the ruler and the ruled: the rights and obligations of both stem from the Divine Law and both of them are bound to submit to that law. In the theory of Moslem Law "Contract" is not a bilateral bond: it is really a trilateral, one—God being the third party who is a surety for the due performence of the obligations contracted for by those entering into a contract. (See Quran Chap. XVI. V. 91)

Abdur Rahim's Conception of State in the Muhammadan System

So long as the Prophet lived, he was the channel of communication between God and man, and what he did convey to the people in this way, in fact in an unadulterated form, is preserved in the Quran till today. But after his death, this channel of communication was interrupted, and the Caliphs could only declare *what* the law was and enforce it just as it was. Thus it was that a sort of separation between the legislative and the executive power took place The Caliph was to be, according to the orthodox view, essentially an administrator and a judge and not a legislator. That, for instance, is the view of Abdur Rahim who would have us believe that :

"The conception of a State in the Muhammadan system is, as already mentioned, that of a commonwealth of all the Moslems living as one community under the guidance and direction of a supreme executive head called the Imam or the Caliph. The responsibility of the Administration rests with the *Imam*, but for the convenient administration, he may delegate his powers to different persons. He may, for instance, appoint ministers to whom he may delegate practically all his powers and faculties or only particular powers, or he may appoint them merely for the purpose of consultation or for executing orders. Similarly, he may appoint a person as Governor of a particular country with such powers as may be necessary. He may also delegate the exercise of his authority in the various departments of administration to different officers, such as the command of the army, administration of justice, police and the

necessary for the administration of secular affairs In fact, during the time of the first four right guided Caliphs there was such a rapid expansion of the world of Islam resulting from victories won by our warriors that the problems that their administration was confronted with were too numerous to have left any time with any of these Caliphs to give any thought to the problem of designing the machinery of the State in accordance with the teaching of their religion After all they could afford to wait for the day when the spirit of Islam would capture and possess the being of all the inhabitants living on the earth, and in the meanwhile, carry on as best as they could, the administration of public affairs This attitude on their part is amply illustrated in the nature of the measures they improvised from time to time to carry on with commendable skill, imagination and courage the historical task that had fallen to their lot to tackle

[illegible] Islam [illegible] years [illegible] Caliph [illegible] up in a splendid isolation and then held aloft and characterised as models for being adopted in these times when the world has moved away from them in time by 1300 years and has brought forth within itself an altogether different sort of economico political cosmos for the modern man to adjust and adapt himself to Our contemporary situation demands that we should apply our rational faculties for the purpose of designing action and the improvisation of constitutional arrangements is just one of these actions and by n[illegible] m an any the more important than others—for regulating the life of society It [illegible] only the indolent mind that would like to submit slavishly to the precedents of the past The history of those first thirty years can be a source of inspiration for us and can help us to reconstruct for ourselves the remarkable manner in which the early administrators of Islam fulfilled their tasks—but to say that across these 1300 years the forms of government the early administrators of Islam improvised continue to be relevant is in the opinion of the present writer, an attitude which cannot be defended upon the plain facts of history

In the light of such rational powers as the Creator has endowed man with it is his duty each time he comes to deal with it to look upon the world *de novo* and courageously assume the full responsibility for the handling of his own affairs untrammelled by the consideration that those that had preceded him, by at least a time lag of 1300 years had solved their problems of state craft in a manner radically different from the one which appeals to him as being relevant *today*

234. Theoretical Foundation of Social Order in Islam

According to Ibn Khaldun human society is *necessary* in that, without it man would not be able to sustain life and to preserve the race In his words *Views of Ibn Khaldun Stated.*

> "It is therefore necessary to unite his efforts with those of his fellow men in order that by co-operation they will produce food sufficient for many times their number "

Similarly, man cannot defend himself if he were left all to himself for,

> "as God gave to each animal an organ of self defence to man he gave the mind and the hand which, in the service of the mind, can apply itself to the crafts and produce tools which take the place of animal's organs of defence "

Human society being thus necessary for the sustenance of man and for the preservation of his species, in its turn gives rise, when it comes to be established, to the need of designing a machinery for restraining each man from invading the rights of others owing to his animal propensities for aggression and oppression And so our author says

there is a direct relationship between man and God—and such obedience as is being shown to the Divine law by man is merely a means of his own fulfillment.

For the purpose of concerted and co-ordinate social action, it is necessary that differences in the opinion of the believers upon questions affecting the specific content of law must be resolved, and this can best be done by *agreement* and not by *compromise*. The Prophet is said to have said, "My people shall never be unanimous in error." And he also said, "The learned ones are the heirs of the Prophet", meaning thereby that persons who attempt to understand the Quran, Nature and Nature's God are in a better position to agree upon a course of conduct which the community of believers ought to follows.

A Summing-up

· In all that has been stated so far, an attempt has been made to present the theoretical foundation of the state and law as it can be gathered from (a) such injunctions of the *Quran* and *Hadis* as are relevant upon that subject and (b) the evidence provided to us by the *Ijtihad* of those who have attempted to evolve political and legal institutions on the foundations of those injunctions: in substance, the view that has found favour with the Muslim jurists upon this subject is that no nation or community can find happiness for the members who compose it unless it be *united* from within. This unity is possible only in terms of some agreed norm with reference to which certain activities can be recommended as promoting the inward cohesion of the community and others condemned as being destructive of the organic unity of social life. Our perception of what is right and wrong must not be relegated to the sphere of private judgment of an individual but must be rendered public and enforced as such, at least in regard to matters that affect the community as a whole. The moral consciousness of the community would then provide the clue not only for judging what is to be regarded as right or wrong but it would also provide the basis for evolving rules of public conduct. It is in this sense that society is "individual-writ-large" and "morality is the very nature of things."

Difference between Religious and Secular Law.

Now it is not possible to adopt uncritically any moral ideal without some sort of ultimate and transcendental sanction. It is religion that provides this source and sanction for the consistent maintenance of the moral ideal. The difference between the secular law and the religious law is not one of content so much as of the sanction and the source from where the two are supposed to emerge. The secular legal order has necessarily some pre-suppositions of a moral character. It is impossible to discover a legal order which is not based upon some moral values. Such a thing as justice, liberty, right of the individual to freely express himself in the life of society, the obligation of the community to ensure the development of healthy corporate life, so that happiness of the individuals composing it is ensured against the possibility of attacks emanating from the brute aggression of another community etc. all these and other values are necessarily the *alpha* and *omega* of any legal order that could be improvised for the organisation of Social Order. And even the foundation, it is submitted, of an avowedly atheistic communistic state is based upon these moral values, although what constitutes the content of these values, or the norm against the background of which it is possible to appreciate the sense of right and wrong that their acceptance engenders in the mind of man, has reference to a different ideology altogether.

235. Morality and Religion

Whatever may be the content of moral obligation, the fact remains that moral causation is universal and man cannot escape from the grip of its authority. We do habitually pass moral judgments in describing certain acts as good and certain others as bad. Whenever there is a play of conflicting interests in our consciousness and we are called upon to choose out of the several possible courses of conduct the one that we *as men ought to pursue because it is the right course of conduct, that something* which is ultimately felt to be decisive in the matter of effecting this choice, is attributable to the moral element present in us.

like But the Imam has no legislative powers at all, though he may interpret the law if he happens to be a jurist, but his interpretation will have no special authority by reason of his position as Imam He is bound by the law and by the decrees and orders of the court like any other citizen The Imam is a mere representative or delegate of the people from whom he derives his rights and privileges The office is elective being based on *Ijma'* (See Abdur Rahim s Jurisprudence, p 383 London Lusac & Co 1911)

The beginnings of legislation in the Law of Islam, in the historical sense at least, could be traced to the emergence of the Institution of *Ijma* (that is the consensus of the community) but the later Doctors of Islam so much curtailed the scope of this source of law making (in the sense that the *Shafai* doctrine of *Ijma'* had described it) that soon very soon, thanks to the conservatism of its pretentious professors the orthodox doctors of law, it ceased to be an effective or productive source of law making It is the view of the present writer that the *right to legislate within the 'prescribed limits* is not only *not d nied t man by the Quran*, but is permitted by it and in fact it would be inconceivable that any u iversal legal order—that is legal order which is to face up to the changing conditions of society—could be founded without making a provision in it as to the existence of this source t law making

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In this context, it is useful to recall what is after all an authentic *hadith* f the Prophet the Prophet sent Mu'adh as a judge to take charge of the legal affairs in *al Yaman*

Mu adh replied On th *Q r an*

d Muhammad Then upon your

you ? asked Muhammad Then

I will follow my own opinion said Mu adh And the Prophet approved this reply (See *Kitab al Tabaqat al Kabir of Ibn Sa'd*) This tradition of the Prophet it b lieved clearly proves two things (1) that cases are conceivable in which neither Quran n r hi t a li tions will furnish an answer directly to a problem which confronts a judge or an dministra tor, and (2) that in dealing with a situation thus presented a man is not only *not* precluded from using his own opinion as a guide for determining a case but is called upon to d It is true that God alone is the ultimate source of all authority—be it spiritual or temporal—as He has not only knowledge of the perfect law but is Law Himself And in Hi l aw ther is no change—that is it is eternal But man who has been created by Him in His imag and is His vicegerent on earth can also reflect the attributes of God as a law giver and in fact he is called upon to do so '*Takhalaqu Be Ikhlaqillah* (Embody in yourselves the Attributes of God) is the command of the Prophet and that command necessarily enjoins upon man the duty of reflecting God s attributes This necessarily means that man has within limits of course, the duty and therefore the capacity to be a law giver It is true that this legislative activity to man is available within limits and where there are clear and un mistakable prohibitions they cannot be transgressed by the law giver But within those limits man is called upon to be a law maker, and it is in this sense that Islam came to es tablish a kind of legal order wherein law making could take place only within the *prescribed limits* and the power to the legislature thus affirmed was to be exercised as a trust ' for establishing justice between man and man ' In the strict theory of Moslem law, society and state merely exist to fulfil the Divine Law and where a society or a state fails of this purpose it forfeits its right to exist The object of the law is not then unconnected with the object of human life The Divine Law and such human laws as can be made within the prescribed limits are calculated to provide for the believer the right path upon which he must endeavour to tread in order to fulfil the purpose for which he has been created And since there is no institution of priesthood in Islam (God being nearer to man than the vein of his neck and there being no place for any one to take his stand in between)

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to action with which the vocabulary of analytic psychology makes us familiar But the point that is being made is that all these biological and psychological factors taken by themselves in their totality are thoroughly *inadequate* to explain completely the moral behaviour of man, and this for the simple reason that the moral quality of our action transcends all the forces which empirically could be invoked as having brought it into being In the moral consciousness of man, the river of life rises beyond its source, for its waters defy the logic of the downward movement In all situations in which man transcends, through action, the immediacy of the total configuration of contending claims which his consciousness mirrors at the time when he is called upon to choose, he gives evidence of his loyalty to a *higher order of things*—an order, which is radically different from the one with which, having regard to the earthly motivations that impel us to action, the mere animal in us is so familiar

Religion explains how Morality is possible

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hard"[3] This foundation for morality has been furnished by religion and that is why the ethical

has been, on the whole, if not the only, at least we may believe a stout bulwark of morality

make an entire difference in morals, yet philosophers have treated morality as being independent of the question They discuss it to pass the time " So also runs the opinion of Leibniz, "In order that it may be concluded by a universal demonstration that everything honourable is beneficial, and that everything base is hurtful, we must assume the immortality of the soul, and the Ruler of the Universe, God " And finally said Mr Joseph "It seems to me that as long as we hold the world and what happens in it really to be what physical science takes it for, we cannot talk the language of ethics, and must jettison conduct " In all these opinions one detects the kind of approach to religion which makes of it as the ultimate sanction of morality

The Atheistic Attitude to Moral Causation

In fact, morality itself results from the teachings of the Prophets of Universal Religion, and if today an atheist can take refuge in the thought that he does good because it pleases him to do so, he conveniently forgets that his feeling of pleasure in the doing of good has b and this situation itself is th of all higher religion and nows the principles on which the action of the steam engine is to be understood, and in fact one can apply these principles in the making of a steam engine without being consciously aware about the gratitude we owe to James Watt, the man who first discovered, applied and formulated them And it is the same with the recognition which an atheist may be disposed to accord to contemporary moral values These values are the condensed essence, the

denouncing the institution of law and the State itself as merely the instruments and agencies that subserve the interests of those who control the production of wealth and the means of its distribution. The Marxist has perforce to banish the ideals from his world, and he can only do so by denouncing them as being merely the "concomitant conditions" of the play of economic forces as they are reflected in the mind of Man.

In his *Contribution to the Critique of Political Economy*, *Karl Marx* has the following to say :

"In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness."

These forms of "social consciousness" were later on baptised by *Karl Marx* as "ideological forms in which men become conscious of social reality." Thus in the *Marxian* system man plays the role of a helpless spectator in the development of a drama whose goal is pre-determined and about which all man can do is to accelerate the pace of the dialectical processes that are anyhow transforming the social reality into a final phase of classless society. In the strict theory of *Marxian* economic interpretation of history, it is not possible to hold that man can ever accelerate this general advance and this for the reason that even the ideological incentive to be operative for securing this general advancement must be, in its turn recognised as a superficial concomitant phenomenon that reflects an existing pattern of economic forces operating in society. Even thoughts, according to *Marx*, are only more or less abstract images of real things. Elsewhere he says:

"The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of man that determines their existence but on the contrary it is their social existence that determines their consciousness."

On these premises even the emergence of *Marxian* ideology cannot itself be explained, nor again can the *Marxian* interpretation of history even explain the triumph of *Marxian* ideology.

"For if economic materialism", says *Nicolas Berdyaev*, "really contends that the human consciousness is no more than an adjunct of man's economic activities, then how are we to explain the origin of the intellect manifested by the prophets of economic materialism themselves, of that manifested by *Marx* and *Engel* which towers above the mere passive reflection of economic relations. When founding his doctrine, *Marx* claimed to possess that type of reason which transcends the purely passive reflex of economic activities. But if the ideological structure of economic materialism represents no more than the figment of a given productive relation, of those, let us say, which came into being in the nineteenth century as a result of the struggle of the proletariate against the bourgeoisie, then it is incomprehensible how the prophets of this doctrine can claim to possess a greater measure of truth than all those others whose systems are qualified as a self-delusion born of this very figment. In that case their doctrine is another illusion generated by the same economic reality."

Similar observations apply to the *Marxian* theory of the class struggle. *Marx* did not clearly comprehened the meaning of the word 'class' he so often used—he did not define it in the context of his own ideas. He in fact read into History what he claimed to have discovered from its pages; in fact he proceeded to apply what was after all an *a priori* assumption to the facts of History and squeezed them to fit into the Procrustean bed of his Theory.

man He no doubt rejects the existence of a benevolent creator and denies that man has any *right to postulate the existence of a power beyond himself But even such an atheist* has to live by an attitude which must take him beyond the evidence which is available to his senses He cannot say, for instance, that he has, in reaching that attitude, taken into account all that there is to be considered—say, factors like the mechanism of perception, the nature of reality and the time process in which the changes are taking place in relation to that reality Even the ultimate attitude of an atheist thus partakes of the character of

reality of religious consciousness to rob man of just the one thing that would have helped to him to withstand the onslaught of the forces of regimentation which he was going to unleash and to dispute the authoritarian order of society which he was so anxious to establish If the dictatorship of the proletariate was at all to be established, man had to be taught to

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serve which, he must give up everything including his right to be free In order that all these far reaching lessons could be effectively taught, the entire scale of religious valuation which had been built up by the labour of our prophets, priests, preachers the teachers of

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The all important choice before the modern world, therefore, is not between theism and atheism but is one which involves momentous issues Has man the right and the freedom to build a society on the foundation of those values which have been consecrated by the traditional religion or is he to be called upon to surrender that right in order that the forces of mechanistic regimentation and of authoritarian and irresponsible rule by the privileged few should come to prevail?

It is for these reasons that the forces of freedom should be augmented And the

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If we are to pose the question in the *Kantian* way, "How is freedom possible", and

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Everyone of us is committed to promoting some purposes which we regard as being 'valuable' consciously or unconsciously we are dominated by the invisible and the intangible ideals The communist is afraid to candidly acknowledge their authority because the ideals at the altar of which he actually says his prayers and the Temple of Dialectical materialism in which he makes his sacrifices are not such as can be defended at the plane of reason And he takes his refuge in the economic interpretation of social reality, by

adventure to realise the kingdom of God on earth. Instead of religion being availed of as a lever for securing social change—it was being used to hoodwink the down-trodden into believing that their suffering would prepare them to being the worthy recipient of a higher and better life in the world to come. The official priests of this Orthodox brand of religion had acquired a vested interest in religion and the only way to get rid of them was to get rid of the institution itself. Communism therefore resolutely rejected all reference to this cosmic orientation of man's pursuits here-below and attempted to find an explanation of it within the frame-work of temporal and earthly causation. Marx taught mankind to believe that man's history shows the inexorable and invincible operation of materialistic forces and enjoined that all man can therefore do is to side with them in order to accelerate the march of events to a pre-ordained state of classless society towards which humanity anyhow is moving. It has already been pointed out that this is an unconvincing explanation of man's yearning to subserve the higher ends and that if history anyhow means an inevitable passage to a classless society considered as an ideal, there is hardly any reason why man should make any sacrifices to reach a target that is anyhow to be attained whether he wants it or no. Islam on the other hand denies that there is any such thing as the inevitability of human progress—for ultimately, even God does not change the conditions of society until and unless the society itself changes such conditions as are within the reach of man to alter. In fact, Islam goes further than communism when it offers a convincing explanation as to why man must participate in the movements of history. Thus man's individual creative effort to concert with his fellow men for the realisation of a higher social ideal ultimately involves obedience to the law of his own being and the fulfilment of the conditions of his own spiritual advancement and inward fulfilment. Man is able to make History precisely because there is something in him which is not the product of History.

237. Communism as a philosophy of life

Communism is at best a narrower ideal and at worst is grounded on assumptions which if allowed to stand uncontradicted will continue to be at war with the harmonies of human life The theistic belief that there is a benevolent Creator of the Universe and that man has been brought up on the bosom of earth by Him to reflect his law and that in all that a man does he is called upon to serve the higher cosmic order of things—all these articles of faith that are inherent in the creed of the Higher Religion of mankind demand of us to take our stand in the centre of the cosmos and own up our responsibility for the fate of human history. The creative urge in man is the fountain source of all urge to social progress and individual perfection. When the individual is dethroned from his sovereign seat in the scheme of things, the possibility of social progress in the direction of building a lasting and durable civilisation is gravely compromised with.

> "Man's whole life", says Erich Frank, "is a struggle to gain true existence, an effort to achieve substantially so that he may not have lived in vain and vanish like a shadow. Whether he is a believer or a sceptic, whether he is a meta-physician or a Positivist—this idea of existential truth is the driving force of all his thought and action. Everything else in the world simply exists; man, however, knows that he is, and he wants to be what he has recognised as his truth, as his true existence. What he seeks is not only satisfaction of his material or spiritual needs, for at the bottom it may be merely an illusion. What man really wants is existential truth, the actualization of his true destiny."

As opposed to this, however, communism teaches that the man in the metaphysical sense does not count, that he must be forced to give up himself in order that the state should thrive and that conditions should be created in which it should be impossible for any one

as a class This consciousness was never known to have existed, say for instance, during the period of the ancient *Greek* and *Roman* civilizations, the slaves did not view themselves as slaves, as a class by themselves, and the masters did not view themselves as a class owning the slaves This is also in fact true of any other dichotomy that one can conceive of Even in an agricultural stage of social evolution, there was no conflict between the landlords and the peasant labourers, because there was no consciousness of the sort which gives rise to these classes

d by employing it as a lever of he truth of the matter is that by was able to accelerate the formulation of classes, into capitalists and wage earners His idea of the class conflict cannot be explained as being a deduction from the lessons of history, although this idea after it was consciously expressed and propagated, became the bed rock of subsequent tensions that in turn brought about the requisite consciousness without which the formation of classes cannot even be conceived

Sufficient has been said to indicate that the ideals of social justice that *Marx* attempted to advance owe their vitality and vigour not so much to the logic of economic forces current in his day as to a vigorous statement at the plane of reason that he was able to make concerning them It is to this that tribute must go for such impact as *Marxian* ideology has been able to make on subsequent history The success of the *Marxian* ideology is a complete contradiction of its logical plausibility and ontological validity

If then it is impossible to escape the grip of ideals, of values and, if the only way the ideals and values can be realised is by means of securing a rational re statement concerning them so that channels of communication between man and man are established for organizing a well co ordinated social activity, the only task before us is *to know what ideals we are to advance and what values we are going to defend* The fulfilment of this task lies in the field of *individual effort*

Thus it would appear the fundamental difference between the code of behaviour enjoined by Islam on its votaries and the one enjoined by communism on its followers is one of emphasis with respect to the *manner in which man is to reflect his capacity to impose an inner condition on external environment and so influence and shape history* In essential particulars, the ideal of social amelioration is one that Islam shares with communism but then, fundamentally, *it is the manner in which this earthly task is regarded by the two of them that goes to distinguish their strategy* Communism has no trans historic motivation to offer to man it merely enjoins that *man must make history without satisfactorily explaining why he should*, Islam on the other hand commands the same ideal to be realised on earth by man but goes on further to provide a trans historic reference viz the ultimate relationship which man as a matter of fact does sustain to the Cosmic order of things According to Islam, man is an agent here below of the Supreme Power according to communism, he is a helpless spectator of the "dull rattling of a chain that was forged innumerable years ago Islam also enjoins that approximation to that higher and ultimate Power is rendered possible only by Man's executive effort to improve the earth And in fact according to Qur'an the Earth is the inheritence of the Righteous Servants of God, and they are to act as the trustees of that patrimony. Islam & Communism

In many ways communism, at least in its earlier historical stages of development, appears to be a reaction to the manner in which the organised institutionalised religion of mankind at the hands of its false professors was being invoked to stultify man's supreme

238. Is there a distinction between secular and religious law?

Enough has been said to point out the nature of the relationship that subsists between morality and religion and it is now necessary to sum up the essential differences between the secular law and the religious law. The religious law claims for itself a source higher than the one upon which the secular law is itself based. Any moral law that can claim to be permanent and absolute, cannot be firmly and finally established by a man who is himself the creature of his age, in the sense that, his thinking and feeling are controlled by such factors as his heredity or what he discovers operating in his environment. Considering that all knowledge is provisional, in the sense that any new experience which cannot be accommodated within the framework of its deliverance must of necessity bring about a revision of the conclusions which had so far been established by those who have been engaged in thinking about life and experience, a necessity arises for accepting the reality of the life of faith—that is, of the way which has been preached by those whose teaching has meant so much to human history. This must have been the thinking behind the views of that greatest of Moslem Philosophers—Imam Al-Ghizali—who in *Munquidh Mina't Dalail* stated the position on this subject as follows:

> "As to those who, professing, by their lips, the faith of the Prophet, place the ordinance of Religion on the same footing as the rules of philosophy—they, in reality repudiate belief in prophecy; for, with them, the Prophet is no more than a wise man, who has been placed by a higher authority as a guide for man. Now this is to ignore the essence of the Prophet's function; true faith in the Prophet implies belief that there exists a sphere above our intelligence and that, to those who are within that sphere, are revealed truth that human intelligence cannot compass—just as the ear cannot perceive things that are perceptible by the eye, as the sense of touch cannot perceive notions of the mind."

If, of course, a given people is satisfied with merely accepting as valid those values which their moral intuitions establish for them as being beyond dispute, it would not be proper, merely on that score, to denounce their social economic and political institutions as being necessarily irreligious or Satanic. *It is in the opinion of the present writer not possible to act consistently with our notions of the moral law, unless we read moral law as evidence of the existence of Divine Law.* But it is equally true that for conducting the affairs of the State, if the people who composeit happen to agree in discarding the ultimate religious hypothesis and find enough agreement between themselves to promote the *general good* in the light of the general moral sense of the community, it would be wrong altogether to denounce such a society as being opposed to the purposes which religious consciousness establishes as constituting the proper pursuit of mankind. The present writer therefore does not view the secular democracies of America, France and Britain as being antithetical to the kind of the society which Islam came to establish. His only criticism against them is that they do not carry forward their moral intuitions to the extent to which rationally considered they ought to be carried. It is the religious foundation of Law alone that, by its coherency of construction, can provide to us a complete and satisfactory answer to our political and socio-economic problems. It alone can provide a durable and lasting basis for world peace. It is the conscious obedience to this law that can give to Man a sense of inward fulfilment. and make of him a diligent missionary for the cause of humanity.

239. Reasons why people of Pakistan constituted themselves into a State to be known as "Islamic Republic".

The reasons why the majority of the people of Pakistan insisted upon constituting themselves as an Islamic Republic are, therefore, more to be discovered from the pages of their history than from any compelling necessity as to an interpretation of their faith.

to realise the principles of individuality and value Entire society thus becomes an amorphous stuff in which there is to be no vestige of the survival of any individuality

Relevance of economic factors in history

Far be it for the present writer to suggest that the economic factors prevalent in society do not influence man's development All that is suggested by him, however, is that they should be given their due place—no more and no less The foundation of social order is the dignity and the sanctity of the individual life and the world problem in the last

community into which he is born, in short he is moulded by history No one can make an absolute beginning, nor can he wholly consummate himself in time The situation in which the individual finds himself is the result of that which he himself and others before

l decisions that cannot be revoked It is only by
think and act and be In this the historicity of

Regarded from this perspective several questions leap up in our mind the moment we begin to meditate upon the problem of oppreciating the place of man in the cosmic order of things

Can history itself give an answer to these questions? Being a process in time, can the deliverance of the teachings of history transcend the time? Can any spectator of the unfolding of the historical evolution of man decipher for us in advance what the plan (if such there be), of the great drama is like? Throughout the ages we see men fighting bitterly about the truth of their different conceptions of Human destiny Does a man's destiny lie beyond this world and beyond time, in his relation to God, as religion teaches? Or is it to be found in this world, in man himself, in the development of all his natural and rational faculties—in short, in the perfection of civilization as modern man believes Since the Re

fate into his own hands Communism, however, teaches that man has really no hands of his own to take charge of his fate All he can hope to do is to accelerate the pace of the forces that are influencing the economic evolution of our society Besides, in a Communist's dictionary, values like truthfulness justice and morality do not have any meaning, they merely represent, if at all, episodic aspects of a life of expediency, a mere temporising with emergencies posed by an awfully indifferent if not a ruthlessly hostile environment

forward for the realisation of this goal Communism is right in insisting that the lot of humanity has to be rendered better here below, but it is right only for the *wrong reasons*, since the whole field of human endeavour is placed by it in a wrong perspective Traditional religion teaches that we are to labour on earth in obedience to the call of the spirit And further it teaches that this life is a part of a wider process, and that, when we are engaged in the fulfilment of our earthly task, we have to be conscious that the performance of our earthly duties is demanded by a higher law,—a law, the truth of which is attested by the inward pulsations of our moral consciousness and is so plainly writ large in the skies

course, that these decisions do not by themselves run counter to those *limitations* on State-Power that have been set forth in the Constitution itself.

The basis of the partition of India is reflected in the Statement of June 3, 1947, made by His Majesty's Government. The Statement is sufficiently important, representing as it does, an important land-mark in the history of the transfer of power from the British hands into the hands of the accredited representatives of the major political parties of the day, and is on that account reproduced by the present writer in the Appendix to this Book. A careful study of that document as also of the chief factors in the process leading up to the solution of the Constitutional problem of India which is embodied therein, would disclose what the principle upon which the partition was effected to transfer the power was. The partition itself, it must be remembered, was effected as a result of the determination made by those representatives of the people of India, who did not wish to join the deliberations of the Constituent Assembly of India which had been set up earlier under a State-paper dated May 16, 1946. But the matter is sufficiently important to need a somewhat more elaborate statement than the one that has been attempted so far.

It would be recalled that the Cabinet Mission to India, in their Statement, dated the 16th of May, 1946, (paragraph 11), had examined the idea of the formation of the sovereign State of Pakistan but had come to the conclusion that they found themselves "unable to advise the British Government that the power that at present resides in British hands should be handed over to two entirely sovereign States". But they were careful enough to add that, "This decision does not, however, blind us to the very real Muslim apprehension that their cultural, political and social life might become submerged in a pure unitary India, in *which the Hindus with their greatly superior numbers must be a dominating element.*" (For the text of the Statement please see the Appendix) They then proceeded to make their recommendations as to the improvisation of constitution—making machinery in order to enable the new Constitution to be worked out. (See paragraphs 17, 18, 19, 20 and 21).

The Muslim League representatives did not participate in the work of the Constituent Assembly thus set up under the Cabinet Mission Plan, and so in the 4th paragraph of the Statement of the 3rd June, 1947, His Majesty's Government defined a new approach to the settlement of the Indian constitutional problem. It was stated:

"His Majesty's Government are satisfied that the procedure outlined below embodies the best practicable method of ascertaining the wishes of the people of such areas on the issue where their Constitution is to be framed:

(a) in the existing Constituent Assembly, or

(b) In the new and separate Constituent Assembly consisting of the representatives of those areas which decide not to participate in the existing Constituent Assembly."

The rest of the Statement was devoted to giving the details of this practical method of ascertaining the wishes of the people.

This is not the place in which to determine where and with whom in particular the responsibility for the rejection of the Cabinet Mission Plan lay, but it is necessary to remark that the principle upon which the partition was ultimately effected was agreed to by the major political parties of the undivided India. The creation of Pakistan was the *offspring* of the desire of the representatives of the major political parties to divide the country into two independent sovereign States and the principle adopted, upon which partition was to be effected, was that the contiguous areas having preponderating Muslim population were to form the State of Pakistan and the rest, the State of Independent India.

Th[illegible] in Pakis[illegible] the minorities in [illegible] Indian Union have therefore to ac[illegible] emselve[illegible] ework of t[illegible] ew sovereign States and

It would be wrong for the Moslems to believe that the light which was revealed by God through the personality of the Prophet, has remained an exclusive property of the so called Musalmans and that the rest of the world down these thirteen centuries has been groping in the dark The correct view of the situation is to say that the light of God's truth has travelled all over the globe (for God is God of the East as well as of the West), and that such progress as humanity has admittedly registered after the last dispensation was announced by the Prophet, has been precisely in the direction in which that dispensation or prophecy hinted that the things would move In fact, observation shows that it is only the Musalmans who have lagged behind in this general march of humanity Their beliefs judged by their practices have lost all the attributes of heroic earnestness and creative vigour and on that account they do not lead up to any constructive action Religion with them has become conventionalised and institutionalised, somewhat like the caste system of the Hindus It no longer represents a living ideal it no longer inspires them to live a life of dedication to the call of their Creator

And so from Indonesia to Morocco Moslems by and large are found to be living individually and collectively a sort of life which is far removed from the one that was commended to them by their Prophet No wonder that the sages of yore said prophetically about these awful and Godless times that Islam would be found in the Quran and the Musalmans would be found laid well under their silent graves

240. A brief historical account of the emergence of the State of Pakistan

We cannot advert in any detail in a study like this to the recounting of that highly fascinating historical narrative of the circumstances connected with and the factors responsible for the emergence of Pakistan as a State on the map of the World plainly such a narrative, if attempted, would appear to be out of place in a study like the present one which is avowedly confined to the limited purpose of merely expounding the juridical and political implications of the Constitution of Pakistan as it exists today Suffice it to say however that the demand for the partition of India was voiced by a significant and appreciable minority of the people of the sub continent who wanted to realise the full measure of the potentialities of their distinctive culture and who wanted to be left free to establish conditions whereby they could be enabled to order their lives according to the teachings of a religion in which they believed

And when that demand of theirs was conceded by the departing British Power, they set about improvising a framework of constitutional arrangements within which to fulfil the desire of that community to found a State where the beliefs and teachings of Islam could be freely professed and practised But the framers of the Constitution overwhelming majority of whom were Muslims, while they were engaged in this task of giving full effect to that desire, realised only too well, that irrespective of anything else, their religion had enjoined upon them *to respect the rights of the minorities and to concede in their favour their right to profess practise and propagate their religion, and to establish maintain and manage their religious institutions*

Our Constitution thus reflects this compromise between these two, at several points conflicting programmes our Constitution has recognised the values which the Muslim majority community, on the one hand, and the non Muslim minorities, on the other, could legitimately pursue for the purpose of securing the full development of the potentialities that lie dormant within them, and the framers of our Constitution within the limits set by the nature of this compromise, have designed institutional devices for accommodating these conflicting goals within the framework of an over all democratic process All questions of the conduct of State policy, of the passing of legislation etc are matters that have henceforth to be decided by an appeal to the majority principle, provided, of

are expected to play an honourable role in the maintenance and establishment of those States Any attempt to re open a question that is settled, or any acceptance of the fact of partition with mental reservation would be wrong in principle and would spell disaster Partition was agreed to because it was considered that that was the only workable solution available to settle the communal problem which had menaced the very possibility of the emergence of Free India—and it would be an irony of fate if that solution instead of finally settling the problem responsible for its improvisation could, by the mere device of generating false reactions towards it, be made by the scheming politicians, a breeding ground for creating two "majority-minority" conflicts in the two States of India and Pakistan

Our Constitution establishes the frame work of a liberal and democratic Rule

The Constitution of Pakistan reflects fully the desire on the part of the majority community to admit all the minority communities living within the territory of our State frontiers, to the benefit of a liberal rule, to their due share in the political, economic and social life of the State The Constitution contains sound and wholesome provisions that guarantee the legitimate rights of the minorities

In the 27th ART of the Constitution we have the following directive principle of State policy

"The State shall safeguard the legitimate rights and interests of the minorities including their due representation in the Federal and Provincial Services "

Thus it would appear the minorities have been admitted to their right as full fledged citizens of the new State of Pakistan, and they are in turn expected to work for and make a contribution towards the development of the new State

Our Constitution lays emphasis on the development of Islamic Law

Our Constitution makes a special provision for securing the *adaptation* of the Statute Book of our country in order that it be brought in line with the teachings of Islam as they are contained in the Holy *Qur'an* and the *Sunnah* (See Art 198 of the Constitution) But before these provisions can be commented upon, it is necessary that we should know what the sources of Muslim Law are and how Muslim Law has hitherto been treated by those who applied it merely as a matter of high policy as the personal law of the Muslims of the Indo Pakistan Sub continent

241. Sources of Muslim Law

The *Sunnis*, says Lord Hobhouse (18 *I A p* 59 *Fuzul Karim v Haji Mowla Buksh & others*) follow the 4 *Imams* who appear to agree in placing the sources of their law in the following order (1) *Qur'an*, (2) The *Hadis* or tradition handed down from the Prophet, (3) *Ijma'* or concordance among the followers and (4) *Qiyas*, or private judgment We would follow this scheme in stating briefly the nature of each one of these sources

With regard to the sources of our law, the *Qur'an* constitutes the most important one of them but it must be rembered that the Quran was not given to the world as a code but in 1 QUR AN

a portion of *Qur'an* was revealed to him he used to order one of his amanuensis to take it down The verses used to be written on stray leaves of paper, shoulder blades, dead leaves etc As a rule, the companions of the Prophet used to commit to memory as much of the revealed verses as they were able to remember The first attempt at collecting the several *suras* of the *Qur'an* was made by *Abu Bakr* but some 16 years had to elapse after this first attempt by *Abu Bakr'* before *Uthman* the third *Caliph of Islam* ordered a second collection This was done precisely 18 years after the death of the Prophet All the transcripts now existing are from that edition We have the testimony of Sir William Muir on the subject of the authen-

"After the ritual, the dogma and the most important political and social institutions had taken definite shape in the second and third centuries, there arose a certain *communis opinio* regarding the reliability of most transmitters of tradition and the value of their statement. The main principles of doctrine had already been established in the writings of *Malik b. Anas, Al-Shafi'i* and other scholars regarded as authoritative in different circles and mainly on the traditional sayings of the Holy Prophet. In the long run no one dared to doubt the truth of these traditions and this almost conclusive presumption of truth had since continued to be attached to the *ahadith* compiled in the *Sihah Sitta.*" (p. 207)

3. IJMA' We may next consider the third *source* of our law namely *Ijma'*, which may be translated as consensus and may be defined as the rule governing the Muslim law which results from the agreement of jurists among the followers of Muhammad in a particular age on a question of law. This source of our law was recognised during the golden age of the development of Muslim jurisprudence—that is, during the *Abbaside Caliphs of Baghdad regime extending from* 750 to 1258 A.D. Some of the greatest *Imams* who have influenced the growth of law lived and flourished during the period. Some of these were:

(1) Jafar Sadiq (A.H. 80-148 (699-765)
(2) Abu Hanifa, (A.H. 80-150 (699-767)
(3) Malik Ibn Anas, (A.H. 95-175 (713-795)
(4) Shafii (A.H. 150-204 (767-814)
(5) Ibn Hambal (A.H. 164-241 (780-855)

With the expansion of the Moslem world and the complexities of social life brought in by a growing civilization, these Muslim jurists had to face the problem of adapting law to the changing conditions of their time. It was realised by these jurists that this method of evolving law through consensus of the companions could not be indiscriminately exploited but that it was to be of limited application, and with this end in view, these jurists laid down rules as to the classes of matters on which *Ijma'* may be effective, the persons whose opinions are to be authoritative, the course that had to be followed where there is conflict of authorities etc. The theory of the *Ijma'* was that the learned men of the Community had the authority delegated to them to lay down the rules of conduct by the exercise of their *Ijtihad.*

"The laws so laid down", says Abdur Rahim in his '*Muhammadan Jurisprudence*', "are presumed to be what God intended and are thus covered by the definition of law as a communication from God. This source a of law is called *Ijma* or consensus of opinion (p. 53).

Each one of the *Mujtahids* must be well read in the *Quran* and the *Hadith* and must have led a life of piety before he can take his place in the body of learned men whose consensus of opinion might be regarded as a source of law. There were some of course who felt that in accepting *Ijma'* as the source of law they were running a great risk in throwing open flood gates of indiscriminate law-making and this was particularly true of those who entertained the opinion that everything required by man on this earth had been provided for in the *Quran* and the *Sunnah.* They did not think it possible to trust the unfettered reason of the jurist to frame a rule of conduct or to discover one which can have the claim to being considered as a law in the real sense of the term.

4. QIYAS Lastly we might notice the *fourth* source of law called *Qiyas* which in English may be rendered as 'reasoning by analogy' from what is contained in the *Quran, Sunnah* and *Ijma'*. This method of juristic deduction was first evolved and applied by *Imam Abu Hanifa*; detailed rules governing the process of juristic deductions were evolved by him and a study of these rules tends to show the great care with which he limited the application of this source of law-making in the matter of answering questions of practical difficulty that arise in the settlement of legal disputes.

Conclusion In conclusion we might notice an argument which is often asserted in support of the

when I order anything about the affairs of world, then I am nothing more than man" And as to the relative authority of the *Qur'an* and *Sunnah* he said 'My words are not contrary to the words of God, but the word of God can contradict mine" He further is said to have remarked, "I leave with you the guides which if you follow faithfully you will never go astray, the *Qur'an* and my practices"

If the authority of the *hadith* has suffered a set back it is for the reason that its authenticity cannot be guaranteed to the extent to which one would ordinarily insist upon the rule of conduct to be proved before it could be made a basis for practical guidance Much of the value of the sayings of the Prophet is ultimately dependent upon the nature of the proof that is made available as to their authenticity The compilation of some of the traditions of the Prophet is believed to have been done during his life time but many thousands of traditions that have come down to us are those that were orally transmitted by word of mouth by one companion to another, who to his son or his friend and so on and this process went on for a period of nearly two hundred years before they were finally set down in writing

It was not until the reign of *Umaiyads* (A D 661 750) that the full possibilities of traditions of the Prophet as a source of law were realised It proved to be an enormous power in the hands of the authorities to shift the responsibility for any decision and to give it stability by referring to the alleged reports of the practice of the Prophet which could be so easily manufactured" (See Tyabji's Muhammadan Law, p 10)

Value of Ahad th—a Comment by the Martial Law Inqu ry Tr bunal

President and the Member of the Court of Enquiry, in their report, a document to which reference has already been made, commented on the value of *ahadith* as a source of law as follows

"The work of compilation of *hadith* began in the third century after the *Hijra* and the *Sihah Sitta* were all compiled in that century These are the *musannifs* of

(1) *Al Bukhari*,	died 256/870,
(2) *Muslim*,	died 261/875,
(3) *Abu Dawud*,	died 275/888,
(4) *Al Tirmizi*,	died 279/892,
(5) *All Nisa'i*,	died 203/915, and
(6) *Ibn i Maja*,	died 273/886

"According to modern laws of evidence, including our own, the *ahadith* are inadmissible evidence of *Sunnah* because each of them contains several links of hearsay, but as authority on law they are admissible *pro prio vigore* The merit of these collections lies not so much in the fact that (as is often wrongly stated) their authors decided for the first time which of the numerous traditions in circulation were genuine and which false but rather in the fact that they brought together everything that was recognised as genuine in ortho dox circles in those days

"The *Shias* judge *hadith* from their own stand point and only consider such tradi tions reliable as are based on the authority of Ali and his adherents They have, therefore, their own works on the subject and hold the following five works particularly in high esteem—

(1) *Al Kafi of Muhammad b Yaqub Al Kulini*, died 328/939,
(2) *Man La Yastahdiruhu'i Fakih of Muhammad b Ali b Babuya Al Kummi*, died 381/991,
(3) *Tahdid Al Ahkam* and
(4) *Al Istibsar Fi Ma'khtalafa Fihi'l Akhbar*, (Extract from the preceding) of *Muhammad Altusi*, died 459/1067,
(5) *Nahj Al Balagha* (alleged sayings of Ali) of *Ali b Tahir Al Sharif Al Murtaza*, died 436/1044 (or of his brother *Radi Al Din Al Baghdadi*)

242. The application of Muslim Law in British India

A Historical Review.

The law that was applied by the British Indian courts was not Muslim Law *stricto sensu* but was, what may be characterised as, a cross-breed, a hybrid, resulting from the interaction of the Principles of Muslim Law with the rules of Muslim Law as these were adopted and applied by the British Indian courts pursuant to the powers conferred on them by several legislative enactments defining their powers and jurisdiction to apply Muslim law in the determination of controversies before them. In order to understand more fully the emergence of this body of law known as "the Anglo-Muhammadan Law", it is necessary to trace at least a bold outline of the history of the development of that law from the days of the East India Company down to the present day. We have already referred, in another context, to the kind of the courts that had been established under the system of administration of justice that was improvised by Warren Hastings before the establishment of the Supreme Court that came to be constituted under the provisions of the *Regulating Act of 1773*. By Section 27 of the *Regulation 2 of 1772* it had been enacted "That in all suits regarding inheritance, succession, marriage and caste and other religious usages or institutions the laws of Qur'an with respect to Muhammadans, and those of the *Shastra* with respect to *gentoos* (*Hindus*) shall be invariably adhered to." The Muhammadan Law Officers used to be attached to the courts that administered justice and they advised the presiding officers of the courts as to the rule of Muslim law that would be applicable to the facts of a given case before them. In the matter of administration of criminal justice, the law of the *Shari'at* was invariably applied irrespective of the religion of the offenders, and it was only as late as 1790 that this jurisdiction was greatly anglicised. But despite this, the Muhammadan element in the substantive law regulating criminal proceedings continued to be decisive until it was superseded by the Penal Code which was enacted in 1862 and its *Rules of Evidence* until 1872, when the Indian Evidence Act was passed. The Supreme Court that was established at Calcutta, as has been pointed out earlier, under the *Act of Parliament* (*Regulating Act of 1773*) had the power:

(a) to exercise civil and criminal jurisdiction over all persons in Calcutta, and
(b) to exercise civil jurisdiction over *all persons in the service of the East India Company throughout its newly acquired territory*.

Freeman vs. Fairlie I.M.A.I. 306

There was, however, very little information contained in the Royal Charter constituting the Supreme Court at Calcutta with regard to the law that was to be applied by the judges who were appointed by the Crown in England. Following the theory which prevailed during the colonial days with English settlers elsewhere, the judges applied *English common and statute law as it was in force in the mother country in so far as it was deemed appropriate and applicable to the new circumstances*. And the limits within which this principle is applicable were stated in the case of *Freeman v. Fairlie, 1 Moore's Indian Appeal page 306 of the year 1828*. The case gives an enunciation of the principles that regulate the application of the law which a settler is deemed to carry with him when he lands in a newly discovered territory: it also draws a distinction between the extent of the operation of the laws that he thus carries with him as applied to a territory he discovers, as opposed to the case of a territory where there pre-exists and prevails a *lex loci*. The case also provides an interesting study of the gradual manner in which the English law, within the limits stated by the Privy Council, came to be applied under the mandate of earlier enactments and Charters that were applicable during the early days of the East India Company's rule. The following passages culled from that scholarly judgment of the Privy Council are no substitute for a careful study of the entire judgment.

"The first question", observed the Privy Council "*that naturally suggests itself, on* these opinions, is how, and when, the English law was generally introduced. The learned Judges all refer its introduction, for the Government of British subjects, to the

contention that *Ijma'* as known to the Muslim jurist cannot be identified with what is called legislation in the sense in which the term is used to-day The argument may be stated in the words of the authors of the Report of the Court of Enquiry

"Since Islam is a perfect religion containing laws, express or derivable by *Ijma'* or *Ijtihad*, governing the whole field of human activity, there is in it no sanction for what may, in the modern sense, be called legislation Questioned on this point *Maulana Abul Hasanat*, President, *Jami'at ul Ulama i-Pakistan*, says

Q Is the institution of legislatures as distinguished from the institution of a person or body of persons entrusted with the interpretation of law, an integral part of an Islamic State ?

A No Our law is complete and merely requires interpretation by those who are ex experts in it According to my belief no question can arise the law relating to which cannot be discovered from the *Qur'an* or the *Hadith*

Q Who were *Sahib ul hall i wal aqd?*

A They were the distinguished *ulama* of the time These persons attained their status by reason of the knowledge of the law They were not in any way analogous or sin [illegible]

" [illegible]

of his spe[illegible]

our *deen* is complete and perfect and that it amounts to *kufr* to make more laws *Maulana Abul Aala Maudoodi*, however, is of the opinion that legislation in the true sense is possible in an Islamic State on matters which are not covered by the *Quran*, the *Sunnah*, or previous *Ijma'* and he has attempted to explain his point by reference to the institution of a body of persons whom the Holy Prophet, and after him the *Khulafa*, consulted on all matters relat [illegible] ise [illegible] by [illegible] se

code wide enough to furnish an answer to any question that may arise relating to any human activity and that it does not know of any 'unoccupied field to be filled by fresh legislation There is no doubt that Islam enjoins consultation, and that not only the Holy Prophet but also the first four *Caliphs* and even their successors, resorted to consultation with the leading men of the time, who for their knowledge of the law and piety could well be relied upon In the inquiry not much has been disclosed about the *Majlis i Shura* except what is contained in *Maulana Abul Aala Maudoodi's* written statement which he supplied to the Court at its request That there was a body of men who were consulted is true, but whether this was a standing body and whether its advice had any legal or binding force, seems somewhat doubtful These men were certainly not elected in the modern way, though their representative character cannot be disputed Their advice was certainly asked *ad hoc*, but that they were competent to make law as the modern legislatures make laws is certainly not correct The decisions taken by them undoubtedly served as precedents and were in the nature of *Ijma'*, which is not legislation but the application of an existing law to a particular case When consulted in affairs of State, their functions were truly in the nature of an advice given by a modern cabinet but such advice is not law but only a decision

"Nor can the legislature in a modren State correspond to *Ijma'* because, as we have already pointed out, the legislature legislates while the *Ulama* of *Majlis i Shura* who were called upon to determine what should be the decision on a particular point which was not covered by the *Quran* and the *Sunnah*, merely sought to discover and apply the law and not to promulgate the law, though the decision when taken had to be taken not only for the purposes of the particular case but for subsequent occasions as a binding precedent" (p 211 212)

Having reviewed the relevant provisions of the earlier legislative enactments, the Privy Council proceeded to deal with the difficulty of:

"How to reconcile the general introduction and authority of English law with the power of executors and administrators to sell the lands and tenements of their testators or intestate, and, with such *property, being* assets, for the satisfaction of debts, of every degree, in their hands."

That is, in other words, to answer the question: From what legitimate source were such particular departures, *from one general law* of real property, actually derived? And *in relation to this question they* proceeded to observe: (at pp. 323—325)

"It appears to me, that a satisfactory solution of this *difficulty may* be found by referring the introduction of English law, in the East India Company's settlement in Bengal, to what I conceive to have been its real period, and its true source, and by ascribing to it such modifications as naturally arose from the peculiar circumstances of the case. The general rules, as to the law of countries newly settled, by British subjects, or acquired by the British Crown, are not fully adverted to by the learned Judges whose opinions are *in evidence before me, and not, I conceive, accurately* applied by *them* to the case of our Indian settlements. It is true, as remarked by Sir Anthony Buller, that if a new country is discovered and settled by British subjects, they carry with them the English law, but with this modification, unnoticed by the learned Judge, that is, so far only as that law is applicable to their local circumstances. India, however, is not, in the sense of authorities by which the rule has been laid down, a new-discovered country; and, with respect *to colonies or settlements*, acquired by cession or conquest, within the description our Indian territories are, the rule is different, the laws of the place, in such cases, remaining in force till changed by royal or parlimentary authority. But there is an anomaly in the case of the settlements in question, which made it difficult or impossible, as I conceive, practically to apply there the latter rule, to its full extent, and *took* the case out of the principles on which both those rules were founded. I apprehend the true general distinction to be, in effect, between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in *the other* case, there is an established *lex loci*, when it might be highly inconvenient all at once to *abrogate*; and, *therefore*, it remains till changed by the deliberative wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps, in civil and political character, to receive them. The reason why the rules are laid down in books of authority, with reference to the distinction between new-discovered countries, on the one hand, and ceded or conquered countries, on the other, may be found, I conceive, in the fact, that this distinction had always, or almost always, practically corresponded with that, between the absence and the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed; for the powers from whom we have wrested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilized and Christian States, whose institutions, therefore, were not wholly dissimilar to our own. But, in the settlements formed by the East India Company in Bengal, the case was very different, and one to which neither of the rules referred to could possibly have an entire application. The acquired territory was not newly discovered or inhabited, but well peopled, and by a civilised race, governed by long-established laws, to which they were much attached, and which it would have been highly inconvenient and dangerous immedi-

Charter of 1774, and former charters, without further explanation, which would lead to the notion, that the English law, introduced by different portions, since the introduction of the whole code, is obviously an act, not susceptible of iteration, and therefore, must have been done, if at all, in that way, by a single charter, not by several, and in that case, it would be material, to ascertain by which of the number, the English law had been introduced, because from its date, subsequent Acts of Parliament would have no effect, without an express extension of their enactments to India but on referring to printed copies of the charaters granted to the East India Company, from the year 1601 to the charter of 26th March 1774, inclusively, and particularly examining the same, from the charter of September 24, 1726, inclusively, being the charter which provided for the administration of justice, in the Company's settlements, by establishing a Court, called the Mayor's Court, I find, in none of them, any express introduction of English law, but on the contrary, they seem all to have proceeded on the assumption, that English law was already in force in those settlements, and their provisions, are directed chiefly to the establishing competent judicial authorities, and rules of proceeding, by which the existing law, may be better administered, specifically ordaining therein, many departures from the practice of the Courts in England, and in other cases, referring generally to the jurisdiction and authority, and forms of proceedings, of those Courts and their officers, as what the new Indian Courts and officers were to conform to, as nearly as local circumstances would permit" (pp 320 321)

After surveying the various Charters the Privy Council observed (at pp 322 323)

"I must conclude, therefore, that English law was not, as the learned Judges have supposed, brought in by the charters, nevertheless, that the law of England, subject to the exceptions in question, and to others introduced by the charters, ought in general to be, and practically is, the law by which British subjects are governed, and their rights determined, within the territories of the East India Company, in Bengal, is agreed on all hands, and has been virtually recognized by Parliament, not merely by Acts which authorised, and have confirmed the charters, but by an enactment in the statute, 21 Geo III, c 70 Ss 17 and 19, the intent of which, cannot otherwise be explained By that statute, entitled, 'An Act to explain and amend so much of an Act, made in the 13th year of the reign of his present Majesty, entitled an Act for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe as relates to the administration of justice in Bengal,' etc , it is enacted, 'that the said Supreme Court shall have full power and authority to hear and determine, in such manner as is provided for that purpose by the said charter of 1774, all actions and suits against all the singular the inhabitants of the city of Calcutta, provided that the inheritance and succession to lands, rents, and goods, and all matters of contracts, and dealing between party and party, shall be determined in the case of *Mahomedans*, by the laws and usages of *Mahomedans*, and in the case of *Gentoos*, by the laws and usages of Gentoos, and where only one of the parties shall be a *Mahomedan* or *Gentoo*, by the law and usages of the defendant ' And it is thereby further enacted, 'That it shall be lawful for the said Supreme Court to frame such process, and make such rules and orders for the execution thereof, in suits, civil and criminal, against the natives of Bengal, Bihar, and Orissa, as may accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execution of the laws and attainment of justice ' Though it is not here declared by what law the same questions shall be governed and determined, when the parties, inhabitants, are neither *Mahomedans* nor *Gentoos*, it seems plainly implied, that the legisla-

sion. The law of the defendant which had to be the rule of the decision, be it noticed, was to be applicable subject to the important condition that it was to be available, whatever may be the nature of the controversy, only upon *failure to prove the usage of the country in which the suit arose.* It was this relative primacy of the local usage over the personal law which led up to those controversies that had reference to the legal status of the members of a number of communities like the *Khojas, Memons, Kuchhis* etc: For although they were, broadly speaking, Musalmans, they had, by reason of the operation of some established usages which they could prove, been deemed to be exempted from the operation of the rules of Muslim Law. A student interested in pursuing his studies further to understand the development of law on this subject would be well advised to read the cases decided by the Bombay High Court and the Privy Council like—

1. *Advocate-General of Bombay, ex relatione Daya Muhammad vs. Muhammad Husen Huseni* (1866) 12 *Bombay High Court Reports*, 323;
2. *In re Kasam Pirbhai*, (1871) 8 *Bombay High Court Reports* (Cr. Cas.) 95;
3. *Mahomed Sidick v. Haji Ahmed*, (1885) 10 *Bom.* 1 ;
4. *Rashid Karmali v. Sherbanoo*, (1904) 29 *Bombay* 85;
5. *Rashid Karmali v. Sherbanoo*, (1907) 31 *Bombay* 264;
6. *Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim*, (1911) 36 *Bombay* 214 *at* 260-61;
7. *Jan Mahomed v. Datu Jaffer*, (1918) 38 *Bombay* 449;
8. *Abdurahim Haji Ismail Mithu v. Halimabai*, (1915) 43 I. A35 *and*
9. *Advocate General of Bombay v. Jimbabai*, (1915) 41 *Bombay* 181.

Specific legislation had therefore to be passed in order to restore to these denominations of the Muslim communities of India, the legal status necessary to attract the rules of *Muslim Law*.

The position in the Punjab.

The legal position in the Punjab in relation the application of Muslim Law, after it came under the British rule in 1849, was influenced by the peculiar facts of the previous political history of the province. For nearly half a century, previous to the advent of the British power in that province, nearly three million of Hindus and Muhammadans had been held under a system of tyrannous subjection and fealty by half a million or so of the Sikhs who had by then, from a pacifist religious order, become a nation of militant aggressors and unscrupulous warriors. The first tentative solution as to the application of personal law to the subjects was embodied in the compilation known as the Punjab Civil Code which though drafted initially with the intention of its being enacted as the law for the Province of Punjab continued to have the status analogous to the one which could be accorded to a manual of instructions to be used by the courts. In Section III of that Code it was provided as follows:—

"(1) The Hindu and Muhammadan Codes, and the *Lex Loci*, or local custom, or other system of law obeyed by any tribe or sect, may be followed in all matters of civil right and social importance which are not opposed to morality, public policy, or positive law, and which may not have been provided for by any specific rule.

(2) Those who belong to the Sikh persuation are, in civil and secular affairs, generally bound by the Hindu Law.

(3) If the parties to a suit belong to different sects or different tribes, and if the law which they respectively observe should be conflicting with regard to the point in dispute, then the judge, having considered the bearings of both laws on the particular case, will decide according to equity and reason.

(4) In any of the matters described in the first clause of this section the judge may place a definite issue before persons learned in the native law, and file their written opinions with the record. But, if possible, the judge will also consult authorities,

ately to change On the other hand, those laws were so interwoven with and dependant

Pagans, that a great part of them could
Christian people Besides there was,
tioned no uniform *lex loci* to regulate
inheritance, successions, and other important subjects of legislation But the two great classes of native inhabitants, *Mahomedans* and *Gentoos* were governed in such matter, by different laws, derived from their respective religious institutions Some new course was to be taken in this peculiar case, and the course actually taken seems to have been to treat the case, in a great measure like that of a new discovered country, for the government of the Company s servants, and other British or Christian settlers

convenience of mutual intercourse and between the British settler and the natives and which are found quite reconcilable with differences of religious faith such for instance, as leaving the interest of money unlimited by law It seems highly probable that the same general adherence to English law, and the same partial adoption of the existing laws and customs of the country were applied to immovable property when acquired by British subjects, and produced the seemingly incongruous practice for which the Judges at a period remote from its first introduction have found it so difficult to account on legal grounds If it be supposed that lands and tenements in Bengal whether held by Mahomedans or Gentoos were liable to be sold in the owner s lifetime by legal process for his debts, and were liable as general assets after his death in the hands of those who had the administration of his personal estate for the satisfaction of his debts, of every degree and might be sold by them for that purpose it will be obvious that these were parts of the law of the country which there were strong reasons of commercial policy and convenience, and even justice, for adopting in regard to the same species of property, when in the hands of British subjects

Position in Madras and Bombay Presidencies

The minor Presidency like that of Madras was not free from the confusion which prevailed in the matter of conflict of laws of the kind that prevailed in the Presidency of Bengal for the legislation applicable to it was modelled very much along lines of legislation that was in force in Bengal In the Presidency of Bombay however the legal development was somewhat different and this had a great deal to do with the fact that the immediate precursor of the British power in that part of western India was not as remarked by Wilson, a *de facto Muhammadan* Government but a *Hindu* Government with the result that the advent of the British law did not have to reckon with the *Muhammadan law* civil or criminal as being a part of the general territorial law of the territories that were acquired by them in 1818 Besides, in the Regulation of 1827 which was the first of the enactments made applicable to that part of India there was a provision which was somewhat differently worded than the parallel provision that had prevailed in the Presidency of Bengal or Madras with regard to *the law to b observed by the courts in the decisions of cases*
This provision was

The law to be observed in the trial of suits shall be, Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations the usage of the country in which the suit arose, if none such appears the the law of the defendent, and in the absence of specific law and usage, justice, equity and good conscience alone '

It would be apparent that this formulation does not contain any specific enumeration of the particular matters with reference to which personal law was to be the rule of deci

has been remarked earlier has continued "save as is otherwise expressly provided in the Constitution" the pre-existing law "so far as applicable and with necessary modifications", until it is *altered, repealed or amended by the appropriate Legislature or other competent authority*. The only redeeming feature of the change brought in by our Constitution in the matter of securing the progressive Islamistation of our Society and law are those provisions that deal with (a) the establishment of an organisation for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim Society on a truly Islamic basis and (b) provide for the setting up of a Commission to make recommendations for bringing existing law into conformity with the Injunctions of Islam. These provisions are contained in ARTs. 197 and 198, and we are now in a position to set-forth the essentials of the programme of securing the overall adjustment of the *corpus juris* of Pakistan within the frame-work of what might be termed as "The Pure Muslim Law".

243. Analysis of ARTs. 197 & 198.

Articles 197 and 198 are contained in Chapter I entitled Islamic Provisions in Part XII of our Constitution. These Articles are important and merit a careful examination.

ART. 197 merely requires the President to set up an organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis. The expenses to be incurred for the purpose are to be met with by way of raising a special tax to be imposed upon the Muslims by means of an Act of Parliament. This fund will be a separate one and would not form part of the Federal Consolidated Fund.

ART. 198 enacts (a) that no law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the *Holy Qur'an* and *Sunnah*, and further (b) that existing laws shall be brought into conformity with such Injunctions. Thus, in substance, there is emphasis on a two-fold requirement: (1) a general prohibition upon law-making organs of the State to the effect that they should not enact laws which are repugnant to the Injunctions of Islam, and (2) the demand that the existing laws are to be brought into conformity with the Injunctions of Islam. Obviously this is a duty cast upon the executive.

The second clause of ART. 198 is important; it enjoins: *Effect shall* be given to the requirements stated above *only* in the manner indicated in the third clause of the Article—a clause which enjoins upon the President to appoint a *Commission* to accomplish a two-fold purpose: (a) "to make recommendations as to the measures for bringing existing law into conformity with the Injunctions of Islam, and as to the *stages* by which such measures should be brought into effect", and (b) "to compile in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect." In other words, the requirement of clause (1) of ART. 198 is limited by way of its implementation to the *method* prescribed *in the third clause*: negatively, the requirement of the Constitution, namely that no law be enacted which will be repugnant to the teachings of Islam and that the existing laws will be brought into conformity with those Injunctions, is not capable of being enforced by a court of law. Legislation passed in contravention of this requirement of the Constitution cannot be successfully challenged in a court of law, nor again can a writ of *mandamus* lie to compel the executive or the legislature to bring existing law in conformity with the Injunctions of Islam.

There are some significant features of this Article that should be carefully borne in mind.

(a) The President appoints the Commission but the *number* of the nembers of the Commission not having been mentioned in the Article itself, becomes a matter upon

and form his own opinion If the case should have been decided by arbitrators, the Court will observe whether their award is in accordance with law and custom

(5) Whenever it may appear that the Hindu, Muhammadan, or other law has been in any district superseded by local usage, and that both parties would rather be governed by custom than by law, the Court may ascertain the custom from competent and experienced persons, and decide according to it

(6) If one party should elect that the suit be decided by custom and the other by law, the Court will determine whether, in the particular case, the law or the custom has the most authority

(7) The laws and customs, as above described, should especially be observed in matters relating to inheritance, special property of females, marriage, divorce special property of females, marriage, divorce and adultery, adoption, wills, legacies, gifts and partitions On the other hand, there are many matters in which their observance should be avoided, such as the prohibition of interest civil disabilities on account of caste, religion, sex, disease, and other disqualifications not allowed under British rule, rights connected with slavery forfeiture of property, by reason of conversion to a religion other than that in which the party may have been brought up, various periods of minority, absence of any law for the limitation of suits, trial by ordeal, etc "

It was not until 1872 that some parts of this law were given legislative recognition and it was not until 1878 that any comprehensive legislation was passed defining the legal position in relation to the application of the customary law on personal matters The matters affecting personal law were mentioned in some detail but taken in their totality these did not amount to much The difference between the law as administered in Bengal and Punjab in regard to the subject of personal law has been stated by Wilson in his *Anglo Muhammadan Law* (as revised and brought up to date by Yusuf Ali) as follows —

"The really important difference is that whereas the Bengal Regulations, now represented by S 37 of Act XII of 1887 took no notice at all of custom, and merely referred the judges to 'justice, equity, and good conscience' in cases not otherwise provided for, the *Punjab Act* directs the Court to inquire, in the first place, whether there is any custom applicable to the parties concerned, and governing the matter in question and assigns only the second place to Hindu or Muhammadan Law '

It was not till little after the creation of Pakistan that the Government of the Province of West Punjab passed laws *bringing about a change in the law relating to the application* of Muslim Law (See Acts of Provincial Legislature of Punjab of the years 1947 52)

We have set forth the principal factors that were responsible for the growth of that body of law which is known as the Anglo Muhammadan Law The principles of Muhammadan Law were applied by the Judges of the Pre Partition phase of Indian History, keeping in view their notions of equity, good conscience and public policy, on the one hand and the rules of Mulsim Law proper as they could be gleaned from the writings of the old commentators of our law, on the other Anglo Muhammadan Law is thus a 'cross breed', a compromise and represents but a half way house between the forces of progress and conservatism Here and there the legislature intervened to pass declaratory Acts to rescue some of the principles of our law from being suppressed under the dead weight of dusty and false precedents, but on the whole, the bulk of those distortions that our law has had to be involved into remains, till today, the major part of that body of the Anglo Muhammadan Law which must be presumed to have been continued into force and effect by virtue of the provisions contained in ART 224 of our Constitution—which article as conclusion

between the various Schools of juristic thought: there are the *Hanafi*, the *Malaki*, the *Shafa'i* and the *Hambali* Schools of the Sunnis' thought as also there is the *Shia* School of jurisprudence. Is it the requirement of the Constitution that each one of these Schools of Muslim Law will contend for legislative recognition of their mode of interpreting the *Qur'an* and *Sunnah* in respect of the *application* of the principle of this Article to the specific Injunctions that according to the recommendations of the Commission are to be given legislative effect?

Besides, should there be a failure to give due effect to the requirement of the explanation would it be possible by means of appropriate proceedings to raise this question before a court of law with a view to obtaining an adjudication upon the controversy relating to the constitutionality of a certain legislative provision (which may have been enacted in consequence of the recommendations of the Commission) being contrary to the interpretation bestowed on the text of the *Qur'an* or the provisions of the *Sunnah*?

These questions do raise numerous difficulties for the solution of which no provision has been made in the Constitution. On the whole, it would appear that ART. 198 is so much hedged in by limitations and qualifications that hardly any substantial progress in the direction of securing adjustment of existing law and making it conform to the Injunctions of Islam would be attained within the foreseeable future.

(e) How are the expenses required for the purpose of setting up this Commission to be met with? Is it the requirement of the Constitution that for the purpose of implementing the mandate of this Article a special tax be imposed upon the Muslim citizens of this State? If so, why has this not been clearly laid down in the Constitution as has been done, for instance, in the case of organization required to be set up under ART. 197? The Constitution requires in its 21st Article that "No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own." Would not the non-Muslim citizens be entitled to complain that since ART. 198 is directed to ensuring the conformity of laws with the teachings of Islam, it is virtually an attempt at the propagation or maintenance of that religion and therefore this should be done by means of a special tax and not by means of securing appropriation from the Consolidated Fund?

Conclusion

As a summing up of the general effect of what the provisions contained in Articles 197-198 come to, the author can do no better than to quote from a recent study, made by a jurist of repute, of the Constitution of our Country. After explaining that any teeth that the stipulation of ART. 198(1) may have, would seem to be promptly drawn by the succeeding paragraphs of that Article, Mr. McWhinney goes on to point out:

"This is a far cry indeed from the original proposal of Moslem religious leaders that a Commission of Holy Men, learned in the *Qoran* and the *Sunnah*, should have power to pass on all laws enacted by the legislative and to determine their validity in accordance with their conformity or non-conformity to the *Qoran* and *Sunnah*. Lacking any enforcement agency other than the predominantly lay-educated supreme court, these Moslem Fundamental Provisions seem likely to reduce to pious injunctions of purely moral significance, for individual members of government to interpret according to their consciences. (p. 149, *Judicial Review in the English Speaking World—Toronto Press*)."

which the Government of the day is to have a final say Even a one man Commission' is possible

(b) The report that the Commission will submit is to be laid before the National Assembly "within six months of its receipt", and the Assembly after considering the report "*shall* enact laws in respect thereof" The language employed seems to suggest that the Assembly is *bound* to give legislative effect to the report of the Commission But since all legislative measures must have the support of the majority of the members in the House, what would be the result if the requisite majority support is not forthcoming in respect of either the whole or a part of the recommendations contained in the report of the Commission? It is obvious that no *mandamus* can lie to compel the Assembly to enact the law All decisions which the Assembly in the matter of law making takes, have to be taken by a majority vote of the members present and voting (See ARTs 55(1)(b) and 88(1)(b)) The *mandamus* to the Legislature, in the first instance, cannot lie even as a matter of common law rule relating to that jurisdiction and, in the second instance, since it is really the members of the National Assembly who have to vote the exercise of this right to vote cannot, at least in principle, be commanded by a *mandamus* What then would be the consequence of the failure or refusal of the National Assembly to enact laws in terms of the report of the Commission? Besides the expression 'The National Assembly after considering the report shall enact laws in respect thereof' does not convey any sense for the simple reason that the requirement of the laws being passed 'in respect of the report' is a somewhat dubious and fanciful one

(c) The personal law of the non Muslim citizens or their status as citizens cannot be interfered [illegible] upon it "[illegible] thereof", [illegible] professed exercise of power to give legislative effect to the recommendations of the Commission We know that the Constitution requires that the *members* should freely vote in the Legislature and only in respect of measures that receive the majority vote of members present at the time of voting that they become the laws under the Constitution These are the requirements of the Constitution It is difficult to discover any sense in the mandate contained in the third clause of ART 198, namely, that the Assembly after considering the report *shall* enact laws in respect thereof, for in that case the compulsion that they accept the recommendations of the Commission would virtually tantamount to denying them their right to exercise their constitutional right to vote freely either for or against a proposed legislative measure Clause 4 of Art 198 preserves the over riding effect of other provisions of the Constitution

(d) The explanation to the Article says "In the application of this Article to the personal law of any Muslim sect, the expression *Qur an* and *Sunnah* shall mean the *Qur'an* and *Sunnah* as interpreted by that sect" It is difficult to apply this explanation to the situation presented to us by the principle of ART 198 It is a matter of common knowledge that there are many sects within the fold of Muslim Community itself who offer conflicting interpretations of *Qur'an* and *Sunnah* upon important questions of law Is it suggested that at the time of enacting laws there are bound to be different provisions in respect of different sects—particularly in those cases where legislative effect of the provisions of *Qur'an* and *Sunnah* bears upon the diverse interpretations bestowed upon them by various sects Students of Muslim Law know that there are fundamental differences

time before the beneficial consequences of this legislation are shared by the tillers of the soil.

In West Pakistan, however, the existence of landlords, having large scale agricultural holdings, e.g. jagirdars and zamindars as a class, continue to constitute one of the main obstacles in the way of securing agrarian reforms and of giving to the peasants and tillers of the soil, the just fruits of their labour.

The framers of the Constitution have emphasised the necessity of preventing the concentration of wealth in the hands of few, the idle rich, and of raising the standard of living of the common man, and of ensuring the establishment of just relationship between employers and employees, and landlords and tenants. If this policy directive is implemented in the proper spirit, the citizenry of Pakistan can look up to an era of social reform and economic justice which will bring to each one of them adequate opportunities for self-expression and self-realisation.

Similarly, the framers of the Constitution have shown considerable solicitude for the social uplift of (a) the people of the Special Areas, and the people, the Constitution describes as forming, (b) the backward classes, and (c) the Scheduled Castes. And they have enjoined upon the State the duty of promoting with particular care, their educational and economic interests.

These are all undoubtedly the ideals of a high social policy and they require men of vision to implement them.

We have already referred in another part of this work, to the appointment of Commissions and the setting up of other appropriate instrumentalities for the purpose of securing an overall improvement of the scheduled castes and backward classes in Pakistan. Reference in this behalf should be made to Chapter IV of Part XII of our Constitution (ARTs. 204 to 207). If all these recommendations are implemented in the spirit and manner in which they ought to be implemented, the people of Pakistan can confidently look up to a very bright future indeed.

Art. 199. In ART. 199, the framers of the Constitution have provided for the setting up of a National Economic Council which is to be charged with the duty of reviewing the overall economic position of the country and of formulating plans in respect of financial, commercial and economic policies which are to be pursued by the Federal and Provincial Governments. They have been directed to keep in view the ideal of ensuring "that uniform standards are attained in the economic development of all parts of the country." In the 4th clause of the said Article the President of the Republic is charged with the duty of taking suitable steps "to decentralise the administration by setting up, in each Province, necessary administrative machinery to provide the maximum convenience to the people, and expeditious disposal of Government business and public requirements." The report submitted by the Council to the National Assembly is every year to be laid before each Provincial Assembly.

All these provisions are designed to create, by means of some well-defined institutional procedures, conditions for bringing about the economic and social well-being of the people of Pakistan.

It is essential to realise that the predominant factors that shape our society and condition the actual working of Government, and make of it either a beneficent organ of society or an instrument of tyranny are the economic ones. Democracy itself is a hand-maid of economic forces of our time. As was pointed out by Henry Demarest Lloyd in his famous book *Wealth against Commonwealth*, due to the economic disequilibrium in society:

"The power of citizenship is relinquished by those who have a livelihood to make to

244. A comment on the Socio-Economic State Policy

The Preamble to our Constitution lays emphasis on the securing for the people of Pakistan of the social, economic and political justice, as also upon the paramount necessity of safeguarding the legitimate interests of minorities and the backward and depressed classes ARTs 28 and 29 contain the following directives of the State policy Arts 28 & 29

"28 —The State shall endeavour to—

(a) promote, with special care, the educational and economic interests of the people of the Special Areas, the Backward Classes and the Scheduled Castes,
(b) remove illiteracy, and provide free and compulsory primary education within the minimum possible period,
(c) make provision for securing just and humane conditions of work ensuring that children and women are not employed in avocations unsuited to their age and sex, and for maternity benefits for women in employment,
(d) enable the people of different areas, through education training and industrial development, to participate fully in all forms of national activities including employment in the service of Pakistan,
(e) prevent prostitution, gambling and the taking of injurious drugs, and
(f) prevent the consumption of alcoholic liquor otherwise than for medicinal and in the case of non Muslims, religious purposes

"29 The State shall endeavour to—

(a) secure the well being of the people, irrespective of caste, creed or race by raising the standard of living of the common man by preventing the concentration of wealth and means of production and distribution in the hands of a few to the deteriment of the interest of the common man, and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants,
(b) provide for all citizens, within the available resources of the country facilities for work and adequate livelihood with reasonable rest and leisure
(c) provide for all persons in the service of Pakistan and private concerns social security by means of compulsory social insurance or otherwise,
(d) provide basic necessities of life, such as food, clothing, housing education and medical relief, for all such citizens, irrespective of caste, creed or race as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment,
(e) reduce disparity, to a reasonable limit, in the emoluments of persons in the various classes of service of Pakistan, and
(f) eliminate *riba* as early as possible "

These directives clearly imply that the State is to move towards the goal of constructive socialism The present state of our society exhibits serious economic mal adjustment between the claims of capital and labour nor again is the relationship between the landlords and tenants based on any sound principles of social justice and it seems that under the existing economic dispensation there is denial of even the right of equal opportunities for all

In East Pakistan a great step forward in the direction of socialism has been taken by the State in that it has abolished landlordism, and has brought the tillers of the soil in direct relationship with the Government by eliminating the intervening links of numerous landlords who were living on unearned income—practically living upon the sweat of labour of the peasants But although legislative reforms have been countenanced, it would be some

nor Roman, nor Christian—nor again merely a mixture of all the *three* legacies. But even Protestanism is half-truth—and like all half-truths can be worse than the lie. Already we are beginning to see whither that half-truth is taking us to. . . But to return to the Gospel of Nationalism.

European Renaissance of the 15th *Century.*

Every school boy in Europe is today taught to believe that 'Reformation' was the result of 'Renaissance' which is supposed to have been ushered in, thanks to the revival of learning that took place after the fall of Constantinople. That is all taught in the Universities of civilized Europe and America in the name of liberal Education! And as to this 'Renaissance' itself, all kinds of false explanations exist—and continue to be concocted—but an honest attempt at historical analysis will show, in the words of Dr Robert Briffault, that:

> "It was under the influence of the Arabian and Moorish revival of culture, and not in the Fifteenth Century, that the real Renaissance took place. Spain, not Italy, was the cradle of the rebirth of Europe. After steadily sinking lower and lower into barbarism, it had reached the darkest depths of ignorance and degredation when the cities of the Saracenic world, Baghdad, Cairo, Cardova, Toledo were growing centres of civilization and intellectual activity. It was there that the new life arose which was to grow into a new phase of Human Evolution. From the time when the influence of their culture made itself felt, began the stirring of a new life."

Dr. Briffault at least is clear that—

> "It is highly probable that but for the Arabs modern European civilization could never have arisen at all; it is absolutely certain that but for them, it would not have assumed that character which has enabled it to transcend all previous phases of evolution. For although there is not a single aspect of European growth in which decisive influence of Islamic Culture is not traceable, nowhere is it so clear and momentous as in the genesis of that power which constitutes the paramount distinctive force of the Modern World and the Supreme Source of its Victory—Natural Science and the Scientific Spirit." (See his *Making of Humanity* pp. 188-190)

Not merely in the direction of intellectual evolution of Modern Europe alone is the influence of Islam to be acknowledged and understood. "To the Intellectual Culture of Islam", says the same Author,

> "which has been fraught with consequences of such moment, corresponded an ethical development no less notable in the influence which it has exercised. The fierce intolerance of Christian Europe was indeed more enraged than humiliated by the spectacle of the broad tolerance which made no distinction of creed and bestowed honour and position on Christian and Jew alike, and whose principles are symbolised in the well-known apologue of the Three Rings popularised by Boccaccio and Lessing. It was, however, not without far-reaching influence on the more thoughtful minds of those who came in contact with Moorish Civilization. But barbaric Europe confessed itself impressed and was stung to emulation by the lofty magnanimity and the ideals of chivalrous honour presented to it by the Knights of Spain, by gentlemen like the fierce soldier Al-Mansur who claimed that, though he had slain many enemies in battle, he had never offered an insult to any—an ideal of knightly demeanour and dignity which Twentieth Century England might with profit perpend. The ruffianly crusaders were shamed by the grandeur of conduct and generosity of Saladin and his chivalry. The ideal of knightly virtue was adopted, the tradition of *Noblesse Oblige* was established. Poetry and Romances deeply tinged with Arabian ideas formed the only secular literature which circulated and appealed to the popular imagination; and a new conception of the place and dignity of women passed into Europe through the Courts of

those who make politics their livelihood These specialists of ward club, the primary, the campaign, the election and office unite, by a law as irresistable as that of the sexes, with all those who want the goods of government—charters contracts rulings permits There might come a time when the policeman and the rail road President would equally show that they cared nothing for the citizen, individually or collectively, because aware that they and not he were the government (See pp 355—356)"

Everywhere corruption in the government stems from the commercial classes, from the contaminating touch of the Big Business Bosses and what is more even the right to vote which democracy concedes to the common man cannot be freely exercised by him in a spoils system which is the natural product of predatory economy Moral approach to politics cannot thrive in an immoral society a society that is ready to tolerate the curse of economic inequality (which has already everywhere defiled the current of History with corpses) as though it had been blessed by every Saint in Heaven cannot, for long endure Ours is an age where the economic forces are primary and fundamental and unless we restore health to the economic order of things political process will be stifled at their very

of the Cities, and his *Autobiography* See also
the Constitution' , E A Ross *Sin and Society* and

245 Concluding Considerations

Impact of Western Thought and Culture on the World of Islam

Having reviewed from the ideological stand point the salient features and discussed the essential nature of the State of Pakistan that has been established by our Constitution and also appreciated the spirit of the teaching of Islam, we are now in a position to survey at one glance the premises upon which an ideological State could be founded

Rome had ceased to serve as the basis of that underlying unity which had given to the isolated fuedal principalities of Christian Europe an appearance of being possessed of a homogenous outlook and a reason for defending the claim of the Cross against the call of the Crescent new loyalties were summoned to fill in the vacuum, after the prestige of the Papal authority was smashed by the Protestant movement, thanks to the onset of new life that was beginning to be born on the ashes of the dark age of Europe, the secular States of modren Europe began to claim the allegiance of the people of that Continent As a result of this revolution, a permanent wedge was driven into the life of man and he begin to witness in himself the conflict between his loyalty to the spiritual values on the one hand and the claims which were being made on him by the things in which *Caesar* was interested on the other Not only the individual but also society itself became infested with these poisoning shafts of conflicts Society was splintered into minute particles and it was out of these that gradually European Nations emerged centred round the heredity of domestic kings

Gospel of Nationalism

The gospel of "Nationalism in Europe has had no spiritual orientation, it has been the offspring of a negative movement a movement that called itself by no better name than "Protestanism ' Against what was this protest being lodged and by whom? These questions *have not*, as *yet*, been *honestly answered* *But the answer is available to any* one who cares to look at History without allowing the spectacles of bigotry and prejudice to intervene between himself and the light of its truth The decisive forces of the Modern World no doubt revealed themselves in that 'Protest' and Modren Civilization in a substantial sense, is *Protestant* Civilization To that extent, at any rate it is neither Hellenistic,

mankind, by playing our heroic part in it, or we would soon find ourselves involved in a fate which must await those "who would let the steam-roller of history pass over them without any let or hindrance."

Genealogy of Western Ideology.

There is no agreed definition of that ideology with which the modern west is associated and it can mean different things to different people. For some, it might merely mean "the *Greco-Roman* cultural heritage, applied *Christianity*, scientific, industrial and technological advancement and secularism," or it may mean any one of these plus a certain way of life which could best be summed up in the words of a recent writer (S. A. Morrison) under the unholy triad of "drugs, drink, divorce", and of course the worst features of the Hollywood film or scandal-mongering newspaper. There are some again who would consider that the essence of Western civilization consists in its moral and spiritual values, values which they believe are being progressively realised by the modern West. But be the content of Western ideology what it may, the fact remains that as a counterpart to this vast medley of heterogeneous elements of occidental culture and, as if, representing its antipodes, is believed to be that assemblage of ideas and values which we associate with the Religion of Islam, more particularly with its beliefs and practices, with its historical role and mission.

Quite apart from the fact that much of what is decisive and valuable in Western culture and civilization could satisfactorily be explained in terms of the cultural radiation of the light of Islam itself, the important feature of the "contradiction" to which the author is referring lies in the fact that, by and large, the generality of men do view Islam as prescribing a code of life which in many ways is diametrically opposed to the one with which the Modern West is traditionally associated.

To a sociologist, what is really important is what men actually believe in and not merely the question whether what they believe in is objectively valid. Similarly, for the historian, what is essential to perceive is that picture of the mental world in which men habitually live and not merely the world of objective truth in which they, in his opinion, ought to live. This is so because man's reaction to his environment is explicable only in terms of what he takes the world to be and not what the world is in reality for him. Judged in this perspective, the contradiction to which a reference has been made earlier acquires considerable pragmatic relevance for the comprehension of our historical predicament. And we will presently see the various forms in which this contradiction manifests itself in the life of our new State.

Re-action of Muslim people to Western Civilization and Culture.

The reaction from the Muslim peoples to the Western world, logically considered, can fall into any one of the following categories: (a) it may be one of total rejection of the values of western culture or (b) of its whole-scale acceptance, or (c) it may be one of securing a reconciliation or compromise between the two. There may, theoretically speaking, be yet a fourth attitude, namely, that of total indifference: but then, that attitude need not be seriously considered here because a human being who is indifferent to his environment cannot be regarded as creative in any sense—for in such a condition Man is hardly an element that can be differentiated from the environment in which his lot is cast. "Sensibility", said Mr. Chesterton, "is the very definition of life." And a person who is indifferent is insensitive to his environment and, therefore, could hardly be said to be alive.

Kamal Ataturk and Riza Shah Pehlavi.

Historically speaking, we might cite the examples of Kamal Ataturk and Riza Shah Pehlavi as standing for the dethronement of Islamic way of life in so far as it has any relevance to the question of shaping the nature and character of a modern polity. The present writer does not agree with the view that associates these two leaders with secularism but for the purpose of present analysis it would not be be wrong to say that, by and large, these two statesmen are believed to have stood for a secular State. It is well known that they tried to confine State-activity within the narrow precincts of non-religious values. It was their belief that Islam itself had been overlaid with false accretions and practices and they proceeded to apply

Provence from the Moorish world, where she shared the intellectual interests and pleasures of man Thus, shocking as the paradox may be to our traditional notions, it would probably be only strict truth to say that Muhammadan culture has contributed atleast as largely to the actual practical, concrete morality of Europe as many a more sublimated ethical doctrine " (See his "The Making of Humanity" pp 307 309)

Reflections on Contemporary Chaos in the field of international relations

The two World Wars of the Twentieth Century have been symptomatic of the clash of national prejudices On the contemporary political scene, however, the conflict to which we are alluding has acquired the new fangled name of 'cold war' Global strategy between the forces of what is euphemistically, if not ironically, called 'the world of free dom loving peoples' on either side of the Atlantic on the one hand and the defenders of the Gospel of Changez Khan, which in the contemporary scene is reflecting itself in the totalitarian order of society behind the Iron Curtain, on the other, continues to engage the energies and attention of the eighty and odd Nation States that form the international community of our time With the discovery of the secret of atom and the consequent man s mastery of the technique of securing the release of its energy by erecting a fission in its heart we have presented to us the latest creation of Man's diabolical effort—the atom bomb, and the hydrogen bomb with all its ever increasing progeny And now the choice is between evolving a world order, organised under law—or witnessing the very end of things

Western civilization, we have often been told, is founded on spiritual principles

mankind "from the onslaught that had been made upon it by those who did not believe in human freedom " As to the motives of men who might go to third world war, a war the possibility of which looms large in the consciousness of modern Man, nothing specific could be said at the moment But it is assumed that in this age of cold war which has set in as a "recess time" between the conclusion of the second world war and the commencement of the third, we are face to face with the dull, dreary and dismal prospect of the total destruc tion of mankind thanks to the power which the belligerents in the cold war have acquired over the forces of nature, the possibility that "the whole achievement of Man may lie buried in a debris of ruins" is not one which can be lightly excluded This time the chances are that the whole of mankind would be involved in the armageddon and there will be neither "victor" nor "vanquished" at the end of it

In the light of these facts of man's recent history, the claim that western civilization is founded on a spiritual principle clearly seems to be pretentious and devoid of any truth whetever The contemporary political scene does not present any prospect of an early settlement of this global conflict to which a reference has been made earlier If ever, the tremendous increase in the world population, on the one hand, and the scarcity of avail able adequate food supplies to feed the teeming millions, on the other, have created a pro blem for the solution of which we seem to be unequal—and this helplessness has, in its turn, contributed to the feeling of that general frustration and depression which seems to be, with ominous portents, brooding over the lives of most of our fellowmen

We, in this country of ours, are however concerned fundamentally with the impact of this global conflict upon the mind and future of our own people Much will depend upon the manner in which we are able to define our attitude to the decisive forces that are shaping the modern world today We are living in the midst of a world revolution and so small has the world become that either we consciously participate in the life of the whole

is secular in outlook without having expressly and publicly to renounce one's religious faith or one's deepest conviction concerning the transcendental sources of morality and religion.

It is no answer to these questions to say that the general aim and end of our national life is to promote those values for which the religion of Islam stands as a symbol. There is, to begin with, hardly any agreement between the view-points of those who say like this: each appears to have his own version of the ends and means sanctioned by Islam. Even if all of us were to assume that there is a general agreement as to the basic purposes for which Muslim society exists, these matters are so vaguely defined that they cannot furnish any common denominator of human thinking and feeling in terms of which one could hope to promote the welfare and solidarity of the peoples of Pakistan.

Although we are avowedly pledged to pursue those values which Islam came to advance, we still have the duty cast upon us to enquire into and determine the precise methodological techniques by resort to which we are going to embody those values within the framework of the contemporary politico-economical situation that is confronting us. It must be admitted that we Pakistanis cannot claim to belong to one and the same race: Pakistan betrays extreme diversity of race and blood in this behalf. Even as a geographical concept, Western and Eastern regions of Pakistan present several anomalous features. The way of life of a man belonging to the North-West Frontier, for instance, is radically different from the way of life of those who belong to Sind and both of them have material differences to exhibit when we come to contrast their ways of life with those of other people who are living in diverse parts of Pakistan. It is true that common religious practices remain the same but it is questionable whether religion itself, regarded from the point of view of cultural anthropology, has after all such a vital force and influence over the lives of the people who seem to profess it. Then the interpretation of this faith differs a great deal from one sect to another, and Western and Eastern wings of Pakistan display such a great variety of religious beliefs and practices that it would be difficult to reconcile them as having flowed from the same fountain source.

It is even wrong to think that the citizens of Pakistan today have a common history or common traditions. When it is said that we have a common history and common traditions it is generally believed that we are referring to Muslim history from which we are to draw inspiration and derive incentive for our action, but even history, before it can become a decisive influence, must first be appreciated as a part and parcel of our living present. We have to reinterpret that history in terms of modern thought before its lessons can be availed of for dealing with existing situations. It is a childish prattle to say that we can, in the past history of the Arabs who had by then only recently come under the banner of Islam find a type of economic and political teaching which, without any further interpretation in the light of present world conditions, could afford us guidance for enabling us to manage our affairs properly. The economic and political structure of the past has nothing in common with the situation which obtains in the contemporary world. The economic forces of our age are definitely of a different dimension, order and magnitude from those that subsisted at about the time of which we are speaking. The growth of international trade, of banking, of exchange, of international credit, of tariff reforms: all these are products of the last 200 years of social revolution and have been called into play as a result of the mastery which man has acquired over the forces of nature and the extent to which he has been able to annihilate space and time. Days of isolation, of localised culture and civilisation are days of the past. No nation today can afford to live, much less hope to grow, in a splendid isolation. The economic policy pursued by the major powers of the world of today affects the economic policy of the rest of the world. Major political events that are happening in the United States of America or Great Britain or the U.S.S.R. for

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Religion was made

inverse As a recent

student of world affairs Mr S A Morrison observes in his book '*Middle East Survey*'

"Both Ataturk and Riza Shah came to the conclusion not only that the dis establish

tions of a modern type, substituted the Latin alphabet for the Arabic, forbade the use of the veil and the fez, and took measures for the emancipation of women In Iran marriage was made a civil ceremony, the wife was given the right, in certain circumstances to sue for divorce, the veil was abolished, Muslim theological seminaries were placed under the state control, and the income from religious endowments was used to support public welfare projects Both Ataturk and Riza Shah were probably agnostics and atheists at heart, but many of their supporters, who welcomed these innovations in the name of progress

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two statesmen and anyone interested in pursuing studies along this track of thought will be advised to refer to *Dr Taha Hussain's Pre Islamic Poetry*, *Dr Ali Abdur Razik s The Origins of Government* and of *Khalid Muhammad Khalid s* essay *From Here We Begin*

There are, however, others who insist on an outright rejection of western values, for they profoundly believe them to be satanic in character They want to return to the sort of life with which the early history of Islam makes them familiar In their anxiety to uphold the supremacy of Muslim way of life and culture, they wish to return to the *Holy Qur'an* They stand for the purification of our individual and collective lives and they insist that this can be best achieved by securing an overall conformity of our conduct with the rules of Muslim conduct, rules which they view in contrast with the laxity of morals prevalent in the modern West

The third group of persons comprises of those who believe that it is possible for them to combine the Western technological and industrial ' know how ' of organising life in modern society with those moral and spiritual incentives to individual culture that are provided for by the *Religion of Islam* What is going to be our answer to this all important question of our time? Besides all this, there are other difficult questions to face

Implications of Ideological State

Is the basis of our State to be territorial in character or is it going to be what is loosely called ideological? Does my participation in the political life of our State proceed upon the basis of my belonging to Pakistan, as a citizen in the conventional sense of that term

ing the majority in the legislature tomorrow proceeds to mis interpret and misapply the religious injunctions upon a given question, what is it that can prevent it from doing so? The question people ask is "Can a democratic State be at the same time an ideological one?" "Can its existence be reconciled with the logic of having more parties than one in the State?" Regarded from this manner of approach, at least the Progenitors of the U S S R appear to be consistent Under the *Soviet Communist State*, for instance, there can be no room for two or more political parties The Soviet State is avowedly monolithic It is intolerant of the emergence of any political party that seeks to contradict the philosophy of the Communist State But even in the Soviet State one can belong to the ruling party which

minimised, but is actually being construed as though Islam had come to obstruct Human progress.

"*The Young Turk Movement* which overthrew despotism in 1908 aimed at the fusion of all the nationalities in a common *Ottoman Nation*, with Turkish as the language of communication. The Young Turks abandoned the idea of basing the Empire on Islam: they were hostile to the hierarchy of clerical lawyers and promised freedom and equality to all religions and nationalities. Yet they also tried to foster Turkish Patriotism by an appeal to Turkish racial pride. For this purpose they encouraged Pan-Turanianism, cultivating the memory of the alleged Mongolian ancestors of the Turks, and the idea of solidarity and national unity of all peoples of Turanian stock, which implied the liberation of millions of people living in the *Russian Empire*. A movement set in for purifying the Turkish language from Persian and Arabic words, and for adopting words and names derived from Turanian roots. The Euranianidea, however, was incompatible with that of an *Ottoman Nation*, based on equality of all races, and, in particular, Young Turkish Policy led to the growth of estrangement between Turks and Arabs. The efforts to save the Empire were thwarted by wars which ended in its ruin. After the *World War* the *Ottomn Empire* was dismembered, and the peace terms of the Allies even menaced the integrity of Turkish territory and the whole national future of the Turks. General Mustapha Kemal Pasha organised victorious resistance to these claims, seized power, and then set out to create a national State on an entirely new foundation.

"This policy began with the ethnic unification of the State by expulsion of all elements considered as alien, and by the reception of kindred immigrants expelled from the *Balkans*. It is significant, however, that the criterion of what was alien and kindred was still religion. Turkey expelled the Christians, even if speaking Turkish only, and the Balkan nations expelled the Moslems, even if speaking *Slavic* or *Greek* only. Soon, however, the Turkish reformers more and more discarded religious institutions and traditions from political life. The *millets* disappeared as also the Capitulations, the people were declared Sovereign, the self-determination of the Arabs was recognised, and *Ankara* became the capital instead of *Constantinople*. The *Caliphate*, which implied the duty of defending Islam and which still appealed to the feelings of millions of Moslems outside Turkey, especially in India, was abolished. In the mosques Turkish replaced the sacred Arabic language, the Holy *Quran* was translated into Turkish, and the purification and Turanization of the language was continued. Arabic script gave way to Latin script, which meant a great saving of the time in the learning of the art of reading and writing. The fez, which had become a symbol of religious conservatism, was abolished and the European custom of wearing hats introduced. Law was completely emancipated from religion, the Swiss Civil Code and other foreign laws were adopted *en bloc*, without any discussion of single clause. The legal position of women was fundamentally altered by the abolition of all laws and customs encroaching upon their equality with men. Polygamy was doomed to extinction by prohibiting any further marriage with more than one wife. The sacred custom of women wearing a veil before their faces was suppressed too. Education was taken out of clerical hands and reformed according to European standards. *All these and other reforms were quite incompatible with Islamic precepts and traditions*. They implied the recognition that modern nationality could only grow in an atmosphere permeated by Western ideas.' In this respect the Turkish, like the Chinese, national revival differed from the national movement in India.

"The connextion of modern ideas of nationality with Western civilization is also shown by the rise of Arabian nations in the Ottoman Empire and after its fall. It is significant that the pioneers of the Arab national revival were chiefly Christian Arabs, educated in missionary schools, both Catholic and Protestant. The missionaries and their pupils

instance, have tremendous repercussions on the formulation of the political or economic policies in different sectors of the world

The impulse that animates Muslim history was released by the personality of the Holy Prophet and the example of his holy and heroic life which he provided to his followers—and

Qur'an They ceased practising the religion of reading, writing and thinking It would, therefore, require a wholesale reinterpretation of the entire phase of Muslim history before

History, as an instrument of inductive enquiry, has not even been contemplated seriously by modern Muslim scholars Ibn Khaldun was the first, as undoubtedly he has been the last, to have emphasised this aspect of human history A considerable bulk of what is loosely described as Muslim history is really the history of the Arabs The present writer would not admit that the Arabs understood Islam to any remarkable extent, although he is aware that such measure of progress as has been recorded in the pages of their history is directly due to their having been influenced, and that too only superficially by the life and example of the Holy Prophet Mohammed's Mission yet remains to be fulfilled Mohammed's Plato is yet to be born Muslim history has yet to be made

It is for this reason that it has been said that the only lesson that we learn from history is that we can learn nothing from history This is so because to each historical phase belongs a new type of adjustment which can only be secured by the free spirit of man aided by the power of his rational thought There is no help or guidance that can come to the ... ver avail him What ... Man must learn to

Islam is a fecundating principle and has hardly any institutionalised content which could serve as a code of immutable injunctions beyond, of course, the belief that God is one and that Mohammed is the last of his prophets It unfolds before man the scroll of his destiny and invites him to strive for the incarnation of divine attributes in his being, it is more to be regarded as indicating the varying shades of spiritual spectrum, as reflecting the scale of values which he must strive to reflect in his being It is a religion that makes man the master of his own destiny—and places in his hands as instrument of his action, the gift of rational thought It is a religion which invites Man to *think*—and by reading the Book of *Nature* to *grow* in moral and spiritual stature

All these observations make it imperative for us to work out a consistent ideology on the basis of which the economic and political policy of the new State can be shaped The Holy *Quran*, the life of the *Holy Prophet*, and his sayings will of course be regarded as the foun

to ponder over the fate that has overtaken some of the Muslim countries that did not know how to adjust themselves to the modern world conditions in accordance with the principles of the Holy *Quran*

In amplification of what is said above, it becomes necessary to refer to the observations of Frederick Hertz, one of the well known sociologists of our time, in order to show somewhat more fully the extent to which the historical role of Islam is not only being Frederick Hertz quoted

mind in Islam who, at the last moments of the *Prophet*, had the moral courage to utter these remarkable words: 'The Book of God is sufficient for us.'

"We heartily welcome the liberal movement in modern Islam; but it must also be admitted that the appearance of liberal ideas in Islam constitutes also the most critical moment in the theory of Islam. Liberalism has a tendency to act as a force of disintegration, and the race-idea which appears to be working in modren Islam greater force than ever may ultimately wipe off the broad human outlook which Muslim people have imbibed from their religion. Further, our religious and political reformers in their zeal for liberalism may over-step the proper limits of reform in the absence of a check on their youthful fervour. We are today passing through a period similar to that of the Protestant Revolution in Europe, and the lesson which the rise and outcome of *Luther's* movement teaches should not be lost on us. A careful reading of history shows that the Reformation was essentially a political movement, and the net result of it in Europe was a gradual displacement of the universal ethics of Christianity by systems of national ethics. The result of this tendency we have seen with our own eyes in the Great European War which, far from bringing any workable synthesis of the two opposing systems of ethics, has made the European situation still more intolerable. It is the duty of the leaders of the world of Islam today to understand the real meaning of what has happened in Europe, and then to move forward with self-control and a clear insight into the ultimate aims of Islam as a social polity."

These are the words of a man who has been rightly regarded as "Pioneer of the Pakistan Movement", *in fact the first man who expressed the ideology of Pakistan; and it would be* worth-while for any serious student to go through his lectures over and over again to see for himself the elastic and catholic spirit of Islam and its capacity to yield to the modern world an ideological basis for the establishment of a sort of society which would be free from those international discords and tensions that infest its peace and stability today.

Dr. Zaki's views on the impact of Islam or "Arab Nationalism."

Nor again does the support for the foregoing thesis merely come from a solitary figure in recent History, a lone voice in the world of modern thought. There are many recent writers who have stressed the importance of letting Islamic principles determine the relationship which the individual is to have with the State and through the State to the supera-national synthesis of mankind taken as a whole. There exists a considerable bulk of thought-provoking literature upon the subject but the present writer could do no better than to refer, by way of a sample, to the observations of Dr. Hazem Zaki Nusseibeh contained in his recent study *The Ideas of Arab Nationalism* for a clear analysis of the problem posed by the recent encounter between the nascent nationalism of the Arabs in the Middle East, in Asia and in South-East Asia, and its relationship with the principles of Islam.

While considering the questions about the genesis and the components of what he calls "Arab-Islamic civilization", our author has no hesitation in declaring that :

(a) "The first and foremost achievement of the Islamic movement was the unification of the Arabs for the first time in their history. Thus, in a historical setting, Arabism owes to Islam its very existence" (p. 20).

(b) It was Islam that made the political organisation of the Arabs at all possible. Out of the community of the believers grew the State. "The State, from the Islamic standpoint, is the means whereby the Islamic concepts of life are realised in a definite human organization. The ultimate reality, according to the *Quran*, is spiritual, but the life of the State consists in its temporal activity. The spirit finds its opportunities in the natural, the material, the secular". (p. 23).

And after quoting Iqbal from his *Reconstruction of Religious Thought in Islam* (Lahore, 1934), at p. 147, our author observes that,

were the first who gave a modern education in Arabic, published many important books and journals, and united the warring creeds among the Arabs by a common ideal Egypt, however, detached herself from the Arab cause as its national pride was aroused by the great civilisation of ancient Egypt, which was much older than Arabian civilization"

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Iqbal s views

econstruction of *Religious Thought in Islam*, had given an account of the forces and factors that had brought about the emergence of the Turkish National Movement, a movement about which Frederick Hertz speaks in the long extract cited above from his *Nationality in History and Politics* Iqbal traced the origin of the Turkish National Movement to the proper application, by the genius of the Turkish people, of that dynamic principle of movement in the structure of Islam whic'
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Islam, but has also become a necessity in view of the new forces that are set free in the world of Islam"

After referring to Ibn Khaldun's famous *Prolegomena* to *History*, and showing how that philosopher of history had himself interpreted the doctrine of Caliphate in Islam Iqbal
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right of intellectual freedom, she alone has passed from the ideal to the real—a transition which entails keen intellectual and moral struggle To her the growing complexities of a mobile and broadening life are sure to bring new situations suggesting new points of view, and necessitating fresh interpretations of principles which are only of an academic interest to a people who have never experienced the joy of spiritual expansion It is, I think, the English thinker Hobbes who makes his acute observation that to have a succession of identical thoughts and feelings is to have no thoughts and feelings at all Such is the lot of most Muslim countries to day They are mechanically repeating old values, whereas the Turk is on the way to creating new values He has passed through great experiences which have revealed his deeper self to him In him life has begun to move, change and amplify, giving birth to new desires, bringing new difficulties and suggesting new interpretations The question which confronts him to day, and which is likely to confront other Muslim countries in the near future, is whether the Law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative, provided the world of Islam approaches it in the spirit of Omer—the first critical and independent

cause of the discontinuity of this civilization. Stagnation has been pervasive for nearly five centuries. Arab contributions to knowledge, impressive and pioneering as they may have been, have long since been out-stripped by the cumulative achievements of the modern era. Even Ibn Khaldun is now admired more for his originality than for the substance of his works, of which most are now out of date. Why then is the Islamic period, in the sense of a civilization, significant to Arab nationalism? It is significant because, without the assurance that stems from association with a worthy past, without the consciousness of forming a distinctive personality with, perhaps, a distinctive mission, a nation loses its basic support, its *raison d'etre.* It is not, therefore, the appurtenances of a civilization but the consciousness of it and the pride in its possession that serves a vital national purpose. It is the feeling of "partnership between those who are living, those who are dead, and those who are to be born."

"Quite apart from his psychological need for pooled self-esteem and the sense of usefulness, Arab nationalism requires the Arab-Islamic legacy in order to discover its own essence and its sources of strength. Although its legacy has been out-stripped by the tremendous advances in the various domains of the sciences, there is still the belief that Arab civilization has not entirely spent itself as a spiritual force. The term spiritual is used in the widest connotation and not in the narrow sense of a religion or a conglomeration of peculiar rituals and beliefs.

"What justification is there for Arab nationalists' belief in the spiritual vitality of their legacy? It is primarily a matter of faith and secondarily disillusionment with what they regard as the spiritual and moral bankruptcy of modren civilization. There have been, as yet, no profound formulations of the latter's spiritual values in answer to the challenging problems of the modren age. Unless or until such formulations are forthcoming, the Arab-Islamic civilization is essential to the Arab nationalist because he believes and contends that it can make a unique contribution toward solving the dilemmas of today." (pp. 30-32).

While the general approach made by our author to the questions relating to the fecundating influence of Islam on Arab nationalism is, broadly speaking, correct, it is necessary to emphasize an aspect or two of this cultural relationship between Arab Nationalism and Islam without which the perspective in which that relationship is to be perceived is likely to be distorted.

Islam—as a fecundating principle of Human Civilization and Culture.

It is essential to realise that Islam, as a spiritual force, is capable of vivifying, fertilizing all earthly formations—and Arab Nationalism is only one of them—and of raising them, of transforming them into becoming the expressions of the Divine. This, it achieves because of its universality, because of its lack of specific content. Islam, rightly understood, is a principle of growth, of vitality. It, by itself, has hardly any content except of course that it proclaims the oneness of all life and the Divine origin of all things. It is for this reason that even the modern civilization of West, or the national resurgence which one notices in the pages of recent and contemporary history of Asia and Africa can, by the application of the principles of vitality and growth which are contained in the creed of Islam, reach the same results as were reached by the Arabs during its formative period of which our author has spoken. Islam is not just one religion amongst or side by side with, other religions. It came to finish the era of revealed religion and to declare open the era of "Realization" of what had been revealed to Man.

Some European writers, thinkers and scholars of repute, impartial students of Islam, have paid to Islam the tribute that it is the most rational of all religions; and observation shows that its teachings, as has been pointed out earlier, have been, as a matter of

"The observation (from Iqbal viz that *Quran* contained as set of simple legal principles which like the twelve tables of the Romans carried, as experience subsequently proved, great potentialities of expansion and development by interpretation) is no doubt accurate, when it is referred to Islam in its founding period, at which time nationality and religion were practically synonymous and no state or church organizations existed to which Islam might have presented a threat In the circumstances of its rise, therefore, Islam's great gift to the Arabs was the creation of a community and the establishment of a state" (pp 23 24)

(c) That Islam imparted to the Arabs a consciousness of their National history, and in fact the historical memory of the Arabs is largely the legacy of Islam "From the relatively obscure and marginal existence which had been their lot, Islam raised them to a position of pre eminence, and a new vista of creativity in almost all walks of life opened up " (p 24)

And finally,

(d) Islam's role in the cultural heritage of the Arabs is paramount Unlike the Romans, for example, whose pagan history vied with their achievements under Christianity, the Arabs' pagan period was, except for its literary output relatively barren All that the Arabs have bequeathed in Philosophy, Theology, Jurisprudence, the sciences, medicines, music, the fine arts, and other disciplines have been the legacy of the Islamic period " (p 28)

Having emphasised the foregoing contribution of Islam to the resurgence of Arab Nationalism, Arab Unity, Arabs' consciousness of their national history, and the remarkable contribution which, thanks to Islam, they were, during the first 5 centuries following the advent of Islam, able to make in the field of culture and civilization, our author raises the fundamental question with respect to the nature of historical role which this Arab Islamic civilization has played In his words

"Is it essentially classical, a mere extension of Greek thought, or is it anti classical? These are not mere historical or intellectual exercises, they have a profound practical significance in the present phase of Arab soul searching and national reconstruction The importance of these questions may be gauged from the fact that almost every political movement in the contemporary Arab world is based upon, and in a large measure stems from the answers to these questions The Pan Islamist believes in the supremacy and the integrity of the Islamic legacy, the Pan Arabist in its uniquely Arab character Other movements such as the Syrian Nationalist in the Levant or the Pharaonic in Egypt reject the Arab Islamic episode as the central event of national history The Syrian boasts of his descent from the Phoenicians—a remnant of Canaanites—who distinguished themselves as a maritime people and who founded an overseas Syriac dominion centered on Carthage The Pharaonic disciple draws his inspiration, of course, from the ancient indigenous civilizations of Egypt and as a corollary rejects Islam as the paramount national event

[illegible]

meshed as to render their untangling well nigh impossible But why should they be separated into components? And who is to decide which part is more truly Arab than another?

"The answers to these questions have been rendered the more difficult be

course, accepted by the entire world But, before this claim of Islam can be appreciated pro perly, it is necessary to discover from the *Holy Qur'an* itself what are the articles of Moslem faith and what is the philosophy of the life and action it has propounded All this requires a new outlook on Islam, an outlook that can only come by a study of History, modern science, and philosophy If the *Holy Qur an* is to be regarded as *Umm ul Kitab* that is the *Mother of Books*, it is necessary to show how its teachings are in conformity with the findings of modern knowledge

In Pakistan, as yet, beyond the raising of mere religious slogans, the present writer has not found any precise statement of the principles of Islam as these could be applied to our daily conduct or the governance of our State, a statement in terms whereof we are required to shape our individual and social life and thus make Pakistan a progressive state in the modern world

That task yet remains to be done and not until that is done can there be Muslim Renaissance, or any hope as to the resurgence of our national spirit or the flowering of our national character

With the fond hope that the foregoing few stray thoughts expressed by the present writer concerning the creative vigour of Islam would go a long way to assist the student in the comprehension of that historical role which, in the days that lie ahead it is for the people of Pakistan to play, it is now time to conclude—and in the fashion of the Muslim writers of the past, the present writer would like to bid farewell to the readers of his Book with an invocation of God s Blessings upon them all

Further God knoweth the best

APPENDIX

PART II

Fundamental Rights

Definition of the State.

3. In this Part, unless the context otherwise requires, "the State" includes the Federal Government, Parliament, the Provincial Governments, the Provincial Legislatures, and all local or other authorities in Pakistan.

Laws inconsistent with or in derogation of the fundamental rights to be void.

4.—(1) Any existing law, or any custom or usage having the force of law, in so far as it is inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part, and any law in contravention of this clause shall, to the extent of such contravention, be void.

(3) Nothing in this Article shall apply to any law relating to the members of the Armed Forces, or the Forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.

Equality before law.

5.—(1) All citizens are equal before law and are entitled to equal protection of law.

(2) No person shall be deprived of life or liberty save in accordance with law.

Protection against retrospective offences or punishment.

6. No person shall be punished for an act which was not punishable by law when the act was done, nor shall any person be subjected to a punishment greater than that prescribed by law for an offence when the offence was committed.

Safeguards as to arrest and detention.

7.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person—

(a) who for the time being is an enemy alien ; or

(b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention.

Explanation.—In this clause "the appropriate Advisory Board" means, in the case of a person detained under a Central Act or an Act of Parliament, a Board consisting of persons appointed by the Chief Justice of Pakistan, or, in the case of a person detained under a Provincial Act or an Act of a Provincial Legislature, a Board consisting of persons appointed by the Chief Justice of the High Court for the Province.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order :

Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

Freedom of speech

8. Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of the security of Pakistan, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Freedom of assembly.

9. Every citizen shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order.

Freedom of association.

10. Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order.

Freedom of movement and right to hold and dispose of property.

11. Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right—

(a) to move freely throughout Pakistan and to reside and settle in any part thereof ;

(b) to acquire, hold and dispose of property.

Freedom of trade, business or profession.

12. Every citizen, possessing such qualifications, if any, as may be prescribed by law in relation to his profession or occupation, shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business :

CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN

Preamble

In the name of Allah, the Beneficent, the Merciful

WHEREAS sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;

WHEREAS the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, declared that Pakistan would be a democratic State based on Islamic principles of social justice;

AND WHEREAS the Constituent Assembly, representing the people of Pakistan, have resolved to frame for the sovereign independent State of Pakistan a constitution;

WHEREIN the State should exercise its powers and authority through the chosen representatives of the people;

WHEREIN the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam should be fully observed;

WHEREIN the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and Sunnah;

WHEREIN adequate provision should be made for the minorities freely to profess and practise their religion and develop their culture;

WHEREIN the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan should form a Federation wherein the Provinces would be autonomous with such limitations on their powers and authority as might be prescribed;

WHEREIN should be guaranteed fundamental rights including rights such as equality of status and of opportunity, equality before law, freedom of thought, expression, belief, faith, worship and association, and social, economic and political justice, subject to law and public morality;

WHEREIN adequate provision should be made to safeguard the legitimate interests of minorities and backward and depressed classes;

WHEREIN the independence of the Judiciary should be fully secured;

WHEREIN the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights over land, sea and air should be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and the progress and happiness of humanity;

NOW THEREFORE, we, the people of Pakistan, in our Constituent Assembly this twenty-ninth day of February, 1956, and the seventeenth day of Rajab, 1375, do hereby adopt, enact and give to ourselves this Constitution.

PART I

The Republic and its Territories

1.—(1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, and is hereinafter referred to as Pakistan. The Republic and its territories.

(2) The territories of Pakistan shall comprise—

(a) the territories of the Provinces of East Pakistan and West Pakistan;

(b) the territories of States which are in accession with or may accede to Pakistan;

(c) the territories which are under the administration of the Federation but are not included in either Province; and

(d) such other territories as may be included in Pakistan.

Explanation.—In the Constitution, the Province of East Pakistan shall mean the Province known immediately before the Constitution Day as the Province of East Bengal, and the Province of West Pakistan shall mean the Province of West Pakistan set up by the Establishment of West Pakistan Act, 1955.

2. Until Parliament by law otherwise provides, the President may, by Order, make provision for the government and administration of the territories specified in sub-clauses (b), (c) and (d) of clause (2) of Article 1. Administration of territories outside the Provinces.

to manage religious institutions.

(b) every religious denomination and every sect thereof has the right to establish, maintain and manage its religious institutions.

Preservation of culture, script, and language.

19. Any section of citizens having a distinct language, script or culture shall have the right to preserve the same.

Abolition of untouchability.

20. Untouchability is abolished, and its practice in any form is forbidden and shall be declared by law to be an offence.

Safeguard against taxation for purposes of any particular religion.

21. No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own.

Remedies for enforcement of rights conferred by this Part.

22. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) The right guaranteed by this Article shall not be suspended except as otherwise provided by the Constitution.

(4) The provisions of this Article shall have no application in relation to the Special Areas.

PART III

Directive Principles of State Policy

Definition of State.

23.—(1) In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part II.

(2) The State shall be guided in the formulation of its policies by the provisions of this Part, but such provisions shall not be enforceable in any court.

Promotion of Muslim unity and international peace.

24. The State shall endeavour to strengthen the bonds of unity among Muslim countries, to promote international peace and security, to foster goodwill and friendly relations among all nations, and to encourage the settlement of international disputes by peaceful means.

Promotion of Islamic principles.

25.—(1) Steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and Sunnah.

(2) The State shall endeavour, as respects the Muslims of Pakistan,—

(a) to provide facilities whereby they may be enabled to understand the meaning of life according to *the Holy Quran and Sunnah* ;

(b) to make the teaching of the Holy Quran compulsory ;

(c) to promote unity and the observance of Islamic moral standards ; and

(d) to secure the proper organization of zakat, wakfs and mosques.

Parochial and other similar prejudices to be discouraged.

26. The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.

Protection of minorities.

27. The State shall safeguard the legitimate rights and interests of the minorities, including their due representation in the Federal and Provincial Services.

Principles of social uplift.

28. The State shall endeavour to—

(a) promote, with special care, the educational and economic interests of the people of the Special Areas, the backward classes and the Scheduled Castes ;

(b) remove illiteracy, and provide free and compulsory primary education within the minimum possible period ;

Provided that nothing in this Article shall prevent—

(a) the regulation of any trade or profession by a licensing system, or

(b) the carrying on, by the Federal or a Provincial Government or by a corporation controlled by any such Government, of any trade business, industry or service, to the exclusion, complete or partial of other persons

Safeguards as to educational institutions in respect of religion etc

13.—(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own

(2) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination

(3) No citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste, or place of birth

Provided that nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens

(4) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation

(5) Every religious community or denomination shall have the right to establish and maintain educational institutions of its own choice, and the State shall not deny recognition to any such institution on the ground only that the management of such institution vests in that community or denomination

Non discrimination in respect of access to public places

14.—(1) In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race religion, caste sex or place of birth

(2) Nothing in this Article shall prevent the making of any special provision for women

Protection of property rights

15—(1) No person shall be deprived of his property save in accordance with law

(2) No property shall be compulsorily acquired or taken possession of save for a public purpose and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given

(3) Nothing in this Article shall affect the validity of—

(a) any existing law, or

(b) any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health, or

(c) any law relating to the administration or acquisition of any property which is or is deemed to be evacuee property under any law, or

(d) any law providing for the taking over by the State for a limited period of the management of any property for the benefit of its owner

(4) In clauses (2) and (3), "property" shall mean immovable property, or any commercial or industrial undertaking, or any interest in any such undertaking

Slavery and forced labour prohibited

16—(1) No person shall be held in slavery

(2) All forms of forced labour are prohibited, but the State may require compulsory service for public purposes

Safeguard against discrimination in services

17—(1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth

Provided that for a period of fifteen years from the Constitution Day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan

Provided further that in the interest of the said service, specified posts or services may be reserved for members of either sex

(2) Nothing in clause (1) shall prevent any Provincial Government or any local or other authority from prescribing, in relation to any class of service under that Government or authority, conditions as to residence in the Province prior to appointment under that Government or authority

Freedom to profess religion and

18. Subject to law, public order and morality—

(a) every citizen has the right to profess, practise and propagate any religion, and

[illegible] removal of the President, [illegible] in accordance with clause [illegible]

[illegible] of Pakistan, or any other person [illegible] this clause shall prevent him [illegible]

[illegible] a Provincial Assembly, [illegible] shall become vacant on the [illegible]

[illegible] member of [illegible] resolution [illegible] President.

[illegible] of the [illegible]

[illegible] National Assembly [illegible]

[illegible] President under [illegible] the Speaker [illegible] clause [illegible] the Speaker from [illegible] the Speaker shall cease [illegible]

[illegible] absent from Pakistan or is [illegible] Speaker of the National [illegible] President resumes [illegible]

[illegible] of President [illegible] President, but he shall not, [illegible] a member of the National [illegible] member.

[illegible] Prime Minister [illegible] be the [illegible]

[illegible] the Cabinet, or a Minister [illegible]

[illegible] the members of the National Assembly [illegible] confidence of the majority of the members [illegible]

[illegible] shall be appointed and removed from office [illegible] Minister of State or Deputy Minister unless he is a member [illegible]

[illegible] shall be collectively responsible to the National Assembly.

[illegible] The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly.

[illegible] In the exercise of his functions, the President shall act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State, as the case may be, except in cases where he is empowered by the Constitution to act in his discretion, and except in respect the exercise of his powers under clause (6).

Explanation.—For the avoidance of doubt it is hereby declared that for the purposes of clause (4) the appropriate Minister shall be the Prime Minister.

(8) A Minister who for any period of six consecutive months is not a member of the National Assembly shall, at the expiration of that period, cease to be a Minister, and shall not before the dissolution of that Assembly be again appointed a Minister unless he is elected a member of that Assembly.

(c) make provision for securing just and humane conditions of work, ensuring that children and women are not employed in avocations unsuited to their age and sex, and for maternity benefits for women in employment ,

(d) enable the people of different areas, through education, training and industrial development, to participate fully in all forms of national activities, including employment in the service of Pakistan,

(e) prevent prostitution, gambling and the taking of injurious drugs , and

(f) prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes

29. The State shall endeavour to— Promotion of social and economic well being of the people

(a) secure the well being of the people, irrespective of caste, creed, or race, by raising the standard of living of the common man, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of the interest of the common man, and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants ,

(b) provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure,

(c) provide for all persons in the service of Pakistan and private concerns social security by means of compulsory social insurance or otherwise ,

(d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment ,

(e) reduce disparity, to a reasonable limit, in the emoluments of persons in the various classes of service of Pakistan , and

(f) eliminate riba as early as possible

30. The State shall separate the Judiciary from the Executive as soon as practicable Separation of the Judiciary from the Executive

31.—(1) Endeavour shall be made by the State to enable people from all parts of Pakistan to participate in the Defence Services of the country Provisions for equal participation in national activities by people of Pakistan

(2) Steps shall be taken to achieve parity in the representation of East Pakistan and West Pakistan in all other spheres of Federal administration

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PART IV

The Federation

CHAPTER I —THE FEDERAL GOVERNMENT

32.—(1) There shall be a President of Pakistan, in the Constitution referred to as the President, who shall be elected by an electoral college consisting of the members of the National Assembly and the Provincial Assemblies, in accordance with the provisions contained in the First Schedule The President

(2) Notwithstanding anything in Part II, a person shall not be qualified for election as President unless he is a Muslim , nor shall he be so qualified—

(a) if he is less than forty years of age, or

(b) if he is not qualified for election as a member of the National Assembly, or

(c) if he has previously been removed from the office of President by impeachment under Article 35

(3) The validity of the election of the President shall not be questioned in any court

33.—(1) Subject to clause (3) and Article 35 the President shall hold office for a term of five years from the date on which he enters upon his office Term of office of President

Provided that notwithstanding the expiration of his term, the President shall continue to hold office until his successor enters upon his office

(2) No person shall hold office as President for more than two terms

(3) The President may resign his office by writing under his hand addressed to the Speaker of the National Assembly

(3) Parliament may by Act alter the number of members of the National Assembly, provided that equality of representation between East Pakistan and West Pakistan is preserved.

(4) Parliament may by Act provide for the representation in the National Assembly of any territory which is included in a Province after the Constitution Day, but no such Act shall alter the number of members to be elected by constituencies in that Province.

Qualifications and disqualifications for membership.

45.—(1) A person shall be qualified to be elected to the National Assembly—

(a) if he is not less than twenty-five years of age, and is qualified to be an elector for any constituency for the National Assembly under Article 143 ; and

(b) if he is not disqualified for being a member by the Constitution or an Act of Parliament.

(2) If any question arises whether a member has, after his election, become subject to any disqualification, the Speaker of the National Assembly shall obtain the opinion of the Election Commission and, if the opinion is that the member has incurred any disqualification, his seat shall become vacant.

(3) If any person sits or votes in the National Assembly knowing that he is not qualified for, or is disqualified for, membership thereof, he shall be liable in respect of every day on which he so sits or votes to a penalty of five hundred rupees, which may be recovered from him as a debt due to the Federation.

Bar against double membership.

46.—(1) No person shall at the same time be a member of the National Assembly for two or more constituencies.

(2) Nothing in clause (1) shall prevent a person from being at the same time a candidate for two or more constituencies, but if a person has been elected as a member for two or more constituencies and does not, within thirty days of his election by the constituency by which he has been elected last, make a declaration in writing under his hand addressed to the Speaker specifying the constituency which he wishes to represent, all his seats in the National Assembly shall become vacant ; but so long as a person is a member for two or more constituencies he shall not sit or vote in the Assembly.

(3) If a member of the National Assembly for one constituency permits himself to be nominated as a candidate for election by another constituency for the Assembly, his seat in respect of the former constituency shall become vacant.

Absence from the National Assembly.

47. If a member of the National Assembly is absent from the Assembly, without leave of the Assembly, for sixty consecutive sitting days, his seat shall become vacant.

Oath of members.

48. If a member of the National Assembly fails to make and subscribe an oath or affirmation in accordance with the provisions of the Constitution within a period of six months from the date of the first meeting of the Assembly after his election, his seat shall become vacant :

Provided that the Speaker may, before the expiration of the said period, for good cause shown, extend the period.

Resignation of members.

49. A member of the National Assembly may resign his seat by notice in writing under his hand addressed to the Speaker.

Meetings and Procedure of the National Assembly

Duration, summoning, prorogation and dissolution of the National Assembly.

50.—(1) The President may summon, prorogue or dissolve the National Assembly and shall, when summoning the Assembly, fix the time and place of the meeting :

Provided that at least one session of the National Assembly in each year shall be held at Dacca.

(2) Whenever a Prime Minister is appointed, the National Assembly, if, at the time of the appointment, it is not sitting and does not stand dissolved, shall be summoned so as to meet within two months thereafter.

(3) Unless sooner dissolved, the National Assembly shall stand dissolved on the expiration of five years from the date of its first meeting.

Sessions of the National Assembly.

51. There shall be at least two sessions of the National Assembly in every year, and six months shall not intervene between the last sitting of the Assembly in one session and its first sitting in the next session.

President's address and messages to the National Assembly.

52. The President may address the National Assembly and may send messages thereto.

Right of Ministers and the Attorney-General to address the National Assembly.

53. Every Minister and the Attorney-General shall have the right to speak in, and otherwise take part in the proceedings of, the National Assembly, and of any committee thereof of which he may be named a member, but shall not by virtue of this Article be entitled to vote.

(9) Nothing in this Article shall be construed as disqualifying the Prime Minister or any other Minister, or a Minister of State or Deputy Minister, for continuing in office during any period during which the National Assembly stands dissolved, or as preventing the appointment of any person as Prime Minister or other Minister, or as Minister of State or Deputy Minister, during any such period

Attorney General

38.—(1) The President shall appoint an Attorney General for Pakistan, who shall hold office during the pleasure of the President, shall receive such remuneration as may be determined by the President, and shall perform such duties as may be assigned to him by the President

(2) No person shall be qualified for appointment as Attorney General for Pakistan unless he is qualified for appointment as a Judge of the Supreme Court, but no person shall be appointed as Attorney General if he is or has been a Judge of the Supreme Court or of a High Court

(3) In the performance of his official duties the Attorney General shall have a right of audience in all courts in Pakistan

Extent of executive authority of the Federation

39.—(1) The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution

(2) The executive authority of the Federation shall extend to all matters with respect to which Parliament has power to make laws

Provided that, save as expressly provided in the Constitution or in any Act of Parliament which Parliament is, under the Constitution, competent to enact for a Province, the said authority shall not extend in any Province to any matter with respect to which the Provincial Legislature also has power to make laws

Supreme Command of the Armed Forces

40.—(1) The Supreme Command of the Armed Forces shall vest in the President, and the exercise thereof shall be regulated by law

(2) Until Parliament makes provision by law in that behalf, the President shall have the power—

(a) to raise and maintain the Naval, Military and Air Forces of Pakistan and the Reserves of such Forces ,

(b) to grant Commissions in such Forces , and

(c) to appoint Commanders in Chief of the Army, Navy and Air Forces and determine their salaries and allowances

Conduct of business of the Federal Government

41.—(1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President

(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President

(3) The President shall also make rules for the allocation and transaction of the business of the Federal Government

Duties of Prime Minister in relation to President

42. It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation ,

(b) to furnish such information relating to the administration of the affairs of the Federation and proposals for legislation as the President may call for , and

(c) if the President so requires, to submit, for the consideration of the Cabinet any matter on which a decision has been taken by a Minister but which has not been considered by the Cabinet

CHAPTER II.—THE PARLIAMENT OF PAKISTAN

Parliament of Pakistan

43. There shall be a Parliament of Pakistan consisting of the President and one House, to be known as the National Assembly

Composition of the National Assembly

44.—(1) Subject to the succeeding clauses the National Assembly shall consist of three hundred members, one half of whom shall be elected by constituencies in East Pakistan, and the other half by constituencies in West Pakistan

(2) In addition to the seats for the members mentioned in clause (1), there shall, for a period of ten years from the Constitution Day, be ten seats reserved for women members only, of whom five shall be elected by constituencies in East Pakistan, and five by constituencies in West Pakistan , and constituencies shall accordingly be delimited as women's territorial constituencies for this purpose

Provided that a woman who, under this clause, is a member of the Assembly at the time of the expiration of the said period of ten years shall not cease to be a member until the Assembly is dissolved

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of that Government ;

(c) the custody of the Federal Consolidated Fund, the payment of moneys into or the issue or appropriation of moneys from, such Fund ;

(d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge ;

(e) the receipt of moneys on account of the Federal Consolidated Fund, or the Public Account of the Federation, or the custody or issue of such moneys, or the audit of the accounts of the Federal or a Provincial Government ; and

(f) any matter incidental to any of the matters specified in the aforesaid sub-clauses.

(2) A Bill shall not be deemed to be a Money Bill by reason only that—

(a) it provides for the imposition or alteration of any fine, or other pecuniary penalty, or for the demand or payment of a licence fee, or a fee or charge for any service rendered ; or

(b) it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) Every Money Bill, when it is presented to the President for his assent, shall bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court.

President's recommendation required for financial measures.

59. No Bill or amendment which makes provision for any of the matters specified in clause (1) of Article 58, or which if enacted and brought into operation would involve expenditure from the revenues of the Federation, shall be introduced or moved in the National Assembly except on the recommendation of the President.

No taxation except by an Act of Parliament.

60. No tax shall be levied for the purposes of the Federation except by or under the authority of an Act of Parliament.

Federal Consolidated Fund and the Public Account of the Federation.

61.—(1) All revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of any loan, shall form part of one consolidated fund, to be known as the Federal Consolidated Fund.

(2) All other public moneys received by or on behalf of the Federal Government shall be credited to the Public Account of the Federation.

Custody of public moneys of the Federation.

62.—(1) The custody of the Federal Consolidated Fund, the payment of moneys into such Fund, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Fund received by or on behalf of the Federal Government, their payment into the Public Account of the Federation and the withdrawal of moneys from such Account, and all matters connected with or ancillary to matters aforesaid, shall be regulated by Act of Parliament and, until provision in that behalf is so made, by rules made by the President.

(2) All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the Federation in his capacity as such, other than revenues or public moneys raised or received by the Federal Government ;

(b) any court to the credit of any cause, matter, account or person in connection with the affairs of the Federation ;

shall be paid into the Public Account of the Federation.

Annual Financial Statement.

63.—(1) The President shall, in respect of every financial year, cause to be laid before the National Assembly a statement of the estimated receipts and expenditure of the Federal Government for that year, in this Part referred to as the Annual Financial Statement.

(2) The Annual Financial Statement shall show separately—

(a) the sums required to meet expenditure described by the Constitution as expenditure charged upon the Federal Consolidated Fund ; and

(b) the sums required to meet other expenditure proposed to be made from the Federal Consolidated Fund ;

and shall distinguish expenditure on revenue account from other expenditure.

54.—(1) The National Assembly shall, as soon as may be, choose two of its members to be respectively Speaker and Deputy Speaker thereof, and so often as the office of Speaker or Deputy Speaker becomes vacant the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be. Speaker and Deputy Speaker of the National Assembly.

(2) A member holding office as Speaker or Deputy Speaker shall vacate his office if he ceases to be a member of the National Assembly, may at any time resign his office by writing under his hand addressed to the President, and may be removed from his office by a resolution of the Assembly passed by a majority of the total number of members thereof, but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

Provided that whenever the National Assembly is dissolved, the Speaker shall not, by virtue of the dissolution, vacate his office until immediately before the first meeting of the Assembly after the dissolution.

(3) While the office of Speaker is vacant, or the Speaker is acting as President, or is otherwise unable to perform the duties of his office, those duties shall be performed by the Deputy Speaker, or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the President may appoint for the purpose, and during any absence of the Speaker from any sitting of the Assembly the Deputy Speaker, or if he also is absent, such person as may be determined by the rules of procedure of the Assembly, shall act as Speaker.

55.—(1) Subject to the provisions of the Constitution— R l p o d r l o c

(a) the procedure of the National Assembly shall be regulated by rules of procedure framed by the Assembly;

(b) a decision in the National Assembly shall be taken by a majority of the members present and voting, but the person presiding shall not vote except when there is an equality of votes, in which case he shall have and exercise a casting vote;

(c) the National Assembly shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Assembly shall not be invalid only for the reason that some person who was not entitled to do so sat or voted or otherwise took part in the proceedings.

(2) If at any time during a meeting of the National Assembly the attention of the person presiding is drawn to the fact that less than forty members are present, it shall be the duty of the person presiding either to adjourn the Assembly, or to suspend the meeting until at least forty members are present.

56.—(1) The validity of any proceedings in the National Assembly shall not be questioned in any court. P l g e o members of the N l Assembly

(2) No officer or member of the National Assembly in whom powers are vested for the regulation of procedure, or the conduct of business, or the maintenance of order in the Assembly, shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any court.

(3) No member of the National Assembly, and no person entitled to speak therein, shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Assembly or any committee thereof.

(4) No person shall be liable to any proceedings in any court in respect of the publication by or under the authority of the National Assembly of any report, paper, vote or proceedings.

(5) Subject to this Article, the privileges of the National Assembly, the committees and members thereof, and the persons entitled to speak therein, may be determined by Act of Parliament.

57.—(1) When a Bill has been passed by the National Assembly it shall be presented to the President who shall within ninety days— P e d n as en to B

(a) assent to the Bill; or

(b) declare that he withholds assent therefrom; or

(c) in the case of a Bill other than a Money Bill, return the Bill to the Assembly with a message requesting that the Bill, or any specified provision thereof, be reconsidered and that any amendments specified by him in the message be considered.

(2) When the President has declared that he withholds assent from a Bill the National Assembly shall be competent to reconsider the Bill, and if it is again passed, with or without amendment, by the Assembly by the votes of not less than two-thirds of the members present and voting, it shall be again presented to the President and the President shall assent thereto.

(3) When the President has returned a Bill to the National Assembly it shall be reconsidered by the Assembly, and if it is again passed, with or without amendment, by the Assembly by a majority of the total number of members of the Assembly, it shall be again presented to the President and the President shall assent thereto.

Financial Procedure

58.—(1) In this Part "Money Bill" means a Bill containing only provisions dealing with all or any of the following matters, that is to say— on B

(b) to make a grant for meeting an unexpected demand upon the resources of the Federation when on account of the magnitude or the indefinite character of the service, the demand cannot be specified with the details ordinarily given in an Annual Financial Statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ;

and Parliament shall have power to authorize by law the withdrawal of moneys from the Federal Consolidated Fund for the purposes for which the said grants are made.

(2) The provisions of Articles 65 and 66 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the Annual Financial Statement and law to be made for the authorization of appropriation of money out of the Federal Consolidated Fund to meet such expenditure.

Legislative Powers of the President

Promulgation Ordinances when National Assembly is not in session.

69.—(1) If at any time, except when the National Assembly is in session, the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall have the like force of law as an Act of Parliament, but the power of making Ordinances under this clause shall be subject to the like restrictions as the power of Parliament to make laws, and any Ordinance made under this clause may be controlled or superseded by any such Act.

(2) An Ordinance promulgated under clause (1) shall be laid before the National Assembly, and shall cease to operate at the expiration of six weeks from the next meeting of the Assembly, or if a resolution disapproving it is passed by the Assembly, upon the passing of that resolution.

(3) At any time when the National Assembly stands dissolved, the President may, if he is satisfied that circumstances exist which render such action necessary, make and promulgate an Ordinance authorizing expenditure from the Federal Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, pending compliance with the provisions of Articles 63, 65 and 66.

(4) As soon as may be after the date of the reconstitution of the National Assembly, any Ordinance promulgated under clause (3) shall be laid before the Assembly, and the provisions of Articles 63, 65 and 66 shall be complied with within six weeks from that date.

PART V
The Provinces
Chapter I.—The Provincial Government

The Governors.

70.—(1) There shall be a Governor for each Province who shall be appointed by the President and shall hold office during the pleasure of the President.

(2) No person shall be eligible for appointment as Governor unless he is a citizen of Pakistan and is not less than forty years of age.

(3) A Governor may resign his office by writing under his hand addressed to the President.

(4) Subject to the foregoing provisions of this Article, a Governor shall hold office for a period of five years from the date on which he enters upon his office.

(5) A Governor shall not be a member of the National or a Provincial Assembly, and if a member of any such Assembly is appointed a Governor, his seat in that Assembly shall become vacant on the date on which he enters upon his office.

The Cabinet.

71.—(1) There shall be a Cabinet of Ministers with the Chief Minister at its head, to aid and advise the Governor in the exercise of his functions.

(2) The question whether any, and if so, what, advice has been tendered by the Cabinet or a Minister to the Governor shall not be inquired into in any Court.

(3) The Governor shall, in his discretion, appoint from amongst the members of the Provincial Assembly a Chief Minister, who, in his opinion, is most likely to command the confidence of the majority of the members of the Provincial Assembly.

(4) Other Ministers, Deputy Ministers and Parliamentary Secretaries shall be appointed and removed from office by the Governor, but no person shall be appointed a Deputy Minister or Parliamentary Secretary unless he is a member of the Provincial Assembly.

(5) The Cabinet shall be collectively responsible to the Provincial Assembly.

(6) The Chief Minister shall hold office during the pleasure of the Governor, but the Governor shall not exercise his powers under this clause unless he is satisfied that the Chief Minister does not command the confidence of the majority of the members of the Provincial Assembly.

Charges on the Federal Consolidated Fund

64. The following expenditure shall be charged upon the Federal Consolidated Fund —

(a) the remuneration payable to the President and other expenditure relating to his office, and the remuneration payable to—

(i) the Judges of the Supreme Court,

(ii) the members of the Federal Public Service Commission ,

(iii) the Comptroller and Auditor General ,

(iv) the Election Commissioners and Regional Election Commissioners ,

(v) the Speaker and Deputy Speaker of the National Assembly , and

(vi) the members of the Delimitation Commission ,

(b) the administrative expenses, including the remuneration payable to officers and servants of the Supreme Court, the Federal Public Service Commission, the department of the Comptroller and Auditor General the Election Commission, the Secretariat of the National Assembly, and the Delimitation Commission ,

(c) all debt charges for which the Federal Government is liable, including interest, sinking fund charges, the repayment or amortisation of capital and other expenditure in connection with the raising of loans, and the service and redemption of debt on the security of the Federal Consolidated Fund ,

(d) any sums required to satisfy any judgment decree or award against Pakistan by any court or tribunal , and

(e) any other sums declared by the Constitution or by an Act of Parliament to be so charged

Procedure relating to Annual Financial Statement

65.—(1) So much of the Annual Financial Statement as relates to expenditure charged upon the Federal Consolidated Fund may be discussed in but shall not be submitted to the vote of, the National Assembly

(2) So much of the Annual Financial Statement as relates to other expenditure shall be submitted to the National Assembly in the form of demands for grants and that Assembly shall have power to assent to or to refuse to assent to any demand, or to assent to any demand subject to a reduction of the amount specified therein

(3) No demand for a grant shall be made except on the recommendation of the President

Appropriation Bill

66—(1) As soon as may be after the grants under the last preceding Article have been made by the National Assembly, there shall be introduced in the Assembly a Bill to provide for appropriation out of the Federal Consolidated Fund of all moneys required to meet—

(a) the grants so made by the National Assembly , and

(b) the expenditure charged on the Federal Consolidated Fund

but not exceeding in any case the amount shown in the statement previously laid before the National Assembly

(2) No amendment shall be proposed in the National Assembly to any such Bill which shall have the effect of varying the amount or altering the destination of any grant so made

(3) Subject to the provisions of the Constitution no money shall be withdrawn from the Federal Consolidated Fund except under appropriation made by law passed in accordance with the provisions of this Article

Supplementary and Excess Grants

67 *If in respect of any financial year it is found*—

(a) that the amount authorized to be expended for a particular service for the current financial year is insufficient, or that a need has arisen for expenditure upon some new service not included in the Annual Financial Statement for that year, or

(b) that any money has been spent on any service during a financial year in excess of the amount granted for that service for that year ,

[illegible]

Votes on Account Votes of Credit etc

68.—(1) Notwithstanding anything in the foregoing provisions of this chapter, the National Assembly shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in Article 65 for the voting of such grant and the passing of law in accordance with the provisions of Article 66 in relation to that expenditure ,

commencement of the Establishment of West Pakistan Act, 1955, constituted the Province of Punjab, shall not be more than two-fifths of the total number of members of that Assembly.

Qualifications and disqualifications for membership.

78.—(1) A person shall be qualified to be elected to a Provincial Assembly—

(a) if he is not less than twenty-five years of age and is qualified to be an elector for any constituency for the Provincial Assembly under Article 143; and

(b) if he is not disqualified for being a member by the Constitution or an Act of Parliament.

(2) If any question arises whether a member has, after his election, become subject to any disqualification, the Speaker of the Provincial Assembly shall obtain the opinion of the Election Commission and, if the opinion is that the member has incurred any disqualification, his seat shall become vacant.

(3) If any person sits or votes in a Provincial Assembly knowing that he is not qualified for, or is disqualified for, membership thereof, he shall be liable in respect of every day on which he so sits or votes to a penalty of five hundred rupees, which may be recovered from him as a debt due to the Province.

Bar against double membership.

79.—(1) No person shall at the same time be a member of the National Assembly and of a Provincial Assembly, and if a person has been elected as a member both of the National Assembly and of a Provincial Assembly, and does not, within thirty days of his election to the Assembly to which he has been elected last, resign one of his seats, his seat in the Provincial Assembly shall become vacant.

(2) No person shall at the same time be a member of both the Provincial Assemblies, and if a person has been elected as a member of both the Assemblies and does not, within thirty days of his election to the second Assembly, resign one of his seats, his seats in both the Assemblies shall become vacant.

(3) No person shall at the same time be a member of a Provincial Assembly for two or more constituencies; but nothing in this clause shall prevent a person from being at the same time a candidate for two or more constituencies, but if a person has been elected as a member for two or more constituencies and does not, within thirty days of his election by the constituency by which he has been elected last, make a declaration in writing under his hand addressed to the Speaker specifying the constituency which he wishes to represent, all his seats in the Assembly shall become vacant ; but so long as a person is a member for two or more constituencies he shall not sit or vote in the Assembly.

(4) If a member of a Provincial Assembly for one constituency permits himself to be nominated as a candidate for election by another constituency for the Assembly, his seat in respect of the former constituency shall become vacant.

Absence from Provincial Assembly.

80. If a member of a Provincial Assembly is absent from the Assembly, without leave of the Assembly, for sixty consecutive sitting days, his seat shall become vacant.

Oath of Members.

81. If a member of a Provincial Assembly fails to make and subscribe an oath or affirmation in accordance with the provisions of the Constitution within a period of six months from the date of the first meeting of the Assembly after his election, his seat shall become vacant :

Provided that the Speaker may, before the expiration of the said period, for good cause shown, extend the period.

Resignation of members.

82. A member of Provincial Assembly may resign his seat by notice in writing under his hand addressed to the Speaker.

Meetings and Procedure of Provincial Assembly

Duration, summoning, prorogation and dissolution of a Provincial Assembly.

83.—(1) The Governor may summon, prorogue or dissolve the Provincial Assembly and shall, when summoning the Assembly, fix the time and place of the meeting.

(2) Whenever a Chief Minister of a Provincial Government is appointed, the Provincial Assembly, if, at the time of the appointment, it is not sitting and does not stand dissolved, shall be summoned so as to meet within two months thereafter.

(3) Unless sooner dissolved, a Provincial Assembly shall stand dissolved on the expiration of five years from the date of its first meeting.

Sessions of a Provincial Assembly.

84. There shall be at least two sessions of a Provincial Assembly in every year, and six months shall not intervene between the last sitting of the Assembly in one session, and its first sitting in the next session.

Governor's address and messages to the Provincial Assembly.

85. The Governor of a Province may address the Provincial Assembly and may send messages thereto.

(7) In the exercise of his functions the Governor shall act in accordance with the advice of the Cabinet or the appropriate Minister as the case may be except in cases where he is empowered by the Constitution to act in his discretion and except as respects the exercise of his powers under clause (6)

Explanation —For the avoidance of doubt it is hereby declared that for the purposes of clause (4) the appropriate Minister shall be the Chief Minister

(8) A Minister who for any period of six consecutive months is not a member of the Provincial Assembly shall at the expiration of that period cease to be a Minister and shall not before the dissolution of that Assembly

Minister or as Deputy Minister or Parliamentary Secretary during any such period

72.—(1) The Governor shall appoint an Advocate General for the Province who shall hold office during the pleasure of the Governor shall receive such remuneration as may be determined by the Governor and shall perform such duties as may be assigned to him by the Governor The Advocate General for the Province

(2) No person shall be qualified for appointment as Advocate General unless he is qualified for appointment as a Judge of a High Court but no person shall be appointed as Advocate General if he is or has been a Judge of the Supreme Court or of a High Court

(3) A person shall not hold office as Advocate General after he has attained the age of sixty five years

73.—(1) The executive authority of a Province shall vest in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution Extent of executive authority of a Province

(2) Except as expressly provided in the Constitution the executive authority of a Province shall extend to all matters with respect to which the Provincial Legislature has power to make laws

74.—(1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor thereof Conduct of business of the Provincial Government

(2) The Governor shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the Governor

(3) The Governor shall also make rules for the allocation and transaction of the business of the Provincial Government

75 It shall be the duty of the Chief Minister of each Province— Duties of Chief Minister in relation to Governor

(a) to communicate to the Governor of the Province all decisions of the Cabinet relating to the administration of the affairs of the Province and proposals for legislation

(b) to furnish such information relating to the administration of the affairs of the Province and proposals for legislation as the Governor may call for and

(c) if the Governor so requires to submit for the consideration of the Cabinet any matter on which a decision has been taken by a Minister but which has not been considered by the Cabinet

CHAPTER II —THE PROVINCIAL LEGISLATURE

76 There shall be a Provincial Legislature for each Province consisting of the Governor and one House to be known as the Provincial Assembly The Provincial Legislature

77—(1) Subject to the succeeding clauses each Provincial Assembly shall consist of three hundred members Composition of Provincial Assembly

(2) In addition to the seats in each Provincial Assembly for the members mentioned in clause (1) there shall for a period of ten years from the Constitution Day be ten seats reserved in each Provincial Assembly for women members only and constituencies shall accordingly be delimited as women's territorial constituencies for this purpose

Provided that a woman who under this clause is a member of a Provincial Assembly at the time of the expiration of the said period of ten years shall not cease to be a member until the Assembly is dissolved

(3) Parliament may by Act alter the number of the members of the Provincial Assemblies provided that the number of members of the two Assemblies shall remain equal

(4) Parliament may with the consent of a Provincial Assembly by Act provide for the representation in that Assembly of any territory which is included in the Province after the Constitution Day but no such Act shall alter the number of members of the Assembly

(5) Until the fourteenth day of October 1965 the number of members of the Provincial Assembly of the Province of West Pakistan elected by constituencies in the territory which immediately before the

(2) When the Governor has reserved a Bill for the consideration of the President it shall be presented to the President, who shall, within ninety days,—

(a) assent to the Bill, or

(b) declare that he withholds assent therefrom.

(3) When the Governor has declared that he withholds assent from a Bill, the Provincial Assembly shall be competent to reconsider the Bill, and if it is again passed, with or without amendment, by the Assembly, by the votes of not less than two-thirds of the members present and voting, it shall be again presented to the Governor, and the Governor shall assent thereto.

(4) When the Governor has returned a Bill to the Provincial Assembly it shall be reconsidered by the Assembly, and if it is again passed, with or without amendment, by the Assembly, by a majority of the total number of members of the Assembly, it shall be again presented to the Governor, and the Governor shall assent thereto.

Financial Procedure

Money Bills

91.—(1) In this Part "Money Bill" means a Bill containing only provisions dealing with all or any of the following matters, that is to say,—

(a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the borrowing of money, or the giving of any guarantee, by the Provincial Government, or the amendment of the law relating to the financial obligations of that Government ;

(c) the custody of the Provincial Consolidated Fund, the payment of moneys into, or the issue or appropriation of moneys from, such Fund ,

(d) the imposition of a charge upon the Provincial Consolidated Fund, or the abolition or alteration of any such charge ;

(e) the receipt of moneys on account of the Provincial Consolidated Fund, or the Public Account of the Province, or the custody or issue of such moneys ; and

(f) any matter incidental to any of the matters specified in the aforesaid sub-clauses

(2) A Bill shall not be deemed to be a Money Bill by reason only that—

(a) it provides for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a license fee, or a fee or charge for any service rendered ; or

(b) it provides for the imposition, abolition, remission, alteration, or regulation of any tax by any local authority or body for local purposes.

(3) Every Money Bill, when it is presented to the Governor for his assent, shall bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court

Governor's recommendation required for financial measures.

92. No Bill or amendment which makes provision for any of the matters specified in clause (1) of Article 91, or which if enacted and brought into operation would involve expenditure from the revenues of the Province, shall be introduced or moved in a Provincial Assembly except on the recommendation of the Governor

No taxation except by Act of the Provincial Legislature.

93. No tax shall be levied for the purposes of a Province except by or under the authority of an Act of the Provincial Legislature.

Provincial Consolidated Fund and the Public Account of the Province

94.—(1) All revenues received by a Provincial Government, all loans raised by that Government, and all moneys received by it in repayment of any loan, shall form part of one consolidated fund, to be known as the Provincial Consolidated Fund.

(2) All other public moneys received by or on behalf of the Provincial Government shall be credited to the Public Account of the Province

Custody of public moneys in a Province.

95.—(1) The custody of the Provincial Consolidated Fund, the payment of moneys into such Fund, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Fund received by or on behalf of the Provincial Government, their payment into the Public Account of the Province, and the withdrawal of moneys from such Account, and all matters connected with or ancillary to matters aforesaid, shall be regulated by Act of the Provincial Legislature and, until provision in that behalf is so made, by rules made by the Governor.

Right of Ministers and the Advocate General to address a Provincial Assembly

86 Every Minister and the Advocate General of a Province shall have the right to speak in and otherwise take part in the proceedings of the Provincial Assembly and of any committee thereof of which he may be named a member but shall not by virtue of this Article be entitled to vote

Speaker and Deputy Speaker

87 —(1) Every Provincial Assembly shall as soon as may be choose two of its members to be respectively Speaker and Deputy Speaker thereof and so often as the office of Speaker or Deputy Speaker becomes vacant the Assembly shall choose another member to be Speaker or Deputy Speaker as the case may be

(2) A member holding office as Speaker or Deputy Speaker shall vacate his office if he ceases to be a member of the Provincial Assembly may at any time resign his office by writing under his hand addressed to the Governor and may be removed from his office by a resolution of the Assembly passed by a majority of the total number of members thereof but no resolution for the purpose of this clause shall be moved unless at least fourteen days notice has been given of the intention to move the resolution

Provided that whenever the Provincial Assembly is dissolved the Speaker shall not by virtue of the dissolution vacate his office until immediately before the first meeting of the Assembly after the dissolution

(3) While the office of Speaker is vacant or the Speaker is for any reason unable to perform the duties of his office those duties shall be performed by the Deputy Speaker or if the office of Deputy Speaker is also vacant by such member of the Assembly as the Governor may appoint for the purpose and during any absence of the Speaker from any sitting of the Assembly the Deputy Speaker or if he also is absent such person as may be determined by the rules of procedure of the Assembly shall act as Speaker

Rules of procedure quorum etc

88 —(1) Subject to the provisions of the Constitution—

(a) the procedure of a Provincial Assembly shall be regulated by rules of procedure framed by the Assembly

(b) a decision in a Provincial Assembly shall be taken by a majority of the members present and voting but the person presiding shall not vote except when there is an equality of votes in which case he shall have and exercise a casting vote

(c) a Provincial Assembly shall have power to act notwithstanding any vacancy in the membership thereof and any proceedings in the Assembly shall not be invalid only for the reason that some person who was not entitled to do so sat or voted or otherwise took part in the proceedings

(2) If at any time during a meeting of the Provincial Assembly the attention of the person presiding is drawn to the fact that less than forty members are present it shall be the duty of the person presiding either to adjourn the Assembly or to suspend the meeting until at least forty members are present

Privileges etc of the members of the Provincial Assembly

89 —(1) The validity of any proceedings in a Provincial Assembly shall not be questioned in any court

(2) No officer or member of a Provincial Assembly in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order in the Assembly shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any court

(3) No member of a Provincial Assembly and no person entitled to speak therein shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Assembly or any committee thereof

(4) No person shall be liable to any proceedings in any court in respect of the publication by or under the authority of a Provincial Assembly of any report paper vote or proceedings

Governor's assent to Bills

90.—(1) When a Bill has been passed by a Provincial Assembly it shall be presented to the Governor who shall within ninety days —

(a) assent to the Bill or

(b) reserve the Bill for the consideration of the President or

(c) declare that he withholds assent from the Bill or

(d) in the case of a Bill other than a Money Bill return the Bill to the Assembly with a message requesting that the Bill or any specified provision thereof be reconsidered and that any amendments specified by him in the message be considered

the Governor shall have power to authorize expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, and shall cause to be laid before the Provincial Assembly a Supplementary Financial Statement or, as the case may be, an Excess Financial Statement, setting out the amount of that expenditure, and the provisions of Articles 96 to 99 shall apply to the aforesaid statements as they apply to the Annual Financial Statement.

Votes on Account, Votes of Credit, etc

101.—(1) Notwithstanding anything in the foregoing provisions of this chapter, the Provincial Assembly shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in Article 98 for the voting of such grant and the passing of the law in accordance with the provisions of Article 99 in relation to that expenditure ;

(b) to make a grant for meeting an unexpected demand upon the resources of the Province when on account of the magnitude or the indefinite character of the service the demand cannot be specified with the details ordinarily given in an Annual Financial Statement ;

(c) to make an exceptional grant which forms no part of the current service of any financial year ,

and the Provincial Legislature shall have power to authorize by law the withdrawal of moneys from the Provincial Consolidated Fund for the purposes for which the said grants are made.

(2) The provisions of Articles 98 and 99 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the Annual Financial Statement and law to be made for the authorization of appropriation of money out of the Provincial Consolidated Fund to meet such expenditure

Legislative Powers of the Governor

Promulgation of Ordinances when Provincial Assembly is not in session

102.—(1) If at any time, except when the Provincial Assembly is in session, the Governor is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall have the like force of law as an Act of the Provincial Legislature, but the power of making Ordinances under this clause shall be subject to the like restrictions as the power of the Provincial Legislature to make laws, and any Ordinance made under this clause may be controlled or superseded by any such Act :

Provided that the Governor shall not, without previous instructions from the President, promulgate any such Ordinance if an Act of the Provincial Legislature containing the same provision would, under the Constitution, have been invalid unless it had received the assent of the President.

(2) An Ordinance promulgated under clause (1) shall be laid before the Provincial Assembly and shall cease to operate at the expiration of six weeks from the next meeting of the Assembly, or if a resolution disapproving it is passed by the Assembly, upon the passing of that resolution.

(3) At any time when the Provincial Assembly stands dissolved, the Governor may, if he is satisfied that circumstances exist which render such action necessary, make and promulgate an Ordinance authorizing expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, pending compliance with the provisions of Articles 96, 98 and 99.

(4) As soon as may be after the date of the reconstitution of the Provincial Assembly, any Ordinance promulgated under clause (3) shall be laid before the Assembly ; and the provisions of Articles 96, 98 and 99 shall be complied with within six weeks from that date.

Excluded and Special Areas

Excluded Areas

103.—(1) In this Article the expression "excluded area" means an area which was an excluded area immediately before the Constitution Day

(2) The executive authority of a Province shall extend to any excluded area therein but, notwithstanding anything in the Constitution, no Act of Parliament or of a Provincial Legislature shall apply to an excluded area unless the Governor by public notification so directs, and in giving such a direction with respect to any Act he may direct that the Act shall in its application to the area, or any specified part thereof, have effect subject to such exceptions or modifications as may be specified in the direction

(3) The Governor may make regulations for the peace and good government of any excluded area in the Province, and any such regulations may repeal or amend any Act of Parliament, or of the Provincial Legislature, or any other law in force in the area :

Provided that no regulation repealing or amending an Act of Parliament shall take effect until it has been approved by the President

(2) All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of a Province in his capacity as such, other than revenues or public moneys raised or received by the Provincial Government ,

(b) any court to the credit of any cause, matter, account or person in connection with the affairs of the Province ,

shall be paid into the Public Account of the Province

Annual Financial Statement

96.—(1) The Governor shall, in respect of every financial year, cause to be laid before the Provincial Assembly a statement of the estimated receipts and expenditure of the Provincial Government for that year, in this part referred to as the Annual Financial Statement

(2) The Annual Financial Statement shall show separately—

(a) the sums required to meet expenditure described by the Constitution as expenditure charged upon the Provincial Consolidated Fund , and

(b) the sums required to meet other expenditure proposed to be made from the Provincial Consolidated Fund ,

and shall distinguish expenditure on revenue account from other expenditure

Charges on the Provincial Consolidated Fund

97. The following expenditure shall be charged on the Provincial Consolidated Fund —

(a) the remuneration payable to the Governor and other expenditure relating to his office and the remuneration payable to—

(i) the Judges of the High Court ,

(ii) the members of the Provincial Public Service Commission , and

(iii) the Speaker and Deputy Speaker of the Provincial Assembly ,

(b) the administrative expenses, including the remuneration payable to officers and servants, of the High Court, the Provincial Public Service Commission, and the Secretariat of the Provincial Assembly ,

(c) all debt charges for which the Provincial Government is liable, including interest, sinking fund charges, the repayment or amortisation of capital and other expenditure in connection with the raising of loans and the service and redemption of debt on the security of the Provincial Consolidated Fund ,

(d) any sums required to satisfy any judgment, decree or award against the Province by any court, or tribunal , and

(e) any other sums declared by the Constitution or by an Act of the Provincial Legislature to be so charged

Procedure relating to Annual Financial Statement

98.—(1) So much of the Annual Financial Statement as relates to expenditure charged upon the Provincial Consolidated Fund may be discussed in, but shall not be submitted to the vote of, the Provincial Assembly

(2) So much of the Annual Financial Statement as relates to other expenditure shall be submitted to the Provincial Assembly in the form of demands for grants, and that Assembly shall have power to assent to or to refuse to assent to any demand, or to assent to any demand subject to a reduction of the amount specified therein

(3) No demand for a grant shall be made except on the recommendation of the Governor

Appropriation Bill

99.—(1) As soon as may be after the grants under the last preceding Article have been made by the Provincial Assembly, there shall be introduced in the Assembly a Bill to provide for appropriation out of the Provincial Consolidated Fund of all moneys required to meet—

(a) the grants so made by the Provincial Assembly , and

(b) the expenditure charged on the Provincial Consolidated Fund,

but not exceeding in any case the amount shown in the statement previously laid before the Provincial Assembly

(2) No amendment shall be proposed in the Provincial Assembly to any such Bill which shall have the effect of varying the amount or altering the destination of any grant so made

(3) Subject to the provisions of the Constitution, no money shall be withdrawn from the Provincial Consolidated Fund except under appropriation made by law passed in accordance with the provisions of this Article

Supplementary and Excess Grants

100. If in respect of any financial year it is found—

(a) that the amount authorized to be expended for a particular service for the current financial year is insufficient, or that a need has arisen for expenditure upon some new service not included in the Annual Financial Statement for that year, or

(b) that any money has been spent on any service during a financial year in excess of the amount granted for that service for that year ,

made by the Provincial Legislature.

existing law, shall prevail and the Act of the Provincial Legislature shall, to the extent of the repugnancy, be void.

(2) Where an Act of a Provincial Legislature with respect to any of the matters in the Concurrent List contains any provision repugnant to the provisions of an earlier Act of Parliament or an existing law with respect to that matter, then, if the Act of the Provincial Legislature, having been reserved for the consideration of the President, has received his assent, the Act of the Provincial Legislature shall prevail in the Province concerned, but nevertheless Parliament may at any time enact any law with respect to the same matter, amending or repealing the law so made by the Provincial Legislature.

Provisions as to recommendations.

111.—(1) Where under any provision of the Constitution the previous recommendation of the President or of a Governor is required to the introduction of a Bill or the moving of an amendment, the making of the recommendation shall not preclude him from exercising subsequently in regard to the Bill in question any powers conferred on him by the Constitution with respect to the withholding of assent to, or the returning or reservation of, Bills.

(2) No Act of Parliament or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous recommendation was not made, if assent to that Act was given—

(a) where the previous recommendation required was that of the Governor, either by the Governor, or by the President ; and

(b) where the previous recommendation required was that of the President, by the President.

CHAPTER II.—FINANCIAL PROVISIONS

Property of the Federal and Provincial Governments exempted from taxes.

112.—(1) The Government of a Province shall not be liable to taxation under any Act of Parliament in respect of lands or buildings situated in Pakistan, or income accruing, arising or received in Pakistan :

Provided that where a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, nothing in this Article shall exempt that Government from any Federal taxation in respect of that trade or business, or any operation connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof.

(2) Property vested in the Federal Government shall, save in so far as an Act of Parliament may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province.

(3) Nothing in this Article shall prevent the imposition of fees for services rendered.

Exemption from taxes on electricity.

113. Save in so far as Parliament may by law otherwise provide, no Act of a Provincial Legislature shall impose or authorize the imposition of a tax upon the consumption or sale of electricity which is consumed by the Federal Government, and any Act of a Provincial Legislature imposing or authorizing the imposition of a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

Grant-in-aid to Provinces.

114. Parliament may by law make grants-in-aid of the revenues of a Province which may be in need of assistance.

Borrowing by the Federation.

115. The executive authority of the Federation shall extend to borrowing upon the security of the Federal Consolidated Fund within such limits, if any, as may be determined by Act of Parliament, and to the giving of guarantees within such limits, if any, as may be so determined.

Loans to and borrowing by the Provinces.

116.—(1) Subject to the provisions of this Article the executive authority of a Province shall extend to borrowing upon the security of the Provincial Consolidated Fund within such limits, if any, as may be determined by Act of the Provincial Legislature, and to the giving of guarantees within such limits, if any, as may be so determined.

(2) The Federal Government may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits determined under the last preceding Article are not exceeded, give guarantees in respect of loans raised by, a Province and any sums required for the purpose of making loans to a Province shall be charged on the Federal Consolidated Fund.

(3) A Province may not without the consent of the Federal Government borrow outside Pakistan, nor without the like consent raise any loan if there is still outstanding any part of a loan made to the Province by the Federal Government or in respect of which a guarantee has been given by the Federal Government.

(4) A consent under this Article may be granted subject to such conditions, if any, as the Federal Government may think fit to impose, but no such consent shall be unreasonably withheld, nor shall the Federal Government refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province, or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable;

(4) The President may by Order direct that the whole or any specified part of an excluded area shall cease to be an excluded area, and any such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper.

Special Areas

104.—(1) The executive authority of the Province of West Pakistan shall extend to the Special Areas, but notwithstanding anything in the Constitution, no Act of Parliament or of the Provincial Legislature shall [illegible]

(2) The Governor may, with the previous approval of the President, make regulations for the peace and good government of a Special Area, or any part thereof, and any regulation so made may repeal or amend any Act of Parliament, or of the Provincial Legislature, or any other law in force in the area

(3) The President may, from time to time, give such directions to the Governor relating to the whole or any part of a Special Area as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions

(4) The President may, at any time, by Order, direct that the whole or any part of a Special Area shall cease to be a Special Area, and any such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper ·

Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the area concerned

PART VI

Relations between the Federation and the Provinces

Chapter I —Legislative Powers

Extent of Federal and Provincial laws

105. Subject to the provisions of the Constitution, Parliament may make laws, including laws having extra-territorial operation, for the whole or any part of Pakistan, and a Provincial Legislature may make laws for the Province or any part thereof

Subject-matter of Federal and Provincial laws

106.—(1) Notwithstanding anything in the two next succeeding clauses, Parliament shall have exclusive power to make laws with respect to any of the matters enumerated in the Federal List

(2) Notwithstanding anything in clause (3), Parliament, and subject to clause (1) a Provincial Legislature also, shall have power to make laws with respect to any of the matters enumerated in the Concurrent List

(3) Subject to clauses (1) and (2), a Provincial Legislature shall have exclusive power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial List

(4) Parliament shall have power to make laws with respect to matters enumerated in the Provincial List, except for a Province or any part thereof

Power of Parliament to legislate for Provinces by consent

107. If it appears to the Provincial Assemblies to be desirable that any of the matters enumerated in the Provincial List, or any matter not enumerated in any list in the Fifth Schedule should be regulated in the Provinces by Act of Parliament, and if resolutions to that effect are passed by the Provincial Assemblies, it shall be lawful for Parliament to pass an Act regulating that matter accordingly, but any Act so passed may, as respects any Province, be amended or repealed by an Act of the Legislature of that Province.

Power of Parliament to give effect to international agreements, etc

108. Parliament shall have power to make laws for the whole or any part of Pakistan for implementing any treaty, agreement or convention between Pakistan and any other country, or any decision taken at any international body, notwithstanding that it deals with a matter enumerated in the Provincial List or a matter not enumerated in any list in the Fifth Schedule

Provided that no law under this Article shall be enacted except after consultation with the Governor of the Province to which the law is to be applied

Residuary power of legislation

109. Subject to the provisions of Articles 107 and 108, the Provincial legislature shall have exclusive power to make laws with respect to any matter not enumerated in any list in the Fifth Schedule, including any law imposing a tax not mentioned in any such list , and the executive authority of the Province shall extend to the administration of any law so made.

Inconsistency between laws made by Parliament and laws

110 —(1) If any provision of an Act of a Provincial Legislature is repugnant to any provision of an Act of Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the Act of Parliament, whether passed before or after the Act of the Provincial Legislature, or, as the case may be, the

(2) The terms and conditions of service and the term of office of the Comptroller and Auditor-General shall be determined by Act of Parliament, and until so determined, by rules made by the President.

Removal of the Comptroller and Auditor-General and ineligibility for further service.

121.—(1) A person who has held office as Comptroller and Auditor-General shall not be eligible for further appointment in the service of Pakistan.

(2) The Comptroller and Auditor-General shall not be removed from office before the expiration of the term of his office except on the like grounds and in the like manner as a Judge of a High Court.

Duties and powers of Comptroller and Auditor General.

122. The Comptroller and Auditor-General shall perform such duties and exercise such powers, in relation to the expenditure and accounts of the Federation and of the Provinces, as may be provided by Act of Parliament

Form of public accounts

123. The accounts of the Federation and of the Provinces shall be kept in such form as the Comptroller and Auditor-General may, with the approval of the President, prescribe.

Reports of Comptroller and Auditor-General

124. The reports of the Comptroller and Auditor-General relating to the accounts of the Federation shall be submitted to the President, who shall cause them to be laid before the National Assembly, and his reports relating to the accounts of a Province shall be submitted to the Governor, who shall cause them to be laid before the Provincial Assembly.

Chapter IV — Administrative relations between the Federation and the Provinces

Protection of Provinces by Federation.

125. It shall be the duty of the Federal Government to protect each Province against external aggression and internal disturbance, and to ensure, subject to the provisions of Part XI, that the Government of every Province is carried on in accordance with the provisions of the Constitution

Directions to Provincial Governments in certain cases.

126.—(1) The executive authority of every Province shall be so exercised—

(a) as to ensure compliance with Acts of Parliament and existing laws which apply to that Province, and

(b) as not to impede or prejudice the exercise of the executive authority of the Federation.

(2) The executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for the purposes of clause (1), and the said authority shall also extend to the giving of directions to a Province—

(a) as to the construction and maintenance of means of communication declared in such direction to be of national or military importance;

(b) as to the measures to be taken for the protection of railways within the Province;

(c) as to the manner in which the executive authority of the Province is to be exercised for the purpose of preventing any grave menace to the peace or tranquillity or economic life of Pakistan, or any part thereof, and

(d) as to the carrying into execution in the Province of any Act of Parliament which relates to a matter enumerated in Part II of the Concurrent List and authorizes the giving of such directions

(3) Where in carrying out any direction given to a Province under sub-clauses (a) and (b) of clause (2), costs have been incurred in excess of those which would have been incurred by the Provincial Government in the discharge of the normal duties of that Government if such directions had not been given, there shall be paid by the Federal Government to the Provincial Government such sums as may be agreed, or in default of agreement, as may be determined in accordance with the procedure prescribed in Article 129

Delegation of powers to Provinces.

127.—(1) Notwithstanding anything in the Constitution, the President may, with the consent of a Provincial Government, entrust either conditionally or unconditionally to that Government, or to any officer thereof, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of Parliament may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has not the power to make laws, confer powers and impose duties, or authorise the conferment of powers and the imposition of duties, upon a Province or officers or authorities thereof.

(3) Where by virtue of this Article powers and duties have been conferred or imposed upon a Province, or officers or authorities thereof, there shall be paid by the Federal Government to the Provincial Government such sums as may be agreed, or, in default of agreement, as may be determined in accordance with the procedure prescribed in Article 129, in respect of any extra costs incurred by the Provincial Government in connection with the exercise of those powers and duties.

and, if any dispute arises whether a refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the dispute shall be settled in accordance with the procedure prescribed in Article 129.

117.—(1) Notwithstanding anything contained in Article 106, no Provincial law relating to taxes for the benefit of a Province or of a municipality, district board, local board, or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income — Taxes on professions trades callings and employment

(2) The total amount payable in respect of any one person to a Province or to any one municipality, district board, local board or other local authority in the Province by way of taxes on professions, trades, callings and employments shall not exceed fifty rupees per annum

(3) The fact that a Provincial Legislature has power to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting, in relation to professions, trades, callings and employments, the generality of the entry in the Federal List relating to taxes on income

118.—(1) As soon as may be after the Constitution Day, and thereafter at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of the Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial Governments, and such other persons as may be appointed by the President after consultation with the Governors of the Provinces — National Finance Commission

(2) It shall be the duty of the National Finance Commission to make recommendations to the President as to—

(a) the distribution between the Federation and the Provinces of the net proceeds of the taxes mentioned in clause (3) ,

(b) the making of grants in aid by the Federal Government to the Governments of the Provinces ,

(c) the exercise by the Federal Government and Provincial Governments of the borrowing powers conferred by the Constitution , and

(d) any other matter relating to finance referred to the Commission by the President

Explanation —In this Article "net proceeds" means, in relation to any tax, the proceeds thereof reduced by the cost of collection

(3) The taxes referred to in paragraph (a) of clause (2) are the following taxes raised under the authority of Parliament, namely .—

(a) export duty on jute and cotton, and any other specified export duty ,

(b) taxes on income other than corporation tax ,

(c) specified duties of Federal excise ,

(d) taxes on sales and purchases , and

(e) any other specified tax

(4) As soon as may be after receiving the recommendations of the National Finance Commission, the President shall by Order specify, in accordance with the recommendations of the Commission under sub clause (a) of clause (2), the share of the net proceeds of the taxes mentioned in clause (3) which is to be allocated to each Province, and that share shall be paid to the Government of the Province concerned, and shall not form part of the Federal Consolidated Fund

(5) The recommendations of the National Finance Commission, together with an explanatory memorandum as to the action taken thereon, shall be laid before the National Assembly and the Provincial Assemblies

119. No Provincial Legislature or Provincial Government shall have power— — Inter Provincial trade.

(a) to pass any law, or take any executive action, prohibiting or restricting the entry into, or export from, the Province of goods of any class or description , or

(b) to impose any taxes, cesses, tolls or dues which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminate in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminate between goods manufactured or produced in any locality and similar goods produced in any other locality

Provided that no Act of a Provincial Legislature which imposes any reasonable restriction in the interest of public health, public order or morality shall be invalid under this Article if it is otherwise valid under the Constitution ; but any Bill for this purpose passed by the Provincial Assembly shall be reserved for the assent of the President, and shall not become law unless the President assents thereto

CHAPTER III —AUDIT AND ACCOUNTS

120 —(1) There shall be a Comptroller and Auditor-General of Pakistan, who shall be appointed by the President — Comptroller and Auditor General of Pakistan

purposes for which it was then held were purposes of the Federation or of a Province, vest in the Federal Government or the Provincial Government, as the case may be.

Power to acquire and dispose of property and make contracts.

134.—(1) The executive authority of the Federation and of each Province shall extend to the purchase or acquisition of property for their respective purposes, and any such property shall vest in the Federal Government or, as the case may be, in the Provincial Government.

(2) The executive authority of the Federation and of each Province shall extend to the transfer by grant, sale, mortgage or otherwise of property vested in the Federal Government or the Provincial Government, as the case may be, and to the making of contracts.

(3) All lands, minerals and other things of value underlying the ocean within the territorial waters of Pakistan shall vest in the Federal Government.

Contracts

135.—(1) All contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the President or the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority, shall be executed on behalf of the President, or the Governor by such person and in such manner as he may direct or authorize

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed in pursuance of any provision of the Constitution, or of any Federal or Provincial Law, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof

Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federal Government or the Government of a Province.

Suits and proceedings.

136. The Federal Government may sue and be sued by the name of Pakistan, and the Government of a Province may sue and be sued by the name of the Province

PART VIII

Elections

Composition of Election Commission and Regional Commissions.

137.—(1) There shall be an Election Commission consisting of a Chief Election Commissioner, who shall be the Chairman of the Commission, and such number of other Election Commissioners as the President may determine.

(2) The Chief Election Commissioner and every other Election Commissioner shall be appointed by the President

(3) The President may, after consultation with the Election Commission, appoint such Regional Election Commissioners as he may consider necessary, to assist the Election Commission in the discharge of its functions under this Part.

(4) In the exercise of his functions under this Article the President shall act in his discretion

Conditions of service of Election Commissioners and Regional Election Commissioners.

138.—(1) The conditions of service of the Election Commissioners and Regional Election Commissioners shall be determined by Act of Parliament, and until so determined, by rules made by the President.

(2) The Chief Election Commissioner shall not be removed from his office except on the like grounds and in the like manner as a Judge of a High Court, but any other Election Commissioner or a Regional Election Commissioner may be removed from his office by the President, in his discretion, after consultation with the Chief Election Commissioner.

(3) The term of office of the Election Commissioners and Regional Election Commissioners shall be five years:

Provided that no such Commissioner shall continue to hold office after he has attained the age of sixty-five years.

(4) On the expiration of his term of office—

(a) the Chief Election Commissioner shall be eligible for re-appointment for one further term of office, but shall not otherwise be eligible for any appointment in the service of Pakistan ;

(b) any other Election Commissioner shall be eligible for re-appointment for one further term of office, or for appointment as Chief Election Commissioner, but shall not otherwise be eligible for any appointment in the service of Pakistan; and

(c) a Regional Election Commissioner shall be eligible for re-appointment for one further term of office, or for appointment as an Election Commissioner, but shall not otherwise be eligible for any appointment in the service of Pakistan

128. The Federal Government may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which Parliament has power to make laws, require the Provincial Government to acquire the land on behalf and at the expense of the Federal Government or, if the land belongs to the Province, to transfer it to the Federal Government on such terms as may be agreed or, in default of agreement, as may be determined in accordance with the procedure prescribed in Article 129. Acquisition of land for federal purposes

129.—(1) Any dispute between the Federal Government and one or both Provincial Governments or between the two Provincial Governments which under the law or the Constitution is not within the jurisdiction of the Supreme Court may be referred by any of the Governments involved in the dispute to the Chief Justice of Pakistan, who shall appoint a tribunal to settle the dispute. Settlement of disputes

(2) Subject to the provisions of any Act of Parliament, the practice and procedure of any such tribunal, including the fees to be charged and the award of costs, shall be determined by rules made by the Supreme Court and approved by the President.

(3) The report of the tribunal shall be forwarded to the Chief Justice, who shall determine whether the purpose for which the tribunal was appointed has been carried out, and shall return the report to the tribunal for reconsideration if he is of opinion that the purpose has not been carried out; and when the report is in order the Chief Justice shall forward the report to the President, who shall make such order as may be necessary to give effect to the report.

(4) Effect shall be given in a Province to any order made under this Article by the President, and any Act of the Provincial Legislature which is repugnant to the order shall, to the extent of the repugnancy, be void.

(5) An order by the President under this Article may be varied by the President in accordance with an agreement made by the parties concerned.

130. If at any time it appears to the President that the public interest would be served by the establishment of an Inter-Provincial Council charged with the duty of— Inter-Provincial Council

(a) investigating and discussing subjects in which the Provinces, or the Federation and one or both of the Provinces, have a common interest, or

(b) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

the President may, with the consent of the Governors of the Provinces, establish such a Council, and define the nature of the duties to be performed by it and its organization and procedure.

131.—(1) Notwithstanding anything in the Constitution, it shall be competent to the Provincial Government to construct and use transmitters with respect to broadcasting in the Province: Broadcasting

Provided that when a Provincial Government constructs and uses transmitters in the Province, it shall be entitled to a part of the net proceeds of the fees received by the Federal Government in respect of the use of any receiving apparatus in the Province in such proportion as may be agreed, or in default of agreement, as may be determined in accordance with the procedure prescribed in Article 129.

(2) Any Act of Parliament with respect to broadcasting shall be such as to secure that effect can be given to the foregoing provisions of this Article.

(3) Nothing in this Article shall be construed as restricting the powers conferred on the President by the Constitution for the prevention of any grave menace to the peace or tranquillity of Pakistan or any part thereof.

132.—(1) Parliament may by law provide for the transfer of the railways in each Province to the Government of the Province or to an authority constituted in the Province for that purpose, and for all conditions, reservations and other matters appertaining to the said transfer; and until a transfer made by or under any such law takes effect, railways shall remain within the purposes of the Government of the Federation, and Parliament shall, notwithstanding anything contained in Article 106, have exclusive power to make laws with respect thereto. Transfer of railways to Provincial control

(2) Notwithstanding anything contained in Article 106, a Provincial Legislature shall not have power to make any law affecting any provisions of a law made under clause (1).

PART VII

Property, Contracts and Suits

133. Any property which has no rightful owner, or which but for the enactment of the Constitution would have accrued to Her Majesty by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a Province, vest in the Provincial Government, and shall in any other case vest in the Federal Government: Property accruing by escheat or lapse or as *bona vacantia*

Provided that any property which at the date when it would have accrued to Her Majesty was in the possession or under the control of the Federal Government or a Provincial Government shall, according as the

Principle of electorate

145. Parliament may, after ascertaining the views of the Provincial Assemblies and taking them into consideration, by Act provide whether elections to the National Assembly and Provincial Assemblies shall be held on the principle of joint electorate or separate electorate, and may in any such Act provide for all matters incidental and consequential thereto

Election Tribunals

146. No election to the National Assembly or a Provincial Assembly shall be called in question except by an election petition presented to such authority and in such manner as may be provided by Act of Parliament

Special provision for Special Areas

147. Nothing in this Part shall apply to the Special Areas, but the President may by Order make such provision for the representation of the Special Areas in the National Assembly and the Provincial Assembly of West Pakistan as he may think fit

PART IX

The Judiciary

Chapter I —The Supreme Court

Establishment and constitution of the Supreme Court

148. There shall be a Supreme Court of Pakistan consisting of a Chief Justice, to be known as the Chief Justice of Pakistan, and not more than six other Judges

Provided that Parliament may by Act increase the number of other Judges beyond six

Appointment of Judges of Supreme Court

149.—(1) The Chief Justice of Pakistan shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice

(2) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of Pakistan, and—

(a) has been for at least five years a Judge of a High Court or two or more High Courts in succession or

(b) has been for at least fifteen years an advocate or a pleader of a High Court, or of two or more High Courts

(3) For the purpose of computing any such period as is referred to in sub-clause (a) of clause (2) there shall be included any period during which a person has been a Judge of a High Court in Pakistan before the Constitution Day

(4) For the purpose of computing any such period as is referred to in sub clause (b) of clause (2) there shall be included any period during which a person was an advocate or a pleader of a High Court in Pakistan before the Constitution Day or of any High Court in British India

Age of retirement and disabilities of Judges of Supreme Court

150.—(1) Subject to Articles 151 and 173, a Judge of the Supreme Court shall hold office until he attains the age of sixty five years

(2) A person who has held office as a permanent Judge of the Supreme Court shall not plead or act before any court or authority in Pakistan

Removal of Judges of Supreme Court

151.—(1) A Judge of the Supreme Court shall not be removed from his office except by an order of the President made after an address by the National Assembly, supported by the majority of the total number of members of the Assembly and by the votes of not less than two thirds of the members present and voting, has been presented to the President for the removal of the Judges on the ground of proved misbehaviour or infirmity of mind or body

Provided that no proceedings for the presentation of the address shall be initiated in the National Assembly unless notice of the motion to present the address is supported by not less than one third of the total number of members of the Assembly

(2) Parliament may by law prescribe the procedure for the presentation of an address and for the investigation and proof of misbehaviour or infirmity of mind or body of a Judge, and until such a law is made the President may by order prescribe the said procedure

Temporary appointment of Chief Justice

152. If the office of Chief Justice of Pakistan becomes vacant, or if the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, those duties shall, until some person permanently appointed to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other Judges of the Supreme Court as the President may appoint as Acting Chief Justice

Temporary appointment of Acting

153. When any Judge of the Supreme Court is appointed to act temporarily as Chief Justice of Pakistan, or when any such Judge is unable to perform his duties on account of absence through grant of leave or for any other reason, the President may appoint a Judge of a High Court, who is qualified for appointment as a Judge of

139.—(1) It shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Election Commission in the discharge of its functions, and for this purpose the President may, after consultation with the Election Commission, issue such directions as he may consider necessary. Assistance to Election Commission

(2) When so requested by the Election Commission, it shall be the duty of the Federal Government and of each Provincial Government to make available to the Commission such staff as may be necessary for the discharge of its functions, and in the event of any disagreement as to what staff is necessary for this purpose the question shall be decided by the President in his discretion.

140. The Election Commission shall be charged with the duty of— Functions of Election Commission

(a) preparing electoral rolls for elections to the National Assembly and the Provincial Assemblies, and revising such rolls annually, and

(b) organizing and conducting elections to the National Assembly and the Provincial Assemblies.

141. Whenever the National Assembly or a Provincial Assembly is dissolved, a general election for the reconstitution of the Assembly shall be held not later than six months from the date of dissolution, and whenever a casual vacancy occurs in any such Assembly, a by election to fill the vacancy shall be held not later than three months from the date of the occurrence of the vacancy. Time of election and by election

Provided that the Chief Election Commissioner may, if in his opinion climatic conditions so require, hold a by election at any time after three months, but not later than six months, from the date of the occurrence of the vacancy.

142.—(1) The President may from time to time constitute a Delimitation Commission consisting of a Chairman who is, or has been a Judge of a High Court, and two other members who shall not be members of the National Assembly or of a Provincial Assembly. Delimitation Commission

(2) The Chairman and other members of the Delimitation Commission shall be appointed by the President for such period as the President may fix, shall hold office during the pleasure of the President, and shall be entitled to such remuneration and privileges as may be determined by the President.

(3) In the exercise of his functions under the two preceding clauses the President shall act in his discretion.

(4) The Delimitation Commission shall have power to delimit territorial constituencies for election to the National Assembly and Provincial Assemblies and shall publish lists of such constituencies by public notification.

(5) The validity of anything done by or under the authority of the Delimitation Commission shall not be called in question in any court.

143.—(1) A person shall be entitled to be an elector in a constituency if— Qualifications of electors

(a) he is a citizen of Pakistan,

(b) he is not less than twenty one years of age on the first day of January in the year in which the preparation or revision of the electoral roll commences,

(c) he is not declared by a competent court to be of unsound mind,

(d) he has been resident in the constituency for a period of not less than six months immediately preceding the first day of January in the year in which the preparation or revision of the electoral roll commences,

(e) he is not subject to any disqualification imposed by the Constitution or Act of Parliament.

(2) Until Parliament by Act otherwise provides, the word "resident", for the purposes of this Article, shall have the same meaning as in the Fourth Schedule.

144. Subject to the provisions of the Constitution, Parliament may by Act provide for— Electoral laws

(a) the delimitation of constituencies, the preparation of electoral rolls, the determination of objections and the commencement of electoral rolls,

(b) the conduct of elections and election petitions, the decision of doubts and disputes arising in connection with elections,

(c) matters relating to corrupt practices and other offences in connection with elections, and

(d) all other matters necessary for the due constitution of the National Assembly and Provincial Assemblies,

but no such law shall have the effect of taking away or abridging any of the powers of the Election Commission under this Part.

Provided that where a certificate is issued under paragraph (c) of this Article an appeal shall lie subject to such rules as may be made in that behalf under paragraph 3 of the Third Schedule, and to such other rules, not inconsistent with the aforesaid rules, as may be made in that behalf by the High Court.

Appeal to the Supreme Court by special leave of the Court.

160. Notwithstanding anything in this Part, the Supreme Court may grant special leave to appeal from any judgment, decree, order or sentence of any court or tribunal in Pakistan, other than a court or tribunal constituted by or under any law relating to the Armed Forces.

Review of judgments or orders by the Supreme Court.

161. The Supreme Court shall have power, subject to the provisions of any Act of Parliament and of any rules made by the Supreme Court, to review any judgment pronounced, or order made, by it.

Advisory jurisdiction of the Supreme Court.

162. If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that court for consideration, and the court may, after such hearing as it thinks fit, report its opinion thereon to the President.

Enforcement of the decrees and orders of the Supreme Court and powers of the Supreme Court.

163.—(1) The law declared by the Supreme Court shall be binding on all courts in Pakistan.

(2) All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.

(3) The Supreme Court shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, and any such direction, order, decree or writ shall be enforceable throughout Pakistan, and shall be executed as if it had been issued by the High Court of the appropriate Province.

(4) If a question arises as to which High Court shall give effect to a direction, order, decree or writ of the Supreme Court, the decision of the Supreme Court thereon shall be final.

(5) The Supreme Court shall have power to issue any order for the purpose of securing the attendance of any person or the discovery or production of any document.

(6) Any order of Her Majesty-in-Council made before the Constitution Day on an appeal or petition shall be enforceable as if it were an order issued by the Supreme Court.

Interpretation.

164. In this part, references to any substantial question of law as to the interpretation of the Constitution shall include references to any substantial question of law as to the interpretation of the Government of India Act, 1935, *or the Indian Independence Act, 1947, including any enactment amending or supplementing* the said Acts or any Order made under the said Acts.

CHAPTER II.—THE HIGH COURTS

Constitution of High Courts.

165.—(1) There shall be a High Court for each Province.

(2) The High Courts for the Provinces of East Bengal and West Pakistan functioning immediately before the Constitution Day shall be deemed to be High Courts, under the Constitution, for the Provinces of East Pakistan and West Pakistan, respectively.

(3) A High Court shall consist of a Chief Justice and such number of other Judges as the President may determine.

Appointment of High Court Judges.

166.—(1) Every Judge of a High Court shall be appointed by the President, after consultation with the Chief Justice of Pakistan, the Governor of the Province to which the appointment relates, and if the appointment is not that of the Chief Justice, the Chief Justice of the High Court of that Province.

(2) Subject to Articles 169 and 173, a Judge of a High Court shall hold office until he attains the age of sixty years.

(3) A person who has held office as a permanent Judge of a High Court shall not plead or act before that court or any court or authority within its jurisdiction.

Qualifications of High Court Judges.

167.—(1) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of Pakistan and—

(a) has been, for at least ten years, an advocate or a pleader of a High Court, or of two or more High Courts; or

(b) is a member of the Civil Service of Pakistan of at least ten years' standing, who has for at least three years served as, or exercised the powers of, a District Judge ; or

(c) has for at least ten years held a Judicial office in Pakistan :

Provided that a person shall not be qualified for appointment as a permanent Chief Justice of a High Court unless—

the Supreme Court, to act temporarily as a Judge of that court, and the person so appointed shall be deemed to be a Judge of the Supreme Court until the President revokes the appointment

Puisne Judges

Appointment of *ad hoc* Judges

154. [illegible] jurisdiction as a Judge of the Supreme Court

Provided that no Judge shall be so nominated by the Chief Justice of Pakistan without previous consultation with the Chief Justice of the High Court concerned

Seat of the Supreme Court

155. The Supreme Court shall sit in Karachi and at such other place as the Chief Justice of Pakistan may, with the approval of the President, from time to time appoint

Provided that the Court shall sit in Dacca at least twice in every year, for such period as the Chief Justice of Pakistan may deem necessary

Original jurisdiction of the Supreme Court

156.—(1) Subject to the provisions of the Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between—

(a) the Federal Government and the Government of one or both Provinces, or

(b) the Federal Government and the Government of a Province on the one side, and the Government of the other Province on the other, or

(c) the Governments of the Provinces,

if and in so far as the dispute involves—

(i) any question, whether of law or of fact, on which the existence or extent of a legal right depends, or

(ii) any question as to the interpretation of the Constitution

(2) The Supreme Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment

Appellate jurisdiction of the Supreme Court in matters involving interpretation of Constitution

157.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution

(2) Where the High Court has refused to give such a certificate, the Supreme Court may if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution grant special leave to appeal from such judgment, decree or final order

(3) Where such a certificate is given or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and with the leave of the Supreme Court, on any other ground

Appellate jurisdiction of the Supreme Court in civil matters

158.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil proceedings—

(a) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute on appeal is, not less than fifteen thousand rupees or such other sum as may be specified in that behalf by Act of Parliament, or

(b) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value, or

(c) if the High Court certifies that the case is a fit one for appeal to the Supreme Court

(2) Notwithstanding anything in this Article, no appeal shall, unless as Act of Parliament otherwise provides, lie to the Supreme Court from the judgment, decree or final order of a Judge of a High Court sitting alone

Appellate jurisdiction of the Supreme Court in criminal matters

159. An appeal shall lie to the Supreme Court from any judgment, final order or sentence of a High Court in criminal proceedings, if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life, or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as aforesaid, or

(c) certifies that the case is a fit one for appeal to the Supreme Court, or

(d) has imposed any punishment on any person for contempt of the High Court

Remuneration, etc., of Judges of the Supreme Court and High Courts

175.—(1) The remuneration and other conditions of service of a Judge of the Supreme Court or of a High Court shall not be varied to his disadvantage during his tenure of office.

(2) Subject to Article 151, the conduct of a Judge of the Supreme Court or of a Judge of a High Court shall not be discussed in the National or a Provincial Assembly.

Supreme Court and High Courts to be courts of record.

176. The Supreme Court and each High Court shall be a court of record and shall have all the powers of such a court, including the power to make any order for the investigation or punishment of any contempt of itself.

Application of Third Schedule

177. Until other provisions in that behalf are made by Act of Parliament, the provisions of the Third Schedule shall apply in relation to the Supreme Court and High Court s in respect of matters specified therein

Exclusion of the Supreme Court and High Court jurisdiction from Special Areas

178. Notwithstanding anything in the Constitution, neither the Supreme Court nor a High Court shall, unless Parliament by law otherwise provides, exercise any jurisdiction under the Constitution in relation to the Special Areas.

PART X

The Services of Pakistan

CHAPTER I.—SERVICES

Conditions of service of persons in the service of Pakistan

179.—(1) No person who is not a citizen of Pakistan shall be eligible to hold any office in the service of Pakistan :

Provided that the President or, in relation to a Province, the Governor, may authorize the temporary employment of a person who is not a citizen of Pakistan :

Provided further that a person who is, immediately before the Constitution Day, a servant of the Crown in Pakistan shall not be disqualified from holding any office in the service of Pakistan on the ground only that he is not a citizen of Pakistan.

(2) Except as expressly provided by the Constitution, the appointment and conditions of service of persons in the service of Pakistan may be regulated by Act of the appropriate legislature

Tenure of office of persons employed in public services

180. Except as expressly provided by the Constitution—

(a) every person who is a member of a defence service, or of a civil service of the Federation, or of an All-Pakistan Service, or holds any post connected with defence or a civil post in connection with the affairs of the Federation, shall hold office during the pleasure of the President, and

(b) every person who is a member of a civil service of a Province or holds any civil post in connection with the affairs of a Province, other than a person mentioned in paragraph (a) of this Article, shall hold office during the pleasure of the Governor

Dismissal, disciplinary matters, etc.

181.—(1) No person who is a member of a civil service of the Federation or of a Province, or of an All-Pakistan Service, or holds a civil post in connection with the affairs of the Federation, or of a Province, shall be dismissed or removed from service, or reduced in rank, by an authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed from service, or reduced in rank, until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply—

(a) where a person is dismissed or removed from service or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge , or

(b) where an authority empowered to dismiss or remove from service a person, or to reduce him in rank, is satisfied that for some reason, to be recorded by that authority, it is not reasonably practicable to give that person an opportunity of showing cause, or

(c) where the President or the Governor, as the case may be, is satisfied, for reasons to be recorded by him, that in the interest of the security of Pakistan or any part thereof, it is not expedient to give to that person such an opportunity.

Recruitment and conditions of service.

182.—(1) Except as expressly provided by the Constitution or an Act of the appropriate legislature, appointments to the civil services of, and civil posts in the service of, Pakistan shall be made—

(a) in the case of services of the Federation and posts in connection with the affairs of the Federation, by the President or such person as he may direct ;

(i) he is or, when first appointed to a Judicial office, was, an advocate or a pleader in a High Court, or

(ii) he has served for not less than three years as a Judge of a High Court in Pakistan

Provided further that a person who was immediately before the Constitution Day a Judge of a High Court shall not be disqualified from continuing as such on the ground only that he is not a citizen of Pakistan

(2) For the purpose of computing any period referred to in sub clause (a) of clause (1) there shall be included—

(a) any period during which a person has held Judicial office after he became an advocate or a pleader, and

(b) any period during which a person was an advocate or a pleader of a High Court in British India

(3) For the purpose of computing any period referred to in sub clause (c) of clause (1) there shall be included any period during which a person held Judicial office in British India

Temporary appointment of Chief Justice and Judges of High Courts

168.—(1) If the office of the Chief Justice of a High Court becomes vacant or if any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, those duties shall until some [illegible]

(2) If the office of any other Judge of a High Court becomes vacant or if any such Judge is appointed to act temporarily as a Chief Justice or is by reason of absence or otherwise, unable to perform the duties of his office the President may appoint a person qualified for appointment as a Judge of a High Court to act as a Judge of that Court, and the person so appointed shall, unless the President revokes his appointment be deemed to be a Judge of that Court, until some person permanently appointed to the vacant office has entered on the duties thereof or until the permanent Judge has resumed his duties

Removal of Judges of High Courts

[illegible]

Power of High Courts to issue certain writs etc

170 Notwithstanding anything in Article 22 each High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any Government, directions orders or writs, including writs in the nature of *habeas corpus* *mandamus* prohibition *quo warranto* and *certiorari* for the enforcement of any of the rights conferred by Part II and for any other purpose

Power of High Court to transfer cases to itself from subordinate courts

171 If a High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case from that court and may—

(a) either dispose of the case itself or

(b) determine the said question of law, and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question and the said court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment

Transfer of High Court Judges

172.—(1) The President may transfer a Judge of a High Court from one High Court to the other High Court but no such Judge shall be transferred except with his consent and after consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court of which he is a Judge

(2) When a Judge is so transferred, he shall during the period for which he serves as a Judge of the High Court to which he has been transferred be entitled to such compensatory allowance in addition to his salary as the President may by order determine

CHAPTER III —GENERAL PROVISIONS AS TO THE SUPREME COURT AND HIGH COURTS

Resignation of Judges of Supreme Court and High Courts

173 A Judge of the Supreme Court or of a High Court may resign his office by writing under his hand addressed to the President

Ineligibility of Supreme Court and High Court Judges for employment as Governor

174 A person who is or has been a Judge of the Supreme Court or of a High Court, shall not be eligible for appointment as Governor of a Province

(2) Not less than one half of the members of a Public Service Commission shall be persons who have held office in the service of Pakistan for not less than fifteen years.

Explanation.—For the purposes of this Article the service of Pakistan shall be deemed to include the service of the Crown in British India, and the service of the Crown in Pakistan before the Constitution Day.

(3) The term of office of the Chairman and other members of the Federal Public Service Commission and of a Provincial Public Service Commission shall be five years

(4) Any member of a Public Service Commission may resign his office by writing under his hand addressed, in the case of the Federal Public Service Commission to the President, and in the case of a Provincial Public Service Commission to the Governor.

(5) On ceasing to hold office—

(a) the Chairman of the Federal Public Service Commission shall not be eligible for further employment in the service of Pakistan ;

(b) the Chairman of a Provincial Public Service Commission shall be eligible for appointment as Chairman or other member of the Federal Public Service Commission, or as Chairman of another Provincial Public Service Commission, but shall not be eligible for any other employment in the service of Pakistan, and

(c) a member of a Public Service Commission, other than the Chairman thereof, shall be eligible for appointment as Chairman or other member of any Public Service Commission other than that on which he has already served, but shall not be eligible for any other employment in the service of Pakistan

Provided that a person who is a member of a Public Service Commission may be appointed as Chairman of that Commission for the unexpired term of his office.

Removal of the members of Public Service Commissions

187.—(1) A member of a Public Service Commission shall not be removed from office except on the ground of misbehaviour or infirmity of mind or body

(2) A member of the Federal Public Service Commission shall not be removed from office except in the manner applicable to a Judge of a High Court.

(3) A member of a Provincial Public Service Commission shall not be removed from office except by an order of the Governor of the Province made in a case where the Supreme Court, on reference having been made to it by the Governor, has reported that the member ought to be removed on a ground such as is mentioned in clause (1)

Functions of Public Service Commissions

188.—(1) It shall be the duty of the Federal Public Service Commission and a Provincial Public Service Commission to conduct examinations for appointment to the services and posts connected with the affairs of the Federation, or the Province, as the case may be

(2) The President, in respect of services and posts in connection with the affairs of the Federation, and the Governor of a Province, in respect of services and posts in connection with the affairs of the Province, may make regulations specifying the matters in which generally or in any particular class of case, or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted; but, subject to such regulations, the appropriate Public Service Commission shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and posts, and qualifications of candidates for such services and posts ,

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another, and on the suitability of candidates for such appointments, promotions or transfers ,

(c) on all disciplinary matters affecting a person in the service of the Federal or a Provincial Government in a civil capacity, including compulsory retirement whether for disciplinary reasons or otherwise; and memorials or petitions relating to such matters,

(d) on any claim by or in respect of a person who is serving or has served under the Federal or a Provincial Government in a civil capacity that any costs incurred by him in defending any legal proceedings instituted against him in respect of acts done or purported to be done in the execution of his duty should be paid out of the Federal Consolidated Fund or the Provincial Consolidated Fund, as the case may be,

(e) on any proposal to withhold a special or additional pension or to reduce an ordinary pension ; and

(f) on any claim for the award of a pension or allowance in respect of injuries sustained while serving under the Federal or a Provincial Government in a civil capacity; and any question as to the amount of any such award ,

(b) in the case of services of a Province and posts in connection with the affairs of a Province, by the Governor of the Province, or such person as he may direct

(2) Except as expressly provided by the Constitution, or an Act of the appropriate legislature, the conditions of service of persons serving in a civil capacity shall, subject to the provisions of this Article, be such as may be prescribed—

(a) in the case of persons serving in connection with the affairs of the Federation, by rules made by the President, or by some person authorized by the President to make rules for the purpose,

(b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province, or by some person authorized by the Governor to make rules for the purpose

Provided that it shall not be necessary to make rules regulating the conditions of service of persons employed temporarily on the condition that their employment may be terminated on one month's notice or less, and nothing in this clause shall be construed as requiring the rules regulating the conditions of service of any class of persons to extend to any matter which appears to the rule making authority to be a matter not suitable for regulation by rule in the case of that class

Provided further that no such Act as is referred to in this clause shall contain anything inconsistent with the provisions of clause (3)

(3) The rules under clause (2) shall be so framed as to secure—

(a) that the tenure and conditions of service of any person to whom this Article applies shall not be varied to his disadvantage , and

(b) that every such person shall have at least one appeal against any order which—

(i) punishes or formally censures him, or

(ii) alters or interprets to his disadvantage any rule affecting his conditions of service , or

(iii) terminates his employment otherwise than upon his reaching the age fixed for superannuation •

Provided that when any such order is the order of the President or the Governor, the person affected shall have no right of appeal, but may apply for review of that order

183.—(1) In the Constitution "All Pakistan Services" means the services common to the Federation and the Provinces which were the All Pakistan Services immediately before the Constitution Day All Pakistan Services

(2) Parliament shall have exclusive power to make laws with respect to the All Pakistan Services

(3) Articles 182 and 188 shall apply to the All Pakistan Services as they apply to Services of the Federation

(4) No member of an All Pakistan Service shall be transferred to a Province to serve in connection with the affairs of that Province, or be transferred from that Province, except by order of the President made after consultation with the Governor of that Province

(5) While a member of an All Pakistan Service is serving in connection with the affairs of a Province, his promotion and transfer within that Province, and the initiation of any disciplinary proceedings against him in relation to his conduct in that Province, shall take place by order of the Governor of that Province

CHAPTER II —PUBLIC SERVICE COMMISSIONS

184.—(1) Subject to the provisions of this Article, there shall be a Public Service Commission for the Federation, and a Public Service Commission for each Province Public Service Commiss

(2) The Public Service Commission for the Federation, if requested so to do by the Governor of a Province, may, with the approval of the President, exercise all or any of the functions of the Public Service Commission of the Province

(3) Where the Federal Public Service Commission is exercising the functions of a Provincial Public Service Commission in respect of any matter, references in the Constitution or in any Act to the Provincial Public Service Commission shall, unless the context otherwise requires, be construed, in relation to that matter, as references to the Federal Public Service Commission

185. In the case of the Federal Public Service Commission the President, and in the case of a Provincial Public Service *Commission the Governor, may by regulations determine*— Cc of Public Service Commiss

(a) the number of members of the Commission and their conditions of service, and

(b) the number of members of the staff of the Commission and their conditions of service

186 —(1) The Chairman and other members of a Public Service Commission shall be appointed in the case of the Federal Public Service Commission by the President in his discretion, and in the case of a Provincial Public Service Commission by the Governor of the Province in his discretion Appo etc , of Public Service Comm.

for the President to summon that Assembly, and if approved by the Assembly, shall remain in force until it is revoked, or if disapproved, shall cease to operate from the date of disapproval.

(7) A Proclamation declaring that the security of Pakistan or any part thereof is threatened by war or external aggression may be made before the actual occurrence of war or any such aggression if the President is satisfied that there is imminent danger thereof.

President's power to suspend fundamental rights, etc., during emergency period.

192.—(1) While a Proclamation issued under Article 191 is in operation, the President may, by Order, declare that the right to move any court for the enforcement of such of the rights conferred by Part II as may be specified in the Order, and all proceedings pending in any court for the enforcement of the rights so specified, shall remain suspended for the period during which the Proclamation is in force.

(2) While a Proclamation issued under Article 191 is in operation, the President shall have power by Order to suspend the operation of the proviso to clause (1) of Article 50.

(3) Every Order made under this Article shall, as soon as may be, be laid before the National Assembly.

Proclamation of assumption of power by the Federation in case of failure of constitutional machinery in Provinces.

193.—(1) If the President, on receipt of a report from the Governor of a Province, is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may by Proclamation—

(a) assume to himself, or direct the Governor of the Province to assume on behalf of the President, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province, other than the Provincial Legislature;

(b) declare that the powers of the Provincial Legislature shall be exercisable by, or under the authority of, Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province :

Provided that nothing in this Article shall authorize the President to assume to himself, or direct the Governor of the Province to assume on his behalf, any of the powers vested in, or exercisable by, a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution, relating to High Courts.

(2) A Proclamation under this Article (not being a Proclamation revoking a previous Proclamation) shall be laid before the National Assembly, and shall cease to operate at the expiration of two months, unless before the expiration of that period it has been approved by a resolution of the National Assembly, and may by a like resolution be extended for a further period not exceeding four months; but no such Proclamation shall in any case remain in force for more than six months:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the National Assembly stands dissolved or if the dissolution of the National Assembly takes place during the period of two months referred to in this clause, the Proclamation shall cease to operate at the expiry of thirty days from the date on which the National Assembly first meets after its reconstitution, unless before the expiration of the said period of thirty days, a resolution approving the Proclamation has been passed by that Assembly.

(3) Where by a Proclamation issued under this Article it has been declared that the powers of the Provincial Legislature shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) to Parliament to confer on the President the power of the Provincial Legislature to make laws;

(b) to Parliament, or the President, when he is empowered under sub-clause (a), to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties upon the Federation, or officers and authorities thereof;

(c) to the President, when the National Assembly is not in session, to authorize expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, pending the sanction of such expenditure by Parliament;

(d) to the National Assembly by resolution to sanction expenditure authorized by the President under sub-clause (c).

(4) Any law made in exercise of the power of the Provincial Legislature by Parliament or the President, which Parliament or the President would not, but for the issue of a Proclamation under this Article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation under this Article has ceased to operate, except as to things done or omitted to be done before the expiration of the said period.

and it shall be the duty of the Public Service Commission to advise on any matter so referred to them and on any other matter which the President or the Governor as the case may be may refer to the Commission

(3) Where under the Constitution or any law rules are made for regulating the appointment or conditions of service of persons in the service of Pakistan but not under the control of the Federal Government or a Provincial Government such rules may provide for consultation with the appropriate Public Service Commission and subject to any express provision of the Constitution or of the said law clause (2) shall apply *mutatis mutandis*

Power to extend functions of Public Service Commissions

189 An Act of Parliament may provide for the exercise of additional functions by the Federal Public Service Commission and an Act of a Provincial Legislature may provide for the exercise of additional functions by the Provincial Public Service Commission

Report of Public Service Commissions

190.—(1) It shall be the duty of the Federal Public Service Commission to present to the President annually a report on the work done by the Commission and the President shall cause a copy of the report to be laid before the National Assembly and it shall be the duty of each Provincial Public Service Commission to present to the Governor annually a report on the work done by the Commission and the Governor shall cause a copy of the report to be laid before the Provincial Assembly

(2) The report shall be accompanied by a memorandum setting out

(a) the cases if any in which the advice of the Commission was not accepted and the reasons therefor

(b) the matters if any on which the Commission ought to have been consulted but was not consulted and the reasons therefor

PART XI

Emergency Provisions

Proclamation of emergency on account of war, internal disturbance

191 —(1) If the President is satisfied that a grave emergency exists in which the security or economic life of Pakistan or any part thereof is threatened by war or external aggression or by internal disturbance beyond the power of a Provincial Government to control he may issue a Proclamation of Emergency in this Article referred to as a Proclamation

(2) *While a Proclamation is in operation notwithstanding anything in the Constitution*—

(a) Parliament shall have power to make laws for a Province or any part thereof with respect to any matter not enumerated in the Federal or the Concurrent List

(b) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority of the Province is to be exercised and

(c) the President may by Order assume to himself or direct the Governor of a Province to assume on behalf of the President all or any of the functions of the Government of the Province and all or any of the powers vested in or exercisable by any body or authority in the Province other than the Provincial Legislature and make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province

Provided that nothing in sub clause (c) shall authorize the President to assume to himself or direct the Governor of the Province to assume on his behalf any of the powers vested in or exercisable by a High Court or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts

(3) The power of Parliament to make laws for a Province with respect to any matter shall include power to make laws conferring powers and imposing duties or authorizing the conferring of powers and the imposition of duties upon the Federation or officers and authorities of the Federation as respects that matter

(4) Nothing in this Article shall restrict the power of a Provincial Legislature to make any law which under the Constitution it has power to make but if any provision of a Provincial law is repugnant to any provision of a Federal law which Parliament has under this Article power to make the Federal law whether passed before or after the Provincial law shall prevail and the Provincial law shall to the extent of the repugnancy but so long only as the Federal law continues to have effect be void

(5) A law made by Parliament which Parliament would not but for the issue of a Proclamation have been competent to make shall to the extent of the incompetency cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period

(6) A Proclamation shall be laid before the National Assembly as soon as conditions make it practicable

and in formulating such plans, the Council shall aim at ensuring that uniform standards are attained in the economic development of all parts of the country.

(3) The Council may, from time to time, appoint such committees or expert bodies as it considers necessary for the discharge of its functions.

(4) In the implementation of the aforesaid plans, the President shall take suitable steps to decentralise the administration by setting up, in each Province, necessary administrative machinery to provide the maximum convenience to the people, and expeditious disposal of Government business and public requirements.

(5) Nothing in this Article shall affect the exercise of the executive authority of the Federation or the Provinces.

(6) The Council shall submit every year to the National Assembly a report on the results obtained and the progress made in the achievement of its objects, and copies of the report shall also be laid before each Provincial Assembly.

Appointment of Advisory Boards for Posts and Telegraphs Department.

200.—(1) The President shall appoint a Board for each Province consisting of representatives of the Federal Government and the Government of the Province, to advise the Federal Government on matters relating to Posts and Telegraphs in the Province.

(2) Notwithstanding anything in the Constitution, recruitment to posts and services, other than Class I, in the Posts and Telegraphs Department in a Province shall be made from amongst persons domiciled in that Province.

Chapter III.—Provisions relating to States and Rulers

Territories in accession with Pakistan.

201. Notwithstanding anything in the Constitution, the President may, by Order, make provision for representation in the National Assembly of the territories mentioned in sub-clauses (b), (c) and (d) of clause (2) of Article 1, provided that equality of representation between East Pakistan and West Pakistan is preserved.

Agreements relating to Rulers.

202.—(1) Where, under any agreement made at any time before or after the Constitution Day between the Government of Pakistan and the Ruler of a State which at that time was in accession with Pakistan, the payment of any sums free of tax has been guaranteed or assured by the Government of Pakistan to that Ruler as his privy purse, those sums shall be charged on the Federal Consolidated Fund and shall be paid out of that Fund to the Ruler free of tax.

(2) Where the territories of any such Ruler as aforesaid are comprised within a Province, there shall be charged on the Consolidated Fund of that Province, and be paid out of that Fund to the Federal Government, any sum which that Government has paid to the Ruler under clause (1).

(3) In the exercise of any power to make laws, and in the exercise of the executive authority of the Federation or a Province, due regard shall be had to the guarantees or assurances given under any such agreement as is referred to in clause (1) with respect to the personal rights, privileges and dignities of the Ruler of any such State as is referred to in that clause.

Provision relating to the State of Jammu and Kashmir.

203. When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the said State shall be determined in accordance with the wishes of the people of that State.

Chapter IV.—Scheduled Castes and backward classes

Definition of Scheduled Castes.

204. The castes, races and tribes, and parts or groups within castes, races and tribes which, immediately before the Constitution Day, constituted the Scheduled Castes within the meaning of the Fifth Schedule to the Government of India Act, 1935, shall, for the purposes of the Constitution, be deemed to be the Scheduled Castes until Parliament by law otherwise provides.

Promotion of the interests of Scheduled Castes and backward classes.

205. The Federal and Provincial Governments shall promote, with special care, the educational and economic interests of the Scheduled Castes and backward classes in Pakistan and shall protect them from social injustice and exploitation.

Appointment of Commission to investigate the conditions of Scheduled Castes and backward classes.

206.—(1) The President may appoint a Commission to investigate the conditions of Scheduled Castes and backward classes in Pakistan and make recommendations as to the steps to be taken and grants to be made by the Federal or Provincial Governments to improve their conditions.

(2) The Commission appointed under clause (1) shall investigate the matters referred to them and submit a report to the President with such recommendations as the Commission thinks fit, and copies of the report shall be laid before the National Assembly and the Provincial Assemblies.

Proclamation in case of financial emergency

194.—(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of Pakistan, or any part thereof, is threatened, he may after consultation with the Governors of the Provinces or [illegible] stability or credit of Pakistan or any part thereof

(2) Notwithstanding anything in the Constitution, any such directions may include a provision requiring a reduction of the salary and allowances of all or any class of persons serving in connection with the affairs of a Province

(3) While a Proclamation issued under this Article is in operation, the President may issue directions for the reduction of the salaries and allowances of all or any class of persons serving in connection with the affairs of the Federation, including the Judges of the Supreme Court and High Courts

(4) The provisions of clause (2) of Article 193 shall apply to a Proclamation issued under this Article as they apply to a Proclamation issued under that Article

Revocation of Proclamation etc

195.—(1) A Proclamation issued under this Part may be varied or revoked by a subsequent Proclamation

(2) The validity of any Proclamation issued or Order made under this Part shall not be questioned in any court

Parliament to make laws of indemnity etc

196. Nothing in the Constitution shall prevent Parliament from making any law indemnifying any person in the service of the Federal or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan where martial law was in force, or validating any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area

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PART XII

General Provisions

Chapter I —Islamic Provisions

Organization for Islamic research and instruction

197.—(1) The President shall set up an organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis

(2) Parliament may by Act provide for a special tax to be imposed upon Muslims for defraying expenses of the organization set up under clause (1), and the proceeds of such tax shall not, notwithstanding anything in the Constitution, form part of the Federal Consolidated Fund

Provisions relating to the Holy Quran and Sunnah

198.—(1) No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in clause (3)

(3) Within one year of the Constitution Day, the President shall appoint a Commission—

(a) to make recommendations—

(i) as to the measures for bringing existing law into conformity with the Injunctions of Islam and

(ii) as to the stages by which such measures should be brought into effect , and

(b) to compile in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect

The Commission shall submit its final report within five years of its appointment, and may submit any interim report earlier The report, whether interim or final, shall be laid before the National Assembly within six months of its receipt, and the Assembly after considering the report shall enact laws in respect thereof

(4) Nothing in this Article shall affect the personal laws of non Muslim citizens, or their status as citizens, or any provision of the Constitution

Explanation —In the application of this Article to the personal law of any Muslim sect, the expression " Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect

Chapter II —Appointment of Special Councils and Boards

National Economic Council

[illegible]

(2) The Council shall review the overall economic position of the country and shall, for advising the Federal and Provincial Governments, formulate plans in respect of financial, commercial and economic policies,

Provided that for the period of twenty years from the Constitution Day, English shall continue to be used for all official purposes for which it was used in Pakistan immediately before the Constitution Day, and Parliament may by Act provide for the use of English after the expiration of the said period of twenty years, for such purposes as may be specified in that Act.

(2) On the expiration of ten years from the Constitution Day, the President shall appoint a Commission to make recommendations for the replacement of English.

(3) Nothing in this Article shall prevent a Provincial Government from replacing English by either of the State languages for use in that Province before the expiration of the said period of twenty years.

Oaths and affirmations.

215. A person elected or appointed to any office mentioned in the Second Schedule shall before entering upon the office make and subscribe an oath or affirmation in accordance with that Schedule.

Amendment of the Constitution.

216.—(1) The Constitution or any provision thereof may be amended or repealed by an Act of Parliament if a Bill for that purpose is passed by a majority of the total number of members of the National Assembly, and by the votes of not less than two-thirds of the members of that Assembly present and voting, and is assented to by the President:

Provided that if such a Bill provides for the amendment or repeal of any of the provisions contained in Articles 1, 31, 39, 44, 77, 106, 118, 119, 199, or this Article, it shall not be presented to the President for his assent unless it has been approved by a resolution of each Provincial Assembly, or, if it applies to one Province only, of the Provincial Assembly of that Province:

Provided further that the Schedules, other than the Fifth Schedule and Part IV of the Fourth Schedule, may be amended or repealed if a Bill for that purpose is passed by a majority of the members present and voting and is assented to by the President:

Provided further that a Provincial Legislature may by law make provision with respect to matters specified in Part IV of the Fourth Schedule.

(2) A certificate under the hand of the Speaker of the National Assembly that a Bill has been passed in accordance with the provisions of clause (1) shall be conclusive, and shall not be questioned in any court.

Application of Fourth Schedule.

217. Until other provision in that behalf is made by law, the provisions of the Fourth Schedule shall apply in respect of the matters specified therein.

CHAPTER VI.—INTERPRETATION

Definitions, etc.

218.—(1) In the Constitution, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

"Act of Parliament" means a Bill passed by the National Assembly and assented to by the President, and includes an Ordinance made by the President in accordance with the Constitution;

"Act of a Provincial Legislature" means a Bill passed by a Provincial Assembly and assented to by the Governor or the President, and includes an Ordinance made by the Governor in accordance with the Constitution;

"agricultural income" means agricultural income as defined for the purposes of the enactments relating to income-tax;

"Article" means an Article of the Constitution;

"borrow" includes the raising of money by the grant of annuities and "loan" shall be construed accordingly;

"casual vacancy" means a vacancy arising in the National or a Provincial Assembly otherwise than by reason of the dissolution of the Assembly;

"citizen" or "citizen of Pakistan" means a person who is a citizen of Pakistan according to the law relating to citizenship;

"clause" means a clause of the Article in which the expression occurs;

"Concurrent List" means the Concurrent List in the Fifth Schedule;

"Constituent Assembly" means the Constituent Assembly of the Dominion of Pakistan;

"Constitution Day" means the day fixed by the Constituent Assembly under clause (4) of Article 222;

"corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:—

(a) that it is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorized to be made from dividends payable by the companies to individuals; and

207.—(1) There shall be a Special Officer for the Scheduled Castes and backward classes in Pakistan, to be appointed by the President. Special Officer for Scheduled Castes and backward classes

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled castes and backward classes by Article 205, to investigate the extent to which any recommendations of the Commission appointed under Article 206 are carried out, and to report his findings to the President at such intervals as the President may direct; and the President shall cause all such reports to be laid before the National Assembly.

CHAPTER V.—MISCELLANEOUS

208.—(1) No title, honour or decoration shall be conferred by the State on any citizen, but the President may award decorations in recognition of distinguished military or public service. Titles, honours and decorations

Explanation.—In this clause "the State" has the same meaning as in Part II.

(2) No citizen of Pakistan shall accept any title, honour or decoration from any foreign State except with the approval of the President.

209. The President shall have power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or authority established by law. Pardons, reprieves, etc.

210.—(1) Notwithstanding anything in the Constitution, the President may, by public notification, direct that, for a period not exceeding three months from such date as may be specified in the notification— Special provisions relating to major ports and aerodromes

(a) any law made by Parliament, or by a Provincial Legislature, shall not apply to any major port or aerodrome, or shall apply thereto subject to such exceptions and modifications as may be specified in the notification ; or

(b) any existing law shall cease to have effect in so far as it applies to any major port or aerodrome, except as respects things done or omitted to be done before the aforesaid date, or shall in its application to such port or aerodrome, have effect subject to such exceptions or modifications as may be specified in the notification.

Explanation.—In this Article "aerodrome" means an aerodrome as defined in any law relating to airways, aircraft or air navigation.

211.—(1) Parliament shall by law provide for the determination of the area of the Federal Capital, and until such a law is passed the area which immediately before the Constitution Day was comprised in the Capital of the Federation shall continue to be the Federal Capital. Federal Capital

(2) The administration of the Federal Capital shall vest in the President who may, by Order, make such provision as he may deem necessary or proper—

(a) for its government and administration,

(b) with respect to the laws which are to be in force therein,

(c) with respect to the jurisdiction, expenses or revenues of any court exercising the jurisdiction of a High Court therein,

(d) with respect to apportionments and adjustments of, and in respect of, assets and liabilities ,

(e) for authorizing expenditure from the revenues of the Federation, and

(f) with respect to other supplemental, incidental and consequential matters.

(3) Notwithstanding anything in the Constitution, Parliament shall have power to make laws for the Federal Capital with respect to matters enumerated in the Provincial List and matters not enumerated in any List in the Fifth Schedule, other than matters relating to the High Courts.

212. The remuneration and other privileges of a person holding the office of President, Minister of the Federal or a Provincial Government, Speaker or Deputy Speaker of the National or a Provincial Assembly, Governor, Comptroller and Auditor-General, member of a Public Service Commission, Election Commissioner, or Regional Election Commissioner, or member of the Delimitation Commission shall not be varied to his disadvantage during his term of office. Remuneration of President, Ministers, etc., not to be varied during their term of office

213. Neither the President nor the Governor of a Province, shall be answerable to any court for the exercise of powers and performance of duties of his office, or for any act done or purported to be done in the exercise of those powers and performance of those duties : Protection to the President and the Governor

Provided that nothing in this Article shall be construed as restricting the right of any person to bring appropriate proceedings against the Federal Government or a Provincial Government.

214.—(1) The State languages of Pakistan shall be Urdu and Bengali : State languages

(3) For the avoidance of doubt it is hereby declared that a session of the National or a Provincial Assembly shall be taken to commence at the beginning of the first meeting of the Assembly after a general election or prorogation and to end with the prorogation or dissolution of the Assembly, and references in the Constitution to an Assembly's being in session shall be construed accordingly.

Applications of General Clauses Act, 1897.

219.—(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall apply for the interpretation of the Constitution as it applies for the interpretation of a Central Act, as if the Constitution were a Central Act.

(2) For the application of the General Clauses Act, 1897, to the interpretation of the Constitution, the Acts repealed by the Constitution shall be deemed to be Central Acts

CHAPTER VII.—COMMENCEMENT AND REPEAL

Commencement.

220. This Article and Articles 218, 219 and 222 shall come into force at once, and the remaining provisions of the Constitution shall come into force on the Constitution Day.

Repeal

221. The Government of India Act, 1935, and the Indian Independence Act, 1947, together with all enactments amending or supplementing those Acts, are hereby repealed:

Provided that the repeal of the provisions of the Government of India Act, 1935, applicable for the purposes of Article 230 shall not take effect until the first day of April, 1957

PART XIII

Temporary and Transitional Provisions

Provision as to President

222.—(1) As soon as may be after the National Assembly has been constituted after the first general election held for the purposes of that Assembly, the Chief Election Commissioner shall take the steps necessary for the election of a President under Article 32

(2) The Constituent Assembly shall, in accordance with the provisions contained in the Sixth Schedule, elect a person to serve as President until such time as a President elected under Article 32 has entered upon his office, and the election shall take place within thirty days of the coming into force of this Article, on a day fixed by the Constituent Assembly

(3) A person shall not be qualified for election as President under this Article unless he is a citizen of Pakistan and has attained the age of forty years

(4) The Constituent Assembly shall fix a day to be the Constitution Day, and the person elected as President under this Article shall, after taking an oath or affirmation in the form set out in paragraph 1 of the Second Schedule, enter upon his office on that day

(5) The validity of the election of a President elected under this Article shall not be questioned in any court

(6) If a vacancy occurs in the office of the President elected under this Article, by reason of his death, resignation or removal from office, it shall be filled by a person elected by the National Assembly in accordance with the provisions contained in the Sixth Schedule

Provision as to the National Assembly and its officers

223.—(1) Until the first meeting of the National Assembly constituted in accordance with the provisions of the Constitution, the body functioning as the Constituent Assembly of Pakistan, immediately before the Constitution Day, shall, as from that day, be the National Assembly of Pakistan

(2) Any casual vacancy in the National Assembly under this Article shall be filled in accordance with such rules as may be made in that behalf by the President

(3) Persons holding office immediately before the Constitution Day as Speaker and Deputy Speaker of the Constituent Assembly shall, as from that day, hold office respectively as Speaker and Deputy Speaker of the National Assembly under this Article, on the same terms and conditions as to remuneration and other privileges as were applicable to them immediately before the Constitution Day

Continuance in force of existing laws and their adaptation.

224.—(1) Notwithstanding the repeal of the enactments mentioned in Article 221, and save as is otherwise expressly provided in the Constitution, all laws (other than those enactments), including Ordinances, Orders-in-Council, Orders, rules, bye-laws, regulations, notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Constitution Day, shall, or far as applicable and with the necessary adaptations, continue in force until altered, repealed or amended by the appropriate legislature or other competent authority

Explanation 1 —The expression "laws" in this Article shall include Letters Patent constituting a High Court

Explanation 2 —In this Article "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation

(2) For the purpose of bringing the provisions of any law in force in Pakistan or any part thereof into

(c) that no provision ex sts for taking the tax so paid into account in comput ng for the purposes of income tax the total income of ind viduals receiving such dividends or in computing the income tax payable by or refundable to such individuals

court does not include the National or a Prov ncial Assembly or any comm ttee of such an Assembly,

debt includes any l ability in respect of any obl gation to repay cap tal sums by way of annu t es and any l ab lity under any guarantee and debt charges shall be construed accord ngly

elector means a person whose name is included in an electoral roll prepared in accordance with the Const tution

estate duty means a duty to be assessed on or by reference to the principal value ascertained in accordance with such rules as may be prescribed by or under any Act of Parl ament relat ng to the duty of all property passing upon death or deemed under the provis ons of the said Act so to pass

existing law means any Act Ordinance order bye law rule regulation or notification wh ch immed ately before the Constitution Day has the force of law in the whole or any part of Pakistan

Federal Court means the Federal Court established under the Government of Ind a Act 1935 and functioning as such immediately before the Constitution Day

Federal List means the Federal List in the Fifth Schedule

Federat on means the Islamic Republ c of Pakistan

Governor General means the Governor General of the Dom n on of Pak stan

guarantee includes any obl gation undertaken before the Constitution Day to make payments in the event of the profits of an un lertak ng fall ng short of a spec fied amount

legal proceed ngs include a su t an appeal or an appl cat on or any cause or matter pend ng before a court of law for adjudication

Part means a Part of the Constitution

pens on means a pension whether contributory or not of any kind whatsoever payable to or in respect of any person and includes retired pay so payable or gratu ty so payable and any sum or sums so payable by way of the return w th or without interest thereon or any add t on thereto of subscriptions to a provident fund

Provincial List means the Provincial List in the Fifth Schedule

Publ c notification means in relation to the Federation a not ficat on n the Gazette of Pakistan and in relation to a Province a not fication in the official Gazette of the Province

remuneration includes salary allowances and pension

Schedule means a Schedule to the Constitution

Scheduled Caste means a S heduled Caste determ ned in accordance w th the provisions of Art cle 204

securities includes stock

service of Pakistan means any serv ce or post in connection with the affa rs of the Federation or of a Province and includes any defence service and any other service declared as a serv ce of Pak stan by or under an Act of Parliament or of a Provincial Leg slature but does not include service as Governor General President Governor Speaker or Deputy Speaker of the Nat onal or a Provincial Assembly Min ster of the Federal or a Provinc al Government Min ster of State or Deputy M n ster of the Federal Government Deputy M nister or Parl amentary Secretary of a Prov ncial Government Judge of the Supreme Court or a H gh Court or Comptroller and Aud tor General and servant of Pakistan shall be construed accordingly

Special Areas means the areas of the Province of West Pakistan which immediately before the commencement of the Establ shment of West Pak stan Act 1955 were—

(a) the tribal areas of Baluch stan the Punjab and the North West Frontier and

(b) the States of Amb Ch tral D r and Swat

sub clause means a sub clause of the clause in wh ch the express on occurs

taxation includes the impos tion of any tax or impost whether general local or special and tax shall be construed accordingly

tax on income includes a tax in the nature of an excess profits tax or bus ness profits tax

(2) Where under the Const tution something is requ red to be specified it shall be spec fied if no specifying author ty has been prescribed by the Pres dent

(3) All legal proceedings pending in the Federal Court, immediately before the Constitution Day, shall, on such day, stand transferred to, and be deemed to be pending before, the Supreme Court for determination; and any judgment or order of the Federal Court delivered or made before the Constitution Day shall have the same force and effect as if it had been delivered or made by the Supreme Court.

(4) Without prejudice to the other provisions of the Constitution, the Supreme Court shall have the same jurisdiction and powers as were immediately before the Constitution Day, exercisable by the Federal Court, and references in any law to the Federal Court shall be deemed to be references to the Supreme Court.

(5) Without prejudice to the other provisions of the Constitution, each High Court shall have the same jurisdiction and powers as were exercisable by it immediately before the Constitution Day.

(6) Subject to the provisions of the Constitution –

(a) all civil, criminal and revenue courts exercising jurisdiction and functions, immediately before the Constitution Day, shall, as from that day, continue to exercise their respective jurisdictions and functions, and all persons holding office in such courts shall continue to hold their respective offices;

(b) all authorities and all officers, judicial, executive, and ministerial throughout Pakistan exercising functions, immediately before the Constitution Day, shall, as from that day, continue to exercise their respective functions.

Legal proceedings by or against the Federation of Pakistan

228. (1) Subject to clause (2), if any legal proceedings in which the Federation of Pakistan is a party were pending in any court, immediately before the Constitution Day, then, in those proceedings, for "the Federation of Pakistan", "Pakistan" shall, as from that day, be deemed to be substituted.

(2) Any legal proceedings which, but for the Constitution, could have been brought by or against the Federation of Pakistan in respect of a matter which, immediately before the Constitution Day, was the responsibility of the Federation and has, under the Constitution, become, the responsibility of a Province, shall be brought by or against the Province concerned, and if any such legal proceedings were pending in any court immediately before the Constitution Day, then, in those proceedings for the Federation of Pakistan, the Province concerned shall, as from that day, be deemed to be substituted.

Public Service Commission.

229. A person holding office as Chairman or other member of the Federal Public Service Commission or of a Provincial Public Service Commission, immediately before the Constitution Day, shall, as from that day, continue to hold his respective office on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before the Constitution Day, until the expiration of his term of office as determined by the law under which he was appointed

Provisions as to financial matters.

230. (1) The provisions of the Constitution relating to the Federal Consolidated Fund, or a Provincial Consolidated Fund, and the appropriation of moneys from either of such Funds, shall not apply in relation to moneys received or raised, or expenditure incurred, by the Federal Government or the Government of a Province in the financial year which includes the Constitution Day or in the next succeeding financial year; and notwithstanding anything in the Constitution any expenditure incurred during those financial years by the Federal Government or the Government of a Province shall be deemed to have been validly incurred if it is incurred in accordance with the provisions of the Government of India Act, 1935.

(2) For the purposes of clause (1), the provisions of the Government of India Act, 1935, and of any statement, demand, schedule or other document made thereunder, shall have effect in relation to any time after the Constitution Day subject to the modification that references therein to the holder of any office, or to any body, service or other matter, shall be construed as references to the holder of the corresponding office, or, as the case may be, to the corresponding body, service or matter, under the Constitution

(3) For the purposes of clause (1), if, at any time when the National Assembly stands dissolved, the President is satisfied that circumstances exist which render such action necessary, he shall have power to authenticate a schedule of authorized expenditure under the Government of India Act, 1935, although no Annual Financial Statement has previously been laid before the Assembly, and although no grants have been made by the Assembly.

(4) Clause (3) shall apply to the Governor of a Province, subject to the modification that references therein to the President and the National Assembly shall be construed as references to the Governor and the Provincial Assembly respectively.

(5) In relation to accounts which have not been completed or audited before the Constitution Day, the Comptroller and Auditor-General shall exercise the functions of the Auditor-General of the Dominion of Pakistan; but reports relating to the accounts of the Federal Government shall be submitted to the President, who shall cause them to be laid before the National Assembly, and reports relating to the accounts of a Province shall be submitted to the Governor, who shall cause them to be laid before the Provincial Assembly.

accordance with the provisions of the Constitution, the President may, within a period of two years from the Constitution Day, by Order, make such adaptations and modifications in such law, whether by way of amendment or repeal, as he may deem necessary or expedient, and any Order so made shall have effect from such date, whether before or after the date of the making of the Order, but not being prior to the Constitution Day, as may be specified in the Order.

(3) The President may authorize the Governor of a Province to exercise in relation to that Province the powers conferred upon him by clause (2) in respect of laws relating to matters enumerated in the Provincial List.

(4) The powers exercisable under clauses (2) and (3) shall be subject to the provisions of any Act of the appropriate legislature.

Provincial Legislatures.

225.—(1) Until a Provincial Assembly for the Province of East Pakistan has been duly constituted under the provisions of the Constitution, the Provincial Legislative Assembly for the Province of East Bengal functioning immediately before the Constitution Day shall exercise the powers conferred, and perform the duties imposed upon, the Provincial Assembly of East Pakistan by or under the provisions of the Constitution, and a person holding office immediately before the Constitution Day as Speaker or Deputy Speaker of the Provincial Legislative Assembly for the Province of East Bengal shall, as from that day, hold office as Speaker or, as the case may be, Deputy Speaker of the Provincial Assembly of East Pakistan.

(2) Until a Provincial Assembly for the Province of West Pakistan has been duly constituted under the provisions of the Constitution, the Legislative Assembly of that province consisting of persons elected thereto under section 11 of the Establishment of West Pakistan Act, 1955 (hereinafter referred to as the Legislative Assembly) shall exercise the powers conferred and perform the duties imposed upon the Provincial Assembly of West Pakistan by or under the provisions of the Constitution, and such person as may have been elected as Speaker or Deputy Speaker of the Legislative Assembly before the Constitution Day shall, as from that day, hold office as Speaker or, as the case may be, Deputy Speaker of the Provincial Assembly.

(3) Any casual vacancy in a Provincial Assembly functioning under clause (1) or clause (2) shall be filled in accordance with such rules as may be made in that behalf by the President.

(4) The provisions of clause (1) of Article 79 shall not apply to a Provincial Assembly functioning under clause (1) or clause (2).

Continuance in office of Governors, Ministers and Advocates-General.

226.—(1) A person holding office as Governor of a Province immediately before the Constitution Day shall, as from that day, continue to hold that office until a Governor appointed under the Constitution enters upon his office.

(2) A person holding office as Prime Minister or other Minister of the Governor-General immediately before the Constitution Day shall, as from that day, hold office as Prime Minister or other Minister of the Federal Government, as the case may be.

Explanation.—In this clause the word "Minister" includes a Minister of State.

(3) A person holding office as Chief Minister or other Minister of the Governor of a Province immediately before the Constitution Day shall, as from that day, hold office as Chief Minister or other Minister of the Provincial Government, as the case may be.

(4) The person holding office as Advocate-General of Pakistan immediately before the Constitution Day shall, as from that day, hold office as Attorney-General for Pakistan on the terms and conditions applicable to him immediately before the Constitution Day.

(5) The person holding office as Auditor-General of Pakistan immediately before the Constitution Day shall, as from that day, hold office as Comptroller and Auditor-General of Pakistan on the terms and conditions applicable to him immediately before the Constitution Day.

(6) A person holding office as Advocate-General of a Province immediately before the Constitution Day shall, as from that day, continue to hold that office on the terms and conditions applicable to him immediately before the Constitution Day.

Judges, Courts and legal proceedings.

227.—(1) A person holding office as Chief Justice or other Judge of the Federal Court immediately before the Constitution Day shall, as from that day, hold office as Chief Justice or other Judge of the Supreme Court, as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before the Constitution Day.

(2) A person holding office as Chief Justice or other Judge of a High Court immediately before the Constitution Day shall, as from that day, hold office as Chief Justice or other Judge of that court, as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before the Constitution Day.

Provided that no person shall subscribe, whether as proposer or as seconder, more than one nomination paper at any one election.

5. The scrutiny shall be held by the Chief Election Commissioner at the time and place fixed by him, and if after scrutiny only one person remains validly nominated, the Chief Election Commissioner shall declare that person to be elected, or if more than one person remains validly nominated, he shall announce, by public notification, the names of the persons validly nominated, to be hereinafter called the candidates.

6. A candidate may withdraw his candidature at any time before noon on the day fixed for this purpose by delivering a notice in writing under his hand to the Presiding Officer with whom his nomination paper has been deposited, and a candidate who has given a notice of withdrawal of his candidature under this paragraph shall not be allowed to cancel that notice.

7. If all but one of the candidates have withdrawn, that one shall be declared by the Chief Election Commissioner to be elected.

8. If there is no withdrawal, or if, after withdrawals have taken place, two or more candidates are left, the Chief Election Commissioner shall announce by public notification the names of the candidates, and their proposers and seconders, and shall proceed to hold a poll by secret ballot in accordance with the provisions of the succeeding paragraphs.

9. If a candidate whose nomination has been found to be in order dies after the time fixed for nomination, and a report of his death is received by the Presiding Officer before the commencement of the poll, the Presiding Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Chief Election Commissioner, and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election :

Provided that no further nomination shall be necessary in the case of a candidate whose nomination was valid at the time of the countermanding of the poll :

Provided further that no person who has under paragraph 6 of this Schedule given notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding.

10. The poll shall be taken at the meetings of the members of the National Assembly and of each Provincial Assembly, and the respective Presiding Officers shall conduct the poll with the assistance of such officers as they may, with the approval of the Chief Election Commissioner, respectively appoint.

11. A ballot paper shall be issued to every member of the National Assembly, and of each Provincial Assembly, who presents himself for voting at the meeting of the members of the Assembly of which he is a member (hereinafter referred to as a person voting), and he shall exercise his vote personally by marking the paper in accordance with the provisions of the succeeding paragraphs.

12. The poll shall be by secret ballot by means of ballot papers containing the names of all the candidates in alphabetical order who have not withdrawn, and a person voting shall vote by placing a cross against the name of the person for whom he wishes to vote.

13. Ballot papers shall be issued from a book of ballot papers with counterfoils, the ballot papers and each counterfoil being numbered; and when a ballot paper is issued to a person voting his name shall be entered on the counterfoil and the ballot paper shall be authenticated by the initials of the Presiding Officer.

14. A ballot paper having been marked by the person voting shall be deposited by that person in a ballot box to be placed in front of the Presiding Officer.

15. If a ballot paper is spoiled by a person voting he may return it to the Presiding Officer, who shall issue a second ballot paper, cancelling the first ballot paper and marking the cancellation on the appropriate counterfoil.

16. A ballot paper shall be invalid if—

(i) there is upon it any name, word or mark, other than the official number, by which the person voting may be identified; or

(ii) it does not contain the initials of the Presiding Officer ; or

(iii) it does not contain a cross; or

(iv) a cross is placed against the names of two or more candidates; or

(v) there is any uncertainty as to the identity of the candidate against whose name the cross is placed.

17. After the close of the poll each Presiding Officer shall, in the presence of such of the candidates or their authorized representatives as may desire to be present, open and empty the ballot boxes and examine the ballot papers therein, rejecting any which are invalid, count the number of votes recorded for each candidate

(6) Notwithstanding anything in the Constitution all taxes and fees levied under law in force, immediately before the Constitution Day, shall continue to be levied until they are varied or abolished by Act of the appropriate legislature

Succession to property and assets, rights, liabilities and obligations

231.—(1) All property and assets which immediately before the Constitution Day were vested in Her Majesty for the purposes of the Federal Government shall, as from that day, vest in the Federal Government, unless they were used for purposes which on the Constitution Day become purposes of the Government of a Province, in which case they shall, as from that day, vest in the Provincial Government

(2) All property and assets which immediately before the Constitution Day were vested in Her Majesty for the purposes of the Government of a Province shall, as from that day, vest in the Government of that Province

(3) All rights, liabilities and obligations of the Federal Government or the Government of a Province, whether arising out of any contract or otherwise, shall as from the Constitution Day, be respectively the rights liabilities and obligations of the Federal Government, and of the Government of the corresponding Province

Provided that all rights, liabilities and obligations relating to any matter—

(a) which immediately before the Constitution Day was the responsibility of the Federal Government but which under the Constitution has become the responsibility of the Government of a Province whether arising out of a contract or otherwise, shall devolve upon the Government of that Province,

(b) which immediately before the Constitution Day was the responsibility of the Government of a Province, but which under the Constitution has become the responsibility of the Federal Government, whether arising out of a contract or otherwise, shall devolve upon the Federal Government

Transitional provision as to servants of the Crown

232. Subject to the provisions of the Constitution every person who was immediately before the [illegible] the affairs of the [illegible] e terms and condi [illegible]

Transitional provision as to conditions of service of persons appointed by the Secretary of State

233 Except as otherwise expressly provided by the Constitution, every person who having been appointed by the Secretary of State, or the Secretary of State in Council, to a civil service of the Crown in India continues after the Constitution Day to serve under the Federal Government or the Government of a Province shall be entitled to receive from the Federal Government or the Government of the Province, which he is from time to time serving, the same conditions of service as regards salary, allowances, leave and pensions and the same rights in disciplinary matters, or rights as similar thereto as the changed circumstances may permit as he was entitled to receive immediately before the Constitution Day

Power of President to remove difficulties

[illegible]

necessary or expedient

Provided that no such Order shall be made after the first meeting of the National Assembly constituted after the first general election held for the purposes of that Assembly

(2) Every Order under this Article shall be laid before the National Assembly, and may be amended or repealed by Act of Parliament

FIRST SCHEDULE

(Articles 32 and 33)

Election of President

1 The Chief Election Commissioner shall hold and conduct any election to the office of President, and shall be the Returning Officer for such election

2 The Chief Election Commissioner shall appoint Presiding Officers to preside at the meeting of the members of the National Assembly, which shall be held at Karachi, and at the meetings of the members of the Provincial Assemblies of East Pakistan and West Pakistan, which shall be held at Dacca and Lahore, respectively

3 The Chief Election Commissioner shall by public notification fix the time and place for depositing nomination papers, holding a scrutiny, making withdrawals, if any, and holding the poll, if necessary

4 At any time before noon on the day fixed for nomination any member of the National Assembly or of a Provincial Assembly may nominate for election as President a person qualified for election as President by delivering to the Presiding Officer of the Assembly of which he is a member, a nomination paper, signed by himself as proposer and by another member of that Assembly as seconder, together with a statement signed by the person nominated that he consents to the nomination

4 *Chief Minister and other Ministers of a Province*.—Oaths (or affirmations) in the following forms shall be administered by the Governor of the Province or by some person deputed by him :—

(a) *Oath (or affirmation) of office* :

"I, ... , do solemnly (or affirm) that I will faithfully discharge the duties of the office of Chief Minister (or Minister) of the Government of the Province of. . . . . , that I will bear true faith and allegiance to Pakistan, that I will preserve, protect and defend the Constitution, and that I will do right to all manner of people according to law without fear or favour, affection or ill-will."

(b) *Oath (or affirmation) of secrecy* :

"I, , do solemnly swear (or affirm) that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration, or shall become known to me as Chief Minister (or Minister) of the Government of the Province of . . . . ,except as may be required for the due discharge of my duties as such Chief Minister (or Minister), or as may be specially permitted by the Governor of that Province acting in his discretion."

5 *Member of National Assembly or Provincial Assembly*.—An oath (or affirmation) in the following form shall be administered at a meeting of the respective Assembly by the person presiding :—

"I, . . . , having been elected a Member of the National Assembly (or Provincial Assembly of . .) do solemnly swear (or affirm) that I will bear true faith and allegiance to Pakistan and that I will faithfully discharge the duties upon which I am about to enter."

6 *Chief Justice or Judge of Supreme Court*.—An oath (or affirmation) in the following form shall be administered by the President or by some person deputed by him :—

"I, , having been appointed Chief Justice of Pakistan (or Judge of the Supreme Court), do solemnly swear (or affirm) that I will faithfully perform the duties of the office to the best of my ability, knowledge and judgment, without fear or favour, affection or ill-will, that I will bear true faith and allegiance to Pakistan, and that I will preserve, protect and defend the Constitution and laws of Pakistan."

7 *Chief Justice or Judge of a High Court*.—An oath (or affirmation) in the following form shall be administered by the Governor of the Province or by some person deputed by him :—

"I, , having been appointed Chief Justice (or Judge) of the High Court of. . . . . . . , do solemnly swear (or affirm) that I will faithfully perform the duties of the office to the best of my ability, knowledge and judgment, without fear or favour, affection or ill-will, that I will bear true faith and allegiance to Pakistan, and that I will preserve, protect and defend the Constitution and laws of Pakistan."

8 *Comptroller and Auditor-General*.—An oath (or affirmation) in the following form shall be administered by the President or by some person deputed by him :—

"I, , having been appointed Comptroller and Auditor-General, do solemnly swear (or affirm) that I will bear true faith and allegiance to Pakistan and that I will faithfully perform the duties of the office to the best of my ability, knowledge and judgment."

THIRD SCHEDULE

(Articles 159 and 177)

The Judiciary

PART I

The Supreme Court

1. *Salary and allowance of Judges*.—(1) There shall be paid to the Chief Justice of Pakistan, a salary of Rs 5,500 per mensem and to every other Judge of the Supreme Court, a salary of Rs 5,100 per mensem.

(2) Every Judge of the Supreme Court shall be entitled to such other privileges and allowances, including allowances for expenses in respect of equipment and travelling on first appointment, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined to the allowances, privileges and rights which immediately before the Constitution Day, were admissible to the Judges of the Federal Court, and for this purpose the provisions of the Government of India (Federal Court) Order, 1937, shall, subject to the provisions of the Constitution, apply.

2. *Officers and servants of the Supreme Court*.—(1) Appointments of officers and servants of the Supreme

on the valid ballot papers and communicate the number of the votes so recorded to the Chief Election Commissioner

18 If there are only two candidates the candidate who has obtained the larger number of votes shall be declared by the Chief Election Commissioner to be elected

19 If there are three or more candidates and one of those candidates has obtained a larger number of votes than the aggregate number of votes obtained by the remaining candidates he shall be declared by the Chief Election Commissioner to be elected

20 If there are three or more candidates and the last preceding paragraph does not apply a further poll shall be held in accordance with the preceding provisions of this Schedule at which the candidate who obtained the smallest number of votes at the previous poll shall be excluded

21 The three last preceding paragraphs shall apply in relation to the further poll and any subsequent poll which may be necessary under the provisions of those paragraphs

22 Where at any poll any two or more candidates obtain an equal number of votes then—

(a) if there are only two candidates for election or

(b) if one of the candidates who obtained equality of votes is required to be excluded from a further poll under paragraph 20 of this Schedule

the selection of the candidate to be elected or as the case may be excluded shall be by drawing of lots

23 When after any poll the counting of the votes has been completed and the result of the voting determined the Chief Election Commissioner shall forthwith announce the result to those present and shall report the result to the Federal Government who shall forthwith cause the result to be declared by a public notification

24 The Chief Election Commissioner may by public notification with the approval of the President make rules for carrying out the purposes of this Schedule

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SECOND SCHEDULE

(Articles 215 and 222)

Oaths and Affirmations

1 *President of Pakistan* —An oath (or affirmation) in the following form shall be administered by the Chief Justice of Pakistan or by some person deputed by him —

> I   do solemnly swear (*or* affirm) that I will faithfully discharge the duties of the office of President of Pakistan according to law that I will bear true faith and allegiance to Pakistan that I will preserve protect and defend the Constitution and that I will do right to all manner of people according to law without fear or favour affection or ill will

2 *Governor of a Province* —An oath (or affirmation) in the following form shall be administered by the President or by some person deputed by him —

> I   do solemnly swear (*or* affirm) that I will faithfully discharge the duties of the office of Governor of the Province of   according to law that I will bear true faith and allegiance to Pakistan that I will preserve protect and defend the Constitution and that I will do right to all manner of people according to law without fear or favour affection or ill will

3 *Prime Minister and other Ministers of the Federal Government* —Oaths (or affirmations) in the following forms shall be administered by the President or by some person deputed by him —

(a) *Oath (or affirmation) of office*

> I   do solemnly swear (*or* affirm) that I will faithfully discharge the duties of the office of Prime Minister (*or* Minister) of the Federal Government that I will bear true faith and allegiance to Pakistan that I will preserve protect and defend the Constitution and that I will do right to all manner of people according to law without fear or favour affection or ill will

(b) *Oath (or affirmation) of secrecy*

> I   do solemnly swear (*or* affirm) that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as Prime Minister (*or* Minister) of the Federal Government except as may be required for the due discharge of my duties as Prime Minister (*or* Minister) or as may be specially permitted by the President acting in his discretion

may direct, and shall be in accordance with the rules framed by the High Court with the previous approval of the Governor.

(2) Subject to the provisions of any Act of the Provincial Legislature, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the High Court:

Provided that rules in so far as they relate to remuneration or leave shall require the previous approval of the Governor.

7. *Right to practise in High Courts.*—An advocate on the rolls of a High Court shall be entitled to act and plead in both the High Courts, and in all other courts subordinate thereto:

Provided that an advocate who has been struck off the rolls of a High Court shall not be entitled to act or plead in that court or in any other court subordinate thereto.

FOURTH SCHEDULE

(Article 217)

Temporary provisions

PART I

Remuneration and Privileges

1. Until Parliament by law otherwise provides, the remuneration and other privileges of persons holding offices mentioned in column 1 of the Table below shall be the same as were admissible, immediately before the Constitution Day, to persons holding offices mentioned in the corresponding entries in column 2 of that Table.

Table

Column 1	Column 2
President	Governor-General.
Speaker of the National Assembly	Speaker of the Constituent Assembly.
Prime Minister	Prime Minister.
Minister of the Federal Government	Minister of the Governor-General.
Minister of State of the Federal Government ..	Minister of State of the Governor-General.
Deputy Minister of the Federal Government ..	Deputy Minister of the Governor-General.
Deputy Speaker of the National Assembly ..	Deputy Speaker of the Constituent Assembly.
Member of the National Assembly	Member of the Constituent Assembly.
Governor of a Province	Governor of the corresponding Province.

PART II

Provisions relating to Elections

2. *Residence.*—(1) A person shall be deemed to be a resident in a constituency if he ordinarily resides in that constituency, or owns or is in possession of a dwelling house therein :

Provided that—

(a) any person who holds the office of Minister of the Federal or a Provincial Government, or Speaker or Deputy Speaker of the National or a Provincial Assembly shall be deemed, during any period in which he holds such office, to be a resident in the constituency in which he would have been resident if he had not held such office;

(b) any person who holds a public office, or is in the service of Pakistan, shall during any period for which he holds such office or is employed in such service be deemed to be a resident in the constituency in which he would have been a resident if he had not held such office or had not been so employed.

(2) Where a person becomes qualified to have his name entered in the electoral roll of a constituency under the proviso to paragraph 2, his wife, if otherwise qualified, shall become so qualified.

3.—(1) A person shall be qualified to be elected to the National Assembly if his name appears on the electoral roll of any constituency for that Assembly.

Court shall be made by the Chief Justice of Pakistan or such other Judge or officer of that court as he may direct, and shall be in accordance with rules framed by the Supreme Court with the previous approval of the President

(2) The conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Supreme Court

Provided that the rules in so far as they relate to remuneration or leave shall require the previous approval of the President

3 *Rule making power of the Supreme Court*—(1) The Supreme Court may with the previous approval of the President make rules for regulating the practice and procedure of the court including rules as to—

(a) the persons practising before the court

(b) the conditions subject to which any judgment pronounced or order made by the court may be reviewed and the procedure for such review including the time within which applications for such review are to be entered

(c) the procedure for hearing appeals and applications to the court including the time within which such appeals and applications are to be entered

(d) the entertainment of appeals under paragraph (c) of Article 159

(e) the costs of and incidental to any proceedings in the court

(f) the fees to be charged in respect of the proceedings in the court

(g) the procedure for summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of causing delay

(h) the number of Judges who are to sit for any purpose and the powers of Judges sitting alone and in any division of the court

(i) the stay of proceedings and the granting of bail

(j) the procedure for enquiries and investigations referred to the court for opinion or report

(2) No judgment shall be delivered and no report shall be made by the Supreme Court save in open court and with the concurrence of the majority of the Judges present at the hearing of the case but nothing shall prevent a Judge who does not concur from delivering a dissenting judgment or opinion

(3) Subject to the provisions of any rules made under this paragraph the Chief Justice of Pakistan shall determine which Judges are to constitute any division of the court and which Judges are to sit for any purpose

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PART II

The High Courts

4 *Salaries of Judges*—(1) There shall be paid to the Chief Justice of a High Court a salary of Rs 5 000 per mensem and to every other Judge of that Court a salary of Rs 4 000 per mensem

(2) Every Judge of a High Court shall be entitled to such other privileges and allowances including allowances for expenses in respect of equipment and travelling upon first appointment and to such rights in respect of leave of absence and pension as may be determined by the President and until so determined to the allowances privileges and rights which immediately before the Constitution Day were admissible to the Judges of the High Court and the provisions of the Government of India (High Court Judges) Order 1937 shall subject to the provisions of the Constitution apply

5 *Administrative functions of High Courts*—(1) Each High Court shall have superintendence and control over all courts subject to its appellate or revisional jurisdiction

(2) Without prejudice to the generality of the foregoing provision the High Court may—

(a) call for returns

(b) make and issue general rules and prescribe forms for regulating the practice and procedure of such courts

(c) prescribe forms in which books entries and accounts shall be kept by the officers of any such courts and

(d) settle tables of fees to be allowed to the sheriffs attorneys and all clerks and officers of such courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any law for the time being in force and shall require the previous approval of the Governor

6 *Officers and servants and expenses of the High Courts*—(1) Appointments of officers and servants of High Courts shall be made by the Chief Justice of the High Court or such other Judge or officer of the Court as he

(2) The Finance Committee shall consist of the Speaker as Chairman, the Minister of Finance, and such other members as may be elected thereto by the National Assembly.

(3) The Finance Committee may make rules regulating its own procedure.

8. *Secretariat of the National Assembly.*—(1) The National Assembly shall have its own secretarial staff.

(2) Parliament may by law regulate the recruitment and conditions of service of persons appointed to the secretarial staff of the National Assembly.

(3) Until provision is made by Parliament, the President may, after consultation with the Speaker of the National Assembly, make rules regulating the recruitment and conditions of service of persons appointed to the secretarial staff of the National Assembly, and any rules so made shall have effect subject to the provisions of any law.

PART IV

A—*Remuneration and Privileges in the Provinces*

9. Until a Provincial Legislature by law otherwise provides, the remuneration and other privileges of persons holding offices mentioned in column 1 of the table below shall be the same as were admissible, immediately before the Constitution Day, to persons holding offices mentioned in the corresponding entries in column 2 of that table

Table

Column 1	Column 2
Chief Minister of a Provincial Government ..	Chief Minister of the Governor of the corresponding Province.
Minister of a Provincial Government	Minister of the Governor of the corresponding Province.
Deputy Minister of a Provincial Government ..	Deputy Minister of the Governor of the corresponding Province.
Parliamentary Secretary of a Provincial Government	Parliamentary Secretary of the Governor of the corresponding Province.
Speaker of a Provincial Assembly	Speaker of the Legislative Assembly of the corresponding Province.
Deputy Speaker of a Provincial Assembly ..	Deputy Speaker of the Legislative Assembly of the corresponding Province.
Member of a Provincial Assembly	Member of the Legislative Assembly of the corresponding Province.

B—*Procedure and Privileges of a Provincial Assembly*

10. *Rules of Procedure.*—Until rules have been framed by the Assembly under Article 88, the procedure of a Provincial Assembly shall be regulated by the Rules of the corresponding Provincial Legislative Assembly in force immediately before the Constitution Day, subject to such amendments as may be made therein by the Governor.

11. *Privileges.*—Until an Act of the Provincial Legislature is made in that behalf under Article 89, the privileges of a Provincial Assembly, its members and committees, and the persons taking part in its proceedings shall be the same as those of the Legislative Assembly of that Province in force immediately before the Constitution Day.

12. *Finance Committee.*—(1) The expenditure of a Provincial Assembly, within the limits sanctioned under the Government of India Act, 1935, or within the limits of the Appropriation Act for the time being in force, shall be controlled by that Assembly acting on the advice of its Finance Committee.

(2) The Finance Committee shall consist of the Speaker, the Minister of Finance, and such other members as may be elected thereto by the Provincial Assembly.

(3) The Finance Committee may make rules regulating its own procedure.

13. *Secretariat of the Provincial Assembly.*—(1) The Provincial Assembly shall have its own secretarial staff.

(2) A person shall be qualified to be elected to a Provincial Assembly if his name appears on the electoral roll of any constituency for that Assembly

4 *Disqualifications for election to the National Assembly or a Provincial Assembly* —(1) A person shall be disqualified for being elected or for being a member of the National Assembly or a Provincial Assembly—

(a) if he is of unsound mind and stands so declared by a competent court

(b) if he is an undischarged insolvent

Provided that this disqualification shall cease after the expiration of ten years from the date on which he has been adjudged insolvent

(c) if he holds any office of profit in the service of Pakistan

(d) [illegible]

in that behalf by the provisions of that law

(e) if having been nominated as a candidate for election to the National Assembly or a Provincial Assembly or having acted as election agent to any person so nominated he has failed to lodge a return of election expenses within the time and in the manner required by law

Provided that this disqualification shall not take effect until one month after the date on which the return ought to have been lodged or until such time as the President in the case of a return relating to an election to the National Assembly and the Governor in the case of a return relating to an election to a Provincial Assembly may allow

Provided further that this disqualification shall cease when

(i) five years have elapsed since the date on which the return ought to have been lodged or

(ii) the disqualification is removed by the President in the case of a return relating to an election to the National Assembly and by the Governor in the case of a return relating to an election to a Provincial Assembly

(f) if he has been convicted of any offence before the date of the establishment of the Federation by a court in British India or on or after that date by a court in Pakistan and sentenced to transportation or to imprisonment for not less than two years unless a period of five years or such less period as the President in the case of election to the National Assembly and the Governor in the case of election to a Provincial Assembly may allow in any particular case has elapsed since his release

(g) if he has been dismissed for misconduct from the service of Pakistan on the recommendation of the Supreme Court or a Public Service Commission

Provided that this disqualification shall cease after the expiry of five years from the date of the dismissal or may at any time within that period be removed by the Governor in the case of dismissal from a service of a Province and by the President in any other case

(h) if he has ceased to be a citizen or has voluntarily acquired the citizenship of a foreign State or has made a declaration of allegiance or adherence to a foreign State

(2) For the purpose of clause (c) of sub paragraph (1) of this paragraph the Judges of the Supreme and High Courts and the Comptroller and Auditor General shall be deemed to be holding offices of profit in the service of Pakistan

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PART III

Procedure and Privileges of the National Assembly

5 *Rules of Procedure* —Until rules have been framed by the Assembly under Article 55 the procedure of the National Assembly shall be regulated by the Rules of the Constituent Assembly functioning as Federal Legislature in force immediately before the Constitution Day subject to such amendments as may be made therein by the President

6 *Privileges* —Until an Act of Parliament is made in that behalf under Article 56 the privileges of the National Assembly the committees and members thereof and the persons authorized to speak therein shall be the same as those of the Constituent Assembly in force immediately before the Constitution Day

7 *Finance Committee* —(1) The expenditure of the National Assembly within the limits sanctioned under the Government of India Act 1935 or within the limits of the Appropriation Act for the time being in force shall be controlled by that Assembly acting on the advice of its Finance Committee

14. Industries, owned wholly or partially by the Federation, or by a corporation set up by the Federation.

15. Mineral oil and natural gas.

16. The constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein; persons entitled to practise before the Supreme Court.

17. Elections to the National Assembly, to the Provincial Assemblies and to the office of President; the Election Commission.

18. Central intelligence and investigating organization; preventive detention for reasons connected with defence, foreign affairs, or the security of Pakistan; persons subjected to such detention.

19. Census; the survey of Pakistan; the Geological Surveys of Pakistan; Meteorological organizations.

20. Property of the Federation situated in any Province and the revenue therefrom.

21. Federal agencies and Federal institutions for the promotion of special studies and special research; libraries and museums financed by the Federation.

22 Federal Services, and the Federal Public Service Commission; Federal Pensions.

23 Remuneration of the President, Ministers, Ministers of State and Deputy Ministers of the Federal Government, Members, Speaker and Deputy Speaker of the National Assembly; remuneration of Comptroller and Auditor-General, Attorney General and the Governors of Provinces.

24. Privileges and immunities of the President and Governors.

25. Powers, privileges and immunities of the National Assembly and of the members and the committees thereof, enforcement of attendance of persons for giving evidence or producing documents before committees of the National Assembly.

26. Duties of customs (including export duties); duties of excise (including duties on salt, but excluding alcoholic liquor, opium and other narcotics), corporation taxes and taxes on income other than agricultural income; estate and succession duties in respect of property other than agricultural land; taxes on the capital value of assets exclusive of agricultural land; taxes on sales and purchases; terminal taxes on goods or passengers carried by sea or air; taxes on their fares and freights; taxes on mineral oil and natural gas.

27. Fees in respect of any of the matters in this List, excluding fees taken in courts.

28. Inquiries and statistics for the purpose of any of the matters in this List.

29. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; offences against laws with respect to any of the matters in this List.

30. All matters which under the Constitution are within the legislative competence of Parliament, and matters incidental thereto.

Concurrent List

Part I

1. Civil and criminal law, including the law of evidence and procedure, limitation, marriage and divorce, minors and infants; adoption, joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the Constitution Day subject to their personal law; wills; intestacy, succession, and transfer of property (excluding succession to and transfer of agricultural land); registration of deeds and documents, arbitration, contract; partnership; agency, bankruptcy and insolvency; actionable wrongs; legal and medical professions; contempt of court; trusts and official trustees.

2. Scientific and industrial research.

3. Poisons and dangerous drugs

4. Newspapers, books and printed publications; printing presses.

Part II

5. Relations between employers and employees; trade unions; industrial and labour disputes; welfare of labour including conditions of work; provident fund; employers liability; workmen's compensation; invalidity and old age pensions and maternity benefits; vocational and technical training of labour; social security and social insurance.

6. Measures to combat corruption.

7. Price control.

8. Relief and rehabilitation of refugees; custody, management and disposal of evacuee property.

9. Economic and social planning.

(2) The Prov ncial Leg slature may by law regulate the recru tment and cond t ons of serv ce of persons appo nted to the staff of the Provincial Assembly

prov s ons of any law

FIFTH SCHEDULE

(Article 106)

Federal L st

1 Defence of Pak stan and of every part thereof and all acts and measures connected therew th

The Naval M l tary and Air Forces of the Federat on and any other armed forces raised or ma nta ned by the Government of the Federat on armed forces wh ch are not forces of the Federat on but are attached to or operat ng w th any of the armed forces of the Federat on any other armed forces of the Federat on nclud ng civil armed forces

Naval M l tary and A r Force works

Industr es connected w th defence nuclear energy and m neral resources neces ary for ts product on

Del m tat on of cantonment areas local self government in cantonment areas const tut on po ers and functions with n such areas of can onment author t es control of house accommodat on (nclud ng cont ol of rents) in such areas

Manufacture of arms fie arms ammun t on and explos ves

2 Fore gn affairs includ ng all matters wh ch br ng Pak stan nto relat on w th any fore gn country

D plomatic consular and trade representat on

Internat onal organizat ons part c pat on in nternat onal bod es and mplement ng of dec s ons made thereat

War and peace mak ng and mplementat on of treat es convent ons declarat ons a d other agreements with fore gn countries

Fore gn and extra terr tor al jur sd ct on offences aga nst the laws of nat ons Adm ralty jur sd t on p racy and offences comm tted on the h gh seas and in the a r

Adm ss on nto and em grat on and expuls on from Pak stan extrad t on passports sas perm t and other such cert ficates p lgr mages to places outs de Pak stan and by persons from outs de Pak stan to pla es ins de Pakistan quarant ne ncluding hosp tals connected there th seamen s and mar ne hosp tals

3 C t zensh p natural zat on and al ens

4 Trade and commerce bet een the provinces and w th fore gn countr es mport and export across customs front ers

5 Currency coinage and legal tender fore gn exchange and negot able ns ruments State Bank of Pak stan bank ng (exclud ng co-operat ve bank ng) w th objects and bus ness not confined to one Prov n e

6 Publ c debt of the Federat on and the borrow ng of money on the secur ty of the Federal Consol dated Fund fore gn loans

7 Stock exchanges and futures markets w th objects and bus ness not confined to one Prov nce

8 Insurance and corporat ons that s to say incorporat on regulat on and w nd ng up of corporat ons whether trad ng or not (but not includ ng co-operat ve societ es or un vers t es or mun c pal and local bod es) w th objects and bus ness not confined to one Prov nce

9 Copyright patents des gns and nvent ons trade and merchand se marks standards of qual ty for goods to be exported out of Pak tan

10 Establ shment of standards of we ght and measure

11 Na gat on and sh pp ng nclud ng coastal sh pp ng (but exclud ng coa tal sh pp ng confined to one Prov nce) a rways aerodromes a r craft and a r nav gat on and all matters connec e l therew h l ght ho ses and other prov s ons for the safety of sh pp ng and a rcraft

12 Major ports that is to say the decla at on and del m tat on of such ports and the const ut on and powers of port au hor ties there n fi h ng and f her es outs de terr tor al waters

13 Posts and all forms of telecommun cat ons includ ng broadcasting and telev on Post Office Savings Bank

25. Sanctioning of cinematograph films for exhibition.

26. Public health and sanitation; hospitals and dispensaries.

27. Registration of births and deaths.

28. Railways.

29. Communications not specified in the Federal List; roads, bridges, ferries and other means of communication, minor railways, tramways; ropeways; inland waterways and traffic thereon.

30. Shipping and navigation on tidal waters.

31. Coastal shipping confined to ports within one Province.

32. Vehicles, including mechanically-propelled vehicles.

33. Ports, subject to entry No. 12 in Federal List.

34. Burials and burial grounds; cremations and cremation grounds.

35. Relief of the disabled and unemployed.

36. Pilgrimages, subject to Federal List.

37. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

38. Cultivation, manufacture and sale of opium.

39. Industries.

40. Factories and boilers.

41. Regulation of mines and mineral development, subject to Federal List and Concurrent List.

42. Trade and commerce within the Province.

43. Production, manufacture, supply and distribution of goods.

44. Markets and fairs.

45. Weights and measures, except establishment of standards.

46. Manufacture, supply and distribution of salt.

47. Money-lending and money-lenders; relief of indebtedness.

48. Forests.

49. Protection of wild animals and birds.

50. Prevention of cruelty to animals.

51. Adulteration of food-stuffs and other goods.

52. Lotteries.

53. Betting and gambling.

54. Fisheries.

55. Treasure trove.

56. Electricity.

57. Gas and gas works.

58. Professions.

59. Inns and inn-keepers.

60. Provincial Public Services; Provincial Public Service Commission.

61. Provincial pensions.

62. Public debt of the Province.

63. Administrator-General.

64. Zakat.

65. Charities and charitable institutions; charitable and religious endowments.

66. Lunacy and mental deficiency including places for reception or treatment of lunatics and mental deficients.

67. Salaries and allowances of members, the Speaker and the Deputy Speaker of the Provincial Assembly; salaries and allowances of Ministers of the Provincial Government, and the Advocate-General.

68. Powers, privileges and immunities of the Provincial Assembly and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Provincial Assembly.

10 Commercial and industrial monopolies, combines and trusts

11 Interprovincial migration and quarantine

12. Iron, steel, coal and mineral products, except mineral oil and natural gas

13 Banking, insurance and corporations, subject to Federal List

14 Stock exchanges and futures markets, subject to Federal List

15 Ancient and historical monuments declared to be of national importance

16 Arms, fire-arms, ammunition and explosives, subject to Federal List

17 Inquiries and statistics for the purpose of any of the matters in this List

18 Fees in respect of any of the matters in this List

19 Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List, offences against laws with respect to any of the matters in this List

Provincial List

1 Public order (but not including the use of naval, military or air forces or any other armed forces of the Federation in aid of the civil power)

2 Administration of justice, constitution and organization of all courts, except the Supreme Court, procedure in Rent and Revenue courts, fees taken in all courts, except the Supreme Court

3 Police, including Armed Police, Railway and Village Police

4 Extension of the powers and jurisdiction of members of a Police Force belonging to any province to any area outside that province

5 Preventive detention for reasons connected with the maintenance of public order persons subjected to such detention

6 Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein, arrangements with other provinces for the use of prisons and other institutions

7 Removal from one province to another province of prisoners, vagrancy, criminal and nomadic tribes

8 Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, colonization

9 The incorporation, regulation, and winding up of corporations, subject to Federal List unincorporated trading, literary, scientific religious and other societies and associations, co-operative societies

10 Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenues

11. Courts of Wards

12 Works lands and buildings vested in or in the possession of the Province

13 Compulsory acquisition or requisitioning of property

14 Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases

15 Local government, that is to say, the constitution and powers of municipal corporations improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self government or village administration

16 Preservation, protection and improvement of stock, and prevention of animal diseases, veterinary training and practice

17 Pounds and the prevention of cattle trespass

18 Prevention of the extension from one Province to another of infectious or contagious diseases

19 Water, including water supplies, irrigation and canals, drainage and embankments, water storage and water power, flood control

20 Education, including Universities, technical education and professional training

21 Libraries, museums and ancient and historical monuments

22 Botanical, zoological and anthropological surveys

23 Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions

24 Theatres, cinemas, sports, entertainments and amusements

5. Where the number of persons who have been duly nominated and have not withdrawn their candidature exceeds two, and at the first ballot no candidate obtains more votes than the aggregate votes obtained by the other candidates, the candidate who has obtained the smallest number of votes shall be excluded from the election. Balloting shall then proceed, with the candidate obtaining the smallest number of votes at each ballot being excluded from the election until one candidate obtains more votes than the remaining candidate or than the aggregate votes of the remaining candidates, as the case may be, and such candidate shall be declared elected.

6. Where at any ballot any two or more candidates obtain an equal number of votes and one of them has to be excluded from the election under paragraph 5, the determination of the question as to which of the candidates whose votes are equal is to be excluded shall be by drawing of lots.

7. The meeting of the Assembly at which the election takes place shall be presided over by the Speaker, or, if the Speaker is unable to preside, by the Deputy Speaker, or, if the Deputy Speaker is also unable to preside, by such person as may be determined by the Rules of the Assembly.

8. In this Schedule, "the Assembly" means, as respects the period before the Constitution Day, the Constituent Assembly, and as respects the period commencing on the Constitution Day, the National Assembly.

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69 Waqfs and mosques

70 Orphanages and poorhouses

71 Taxes on agricultural income and on the capital value of agricultural land

72 Duties in respect of succession to agricultural land

73 Stamp duty, including stamp duty on negotiable instruments and insurance policies

74 Estate duty in respect of agricultural land

75 Taxes on lands and buildings

76 Taxes on mineral rights, subject to Federal List and to any limitations imposed by Parliament by law relating to mineral development

77 Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in Pakistan —

(a) alcoholic liquors for human consumption,

(b) opium, Indian hemp and other narcotic drugs and narcotics, non narcotic drugs,

(c) medicinal and toilet preparations containing alcohol or any substance included in sub paragraph (b) of this entry

78 Taxes on the entry of goods into a local area for consumption use or sale therein

79 Taxes on the consumption or sale of electricity

80 Taxes on advertisements

81 Taxes on the sale or purchase of newspapers

82 Taxes on goods and passengers carried by road or on inland waterways

83 Taxes on vehicles, whether mechanically propelled or not, suitable for use on a road on boats, launches and steamers on inland waters, on tram cars

84 Taxes on animals and boats

85 Tolls

86 Taxes on professions, trades, callings and employments

87 *Capitation taxes*

88 Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling

89 Terminal taxes on goods or passengers carried by railway

90 Rates of stamp duty in respect of documents other than those specified in the provisions of Federal List with regard to rates of stamp duty

91 Offences against laws with respect to any of the matters in this List

92 Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List

93 Fees in respect of any of the matters in this List, but not including fees taken in any court

94 Inquiries and statistics for the purpose of any of the matters in this List

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SIXTH SCHEDULE

(Article 222)

Election of President under Article 222

1 At any time before noon on the day preceding the day fixed for the election of the President any member of the Assembly may propose a person for election by delivering to the Secretary of the Assembly a nomination paper signed by that member and stating that that person consents to the nomination

2 Any person who has been nominated may withdraw his candidature at any time prior to the holding of the election

3 On the day fixed for the election the person presiding over the Assembly shall read out to the Assembly the names of the persons who have been duly nominated and have not withdrawn their candidature together with the names of their proposers and, if there is only one such person, shall declare that person to be duly elected If there is more than one such person, the Assembly shall proceed to elect the President by secret ballot The ballot shall be held in such manner as the person presiding over the Assembly may direct

4 Where there are only two candidates for election, the candidate who obtains at the ballot the larger number of votes shall be declared elected If two candidates obtain an equal number of votes, the determination of the election shall be by drawing of lots

in the service of Pakistan or of any Government or Administration in Pakistan at the commencement of this Act, has] or had his domicile within the meaning of Part II of the Succession Act, 1925, as in force at the commencement of this Act, in Pakistan or in the territories now included in Pakistan; or XXXIX of 1925.

(c) who is a person naturalised as a British subject in Pakistan; and who, if before the date of the commencement of this Act he has acquired the citizenship of any foreign State, has before that date renounced the same by depositing a declaration in writing to that effect with an authority appointed or empowered to receive it; [1][or

[1](d) who before the commencement of this Act migrated to the territories now included in Pakistan from any territory in the Indo-Pakistan sub-continent outside those territories with the intention of residing permanently in those territories.]

[2]* * * * * * *

Citizenship by birth.

4. Every person born in Pakistan after the commencement of this Act shall be a citizm of Pakistan by birth:

Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth—

(a) his father possesses such immunity from suit and legal process as is accorded to an envoy of an external sovereign power accredited in Pakistan and is not a citizen of Pakistan; or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

Citizenship by descent.

5. Subject to the provisions of section 3 a person born after the commencement of this Act, shall be a citizen of Pakistan by descent if his father is a citizen of Pakistan at the time of his birth:

Provided that if the father of such person is a citizen of Pakistan by descent only, that person shall not be a citizen of Pakistan by virtue of this section unless—

(a) that person's birth having occurred in a country outside Pakistan the birth is registered at a Pakistan Consulate or Mission in that country, or where there is no Pakistan Consulate or Mission in that country [3][at the prescribed Consulate or Mission or] at a Pakistan Consulate or Mission in the country nearest to that country; or

(b) that person's father is, at the time of the birth, in the service of any Government in Pakistan.

Citizenship by migration.

6.—(1) The Central Government may, upon his obtaining a certificate of domicile under this Act, register as a citizen of Pakistan by migration any person who [4][after the commencement of this Act and before the first day of January 1952 has migrated] to the territories now included in Pakistan from any territory in the Indo-Pakistan sub-continent outside those territories, with the intention of residing permanently in those territories:

Provided that the Central Government may, by general or special order, exempt any person or class[5] of persons from obtaining a certificate of domicile required under this sub-section.

(2) Registration granted under the preceding sub-section shall include, besides the person himself, his wife, if any, unless his marriage with her has been dissolved, and any minor child of his dependent whether wholly or partially upon him.

Persons migrating from the territories of Pakistan.

7. Notwithstanding anything in sections 3, 4 and 6, a person who has after the first day of March, 1947, migrated from the territories now included in Pakistan to the territories now included in India shall not be a citizen of Pakistan under the provisions of these sections:

Provided that nothing in this section shall apply to a person who, after having so migrated to the territories now included in India has returned to the territories now included in Pakistan under a permit for resettlement or permanent return issued by or under the authority of any law for the time being in force.

Rights of citizenship of certain persons residence abroad.

8. The Cenetral Government may, upon application made to it in this behalf, register as a citizen of Pakistan any person who, or whose father or whose father's father, was born in the Indo-Pakistan sub-continent and who is ordinarily resident in a country outside Pakistan at the commencement of this Act, if he has, unless exempted by the Central Government in this behalf, obtained a certificate of domicile:

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1 The word "or" and clause (d) ins., *ibid.*

2 Proviso omitted, *ibid.*

3 Ins. by the Pakistan Citizenship (Amendment) Act, 1952 (5 of 1952), s. 4.

4 Subs. *ibid.*, s. 5. for "before the commencement of this Act migrated".

5 All Government servants including optees coming from the late Government of India, shall as a class be exempt from obtaining the Certificate of Domicile, see Gazette of Pakistan, 1952, Pt. I, p. 113.

THE PAKISTAN CITIZENSHIP ACT, 1951

[1]ACT NO II OF 1951

[13th April 1951]

An Act to provide for Pakistan citizenship

(As modified up to the 26th April, 1954)

WHEREAS it is expedient to make provision for citizenship of Pakistan,

It is hereby enacted as follows —

1.—(1) This Act may be called the Pakistan Citizensh p Act 1951 — Sl ort t le and com mencement

(2) It shall come into force at once

2 In this Act— — Definit ons

alien means a person who is not a citizen of Pakistan or a Commonwealth citizen

26 Geo 5 c 2 — Indo Pakistan sub continent means India as defined[2] in the Government of Ind a Act 1935 as originally enacted

IX of 1875 — minor means notwithstanding anything in the Majority Act 1875 any person who has not completed the age of twenty one years

prescribed means prescribed by rules made under this Act [3]*

11 & 12 Geo 6 c 56 — [4][Commonwealth citizen means a person who has the status of a Commonwealth citizen under the [5]British National ty Act 1948,

11 & 12 Geo 6 c 56 — British protected person means a person who has the status of a British protected person for the [6]purposes of the British Nat onal ty Act 1948]

3 At the commencement of this Act every person shall be deemed to be a citizen of Pakistan— — C t zensh p at the date of com mencement of th s Act

(a) who or any of whose parents or grandparents was born in the territory now included in Pakistan and who after the fourteen day of August 1947 has not been permanently resident in any country outside Pakistan or

(b) who or any of whose parents or grandparents was born in the territories included in Ind a on the thirty first day of March 1937 [7][and who except in the case of a person who was

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1 For Statement of Objects and Reasons *see* Gazette of Pak stan 95 Pt V pp 45 46

It has also been extended to the Kha rpur State by the Kha rpur (Federal Laws) (Extens on) O der 953 (G G O 5 of 1953)

ue a e to be pa o 1 a a

3 The word and om tted by the Pak tan C tizensh p (Amendment) Act 1952 (5 of 1952) s 2

4 Subs *t d* for the or g nal defin tion of Commonweal h c tizen

5 Sect on 1 wh ch read as follows —

1 —(1) Every person who under th s Act is a citizen of the Un ted Kingdom and Colon es or who under any enactment for the t me being n force n any country mentioned n sub-sect on (3) of th s sect on s a c tizen of that country shall by v rtue of that c t zensh p ha e the status of a Brit h subject

(2) Any person having the status aforesa d may be known e ther as a Br tish subject or as a Commonwealth c t zen and accord ngly n th s Act and in any other enactment or instrument whatever whether passed or made before or after the commencement of th s Act the express on Brit sh subject and the express on Commonwealth c tizen shall have the same mean ng

(3) The following are the countries here nbefore referred to that s to say Canada Australia New Zealand the Un on of South Africa Newfoundland Ind a Pakistan Southern Rhodesia and Ceylon

6 Br t sh protected person means a person who is a member of a class of persons declared by Order n Counc l made in relat on to any protectorate protected state mandated terr tory or tru t territory to be for the purposes of th s Act Pr tish protected persons by v rtue of the r connect on w th that protectorate state or territory

7 Subs by the Pakistan C t zensh p (Amendment) Act 1952 (5 of 1952) s 3 for and has

Deprivation of citizenship.

16.—(1) A citizen of Pakistan shall cease to be a citizen of Pakistan if he is deprived of that citizenship by an order under the next following sub-sections.

(2) Subject to the provisions of this section the Central Government may by order deprive any such citizen of his citizenship if it is satisfied that he obtained his certificate of domicile or certificate of naturalisation [1][under the Naturalisation Act, 1926] by means of fraud, false representation or the concealment of any material fact, or if his certificate of naturalisation is revoked. VII of 1926.

(3) Subject to the provisions of this section the Central Government may by order deprive any person who is a citizen of Pakistan by naturalisation of his citizenship of Pakistan if it is satisfied that that citizen—

(a) has shown himself by any act or speech to be disloyal or dis-affected to the Constitution of Pakistan; or

(b) has, during a war in which Pakistan is or has been engaged, unlawfully traded or communicated with the enemy or engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist the enemy in that war; or

(c) has within five years of being naturalised been sentenced in any country to imprisonment for a term of not less than twelve months.

(4) The Central Government may on an application being made or on its own motion by order deprive any citizen of Pakistan of his citizenship if it is satisfied that he has been ordinarily resident in a country outside Pakistan for a continuous period of seven years [1][beginning not earlier than the commencement of this Act] and during that period has neither—

(i) been at any time in the service of any Government in Pakistan or of an international organisation of which Pakistan has, at any time during that period been a member; nor

(ii) registered annually in the prescribed manner at a Pakistan Consulate or Mission or in a country where there is no Pakistan Consulate or Mission [2][at the prescribed Consulate or Mission or] at a Pakistan Consulate or Mission in a country nearest to the country of his residence his intention to retain Pakistan citizenship.

(5) The Central Government shall not make an order depriving a person of citizenship under this section unless it is satisfied that it is in the public interest that that person should not continue to be a citizen of Pakistan.

(6) Before making an order under this section the Central Government shall give the person against whom it is proposed to make the order notice in writing informing him of the grounds on which it is proposed to make the order and calling upon him to show cause why it should not be made.

(7) If it is proposed to make the order on any of the grounds specified in sub-sections (2) and (3) of this section and the person against whom it is proposed to make the order applies in the prescribed manner for an inquiry, the Central Government shall, and in any other case may, refer the case to a committee of inquiry consisting of a chairman, being a person possessing judicial experience, appointed by the Central Government and of such other members appointed by the Central Government as it thinks proper.

Certificate of domicile.

17. The Central Government may upon an application being made to it in the prescribed manner containing the prescribed particulars grant a certificate of domicile to any person in respect of whom it is satisfied that he has ordinarily resided in Pakistan for a period of not less than one year immediately before the making of the application, and has acquired a domisile therein.

Delegation of powers.

18. The Central Government may, by order notified in the official Gazette, direct that any power conferred upon it or duty imposed on it by this Act shall, in such circumstances, and under such conditions, if any, as may be specified in the direction, be exercised or discharged by such authority or officer as may be specified.

Cases of doubt as to citizenship.

19.—(1) Where a person with respect to whose citizenship a doubt exists, whether on a question of law or fact, makes application in that behalf to the Central Government, the Central Government may grant him a certificate that at the date of the certificate he is a citizen of Pakistan.

(2) The certificate, unless it is proved to have been obtained by fraud, false representation or concealment of any material fact, shall be conclusive evidence of the fact recorded in it.

Acquisition of Pakistan citizenship by citizens of Commonwealth countries.

20. The Central Government may upon such terms and conditions as it may by general or special order specify register a [3][Commonwealth citizen or a British protected person] as a citizen of Pakistan.

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1 Ins. *ibid.*, s. 8.

2 Ins. by the Pakistan Citizenship (Amendment) Act, 1952 (5 of 1952), s. 8.

3 Subs. by the Pakistan Citizenship (Amendment) Act, 1952 (5 of 1952), s. 9, for "citizen of a Commonwealth country".

Provided that a certificate of domicile shall not be required in the case of any such person who is out of Pakistan under the protection of a Pakistan passport, or in the case of any such person whose father or whose father s father is at the commencement of this Act residing in Pakistan or becomes before the aforesaid application is made a citizen of Pakistan

Citizenship by naturalisation

9 The Central Government may, upon an application made to it in that behalf by any person who has been granted a certificate of naturalisation under the Naturalisation Act 1926 register that person as a citizen of Pakistan by naturalisation

VII of 1926.

Provided that the Central Government may register any person as a citizen of Pakistan without his having obtained a certificate of naturalisation as aforesaid

Married women

10.—(1) Any woman who by reason of her marriage to a [1][British subject] before the first day of January, 1949 has acquired the status of a [1][British subject] shall if her husband becomes a citizen of Pakistan be a citizen of Pakistan

(2) Subject to the provisions of sub section (1) and sub-section (4) a woman who has been married
[illegible] a person who but for his death would have been a citizen of Pakistan under
[illegible] ment in the pre
[illegible] the oath of alle
[illegible] istan whether or
[illegible]

and taking the oath therein mentioned

(4) A person who has ceased to be a citizen of Pakistan under section 14 or who has been deprived of citizenship of Pakistan under this Act shall not be entitled to be registered as a citizen thereof under this section but may be so registered with the previous consent of the Central Government

Registration of minors

11.—(1) The Central Government may upon application to it in this behalf made in the prescribed manner by a parent or guardian of a minor child of a citizen of Pakistan register the child as a citizen of Pakistan

(2) The Central Government may, in such circumstances as it thinks fit register any minor as a citizen of Pakistan

Citizenship by registration to begin on date of registration

12 Any person registered as a citizen of Pakistan shall be such a citizen from the date of his registration

Citizenship by incorporation of territory

13 If any territory becomes a part of Pakistan the Governor General may by order specify the persons who shall be citizens of Pakistan by reason of their connection with that territory and those persons shall be citizens of Pakistan from such date and upon such conditions if any as may be specified in the order

Dual citizenship or nationality not permitted

14.—(1) Subject to the provisions of this section if any person is a citizen of Pakistan under the provisions of this Act and is at the same time a citizen or national of any other country he shall unless [2]* * * he makes a declaration according to the laws of that other country renouncing his status as citizen or national thereof cease to be a citizen of Pakistan

[3][(1A) Nothing in sub section (1) applies to a person who has not attained twenty-one years of his age]

(2) Nothing in [4][(sub section) (1)] shall apply to any person who is a subject of an Acceding State so far as concerns his being a subject of that State

Persons becoming citizens to have the status of Commonwealth citizens

15 Every person becoming a citizen of Pakistan under this Act shall have the status of a Commonwealth citizen

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1 Subs by the Pakistan Citizenship (Amendment) Act 1952 (5 of 1952 s 6 for Commonwealth citizen

2 The words within one year of the commencement of this Act or within six months *of attaining twenty-one* years of his age whichever is later omitted by the Pakistan Citizenship (Amendment) Act 1952 (5 of 1952) s 7

3 Sub-section (1A) ins *ibid*

4 Subs *ibid* for this section

GENERAL CLAUSES ACT, 1897

[1]ACT No. X OF 1897

[11th March, 1897]

An Act to consolidate and extend the General Clauses Acts, 1868 and 1887.

WHEREAS it is expedient to consolidate and extend the General Clauses Acts, 1868 and 1887; It is hereby enacted as follows:— I of 1868. I of 1887.

PRELIMINARY

Short title. 1.—(1) This Act may be called the General Clauses Act, 1897; [2]*

[2]* * * * * * * * *

2. [*Repeal.*] *Rep. by the Repealing and Amending Act, 1903 (I of 1903), s. 4 and Schedule III.*

GENERAL DEFINITIONS

Definitions. 3. In this Act, and in all [3][Central Acts] and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

"Abet." (1) "abet", with its grammatical variations and cognate expressions, shall have the same meaning as in the Pakistan Penal Code: XLV of 1860.

"Acceding State." [4][(1a) "Acceding State" shall mean any territory in the Indo-Pakistan sub-continent which the Central Government recognises as a State, whether described as a State or otherwise, and which has acceded to Pakistan," and

"Non Acceding State" "non-Acceding State" shall mean any State so recognised which has not so acceded;]

"Act." (2) "act", used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions:

"Affidavit." (3) "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:

"Assam Act." [5][(3a) "Assam Act" shall mean an Act made by the Chief Commissioner of Assam in Council under the Indian Councils Acts, 1861 to 1909,) [6][or the Government of India Act, 1916,] [7][or by the local Legislature or the Governor of Assam under the Government of India Act,) [8][or by the Provincial Legislature or the Governor of Assam under the Government of India Act, 1935:] 5 & 6 Geo. 5 c. 61. 26 Geo. 5. c 2.

"Barrister." (4) "barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland:

"Bengal Act." [9][(5) "Bengal Act" shall mean, in the case of Acts passed prior to the 1st April, 1912, an Act made by the Lieutenant-Governor of Bengal in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909, and in the case of Acts passed after that date, an Act made by the Governor of the Presidency of Fort William in Bengal in Council under the Indian Councils Acts, 1861 to 24 & 25 Vict., c. 67. 55 & 56 Vict., c. 14.

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1 For Statement of Objects and Reasons *see* Gazette of India, 1897, Pt. V, p. 38; for Report of the Select Committee, *see ibid.*, p. 77, and for Proceedings in Council, *see ibid*, Pt. VI, pp. 35, 40, 56 and 76.

This Act has been declared to be in force in the Chittagong Hill Tracts by the Chittagong Hill Tracts Regulation, 1900 (1 of 1900); in Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 of 1913);

It has been applied to Phulera in the Excluded Area of Upper Tanawal to the extent the Act is applicable in the N.-W.F.P., subject to certain modifications, and also extended to the Excluded Area of Upper Tanawal (N.-W.F.P.) other than Phulera with effect from such date and subject to such modifications as may be notified,—*see* N.-W.F.P. (Upper Tanawal) (Excluded Area) Laws Regulation, 1950.

2 The word "and" in sub section (1) and the whole of sub-section (2) rep. by s. 3 and Sch. II of the Repealing and Amending Act, 1914 (10 of 1914).

3 Subs by the A. O., 1937, for "Acts of the G. G. in C.".

4 Cl. (1a) ins. by G. G. O. 4 of 1949, Sch.

5 Ins. by the Repealing and Amending Act, 1914 (10 of 1914), s. 2 and Sch. I.

6 Added by the Repealing and Amending Act, 1917 (24 of 1917), s. 2 and Sch. I.

7 Added by the Repealing and Amending Act, 1928 (18 of 1928), s. 2 and Sch. I.

8 Added by the A. O., 1937.

9 *Subs. by the Repealing and Amending Act, 1914 (10 of 1914), s. 2 and Sch. I, for the original clause (5).*

21. Any person who in order to obtain or prevent the doing of anything under the Act makes any statement or furnishes any information which is false in any material particular and which he knows or has reasonable cause to believe to be false, or does not believe to be true, shall be deemed to have committed an offence punishable under section 177 of the Pakistan Penal Code — Penalties — XLV of 1860

22.—(1) For the purposes of this Act a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country shall be deemed to have been born in the place in which the ship or aircraft was registered or as the case may be in that country — Interpretation

(2) Any reference in this Act to the status or description of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father be construed as a reference to the status or description of the father at the time of the father's death, and where that death occurred before, and the birth occurs after the commencement of this Act the status or description which would have been applicable to the father had he died after the commencement of this Act shall be deemed to be the status or description applicable to him at the time of his death

23.—(1) The Central Government may frame rules[1] for carrying into effect the provisions of this Act — Rules

(2) No rule framed under this Act shall have effect unless published in the official Gazette

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SCHEDULE

(Form of oath or affirmation)

(*See* section 10)

"I (name) of (address) do hereby swear (or affirm) that I will be faithful and bear true allegiance to the Constitution of Pakistan"

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1 For Pakistan Citizenship Rules 1952 *see* Gazette of Pakistan, Extra-ordinary, 1952, pp 57 90

at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor General;

(b) in relation to anything done after the [1]commencement of Part III of the said Act, but before the establishment of the Federation of Pakistan, mean, as respects matters with respect to which the Governor General was by or under the provisions of the said Act then in force required to act in his discretion, the Governor General and as respects other matters, the Governor General in Council; and

(c) in relation to anything done or to be done after the establishment of the Federation of Pakistan, mean the Governor General;

and shall include—

(i) in relation to functions entrusted under sub-section (1) of section 124 of the said Act to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act.]

"Central Legislature." [2][(8ac) "Central Legislature" shall mean the Governor General in Council acting in a legislative capacity under the Government of India Act, 1833, the Government of India Act, 1853, the Indian Councils Acts, 1861 to 1909, or any of those Acts, or the Government of India Act, 1915, the Indian Legislature acting under the Government of India Act, or the Government of India Act, 1935, or the Federal Legislature acting under the Government of India Act, 1935, as the case may require:] 3 & 4 Will. 4, c. 85; 16 & 17 Vict., c. 95; 5 & 6 Geo., 5, c. 61; 26 Geo 5, c. 2.

[3]* * * * * * * * *

[4]* * * * * * * * *

"Chapter." (9) "Chapter" shall mean a Chapter of the Act or Regulation in which the word occurs:

"Chief Controlling Revenue Authority." [2][(9a) "Chief Controlling Revenue Authority", or "Chief Revenue Authority" shall mean—

(a) in provinces where there is a Board of Revenue, that Board;

(b) in provinces where there is a Revenue Commissioner, that Commissioner;

(c) in [5][the Punjab], the Financial Commissioner; and

(d) elsewhere, such authority as, in relation to matters enumerated in List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government, and in relation to other matters, the Provincial Government, may by notification in the official Gazette appoint:] 26 Geo. 5, c. 2.

"Collector." [6][(10) "Collector" shall mean the chief officer in charge of the revenue administration of a District;]

"Colony." [7][(11) "Colony"—

(a) in any Central Act passed after the commencement of Part III of the Government of India Act, 1935, shall mean any part of His Majesty's Dominions exclusive of the British Islands, the Dominions of India and Pakistan (and before the establishment of those Dominions, British India) any Dominion as defined in the Statute of Westminster, 1931, any Province or State forming part of any of the said Dominions, and British Burma; and

(b) in any Central Act passed before the commencement of Part III of the said Act, mean any part of His Majesty's Dominions exclusive of the British Islands and of British India; and in either case where parts of those Dominions are under both a central and local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.]

1 *i. e.*, the 1st April, 1937.

2 Ins. by the A. O., 1937.

3 Cl. (8b) relating to "Central Provinces Act" which was ins. by the Second Repealing and Amending Act, 1914 (17 of 1914), s. 2 and Sch. I, rep. by the Federal Laws (Revision and Declaration) Act, 1951 (26 of 1951), s. 3 and II Sch.

4 Cl. (8c) relating to "Central Provinces and Berar Act" which was ins. by the A. O., 1937, rep. by Act 26 of 1951, s. 3 and II Sch.

5 Subs. by Act 26 of 1951, s. 8, for "West Punjab" which had been subs., for "the Punjab" by the Pakistan Adaptation of Existing Pakistan Laws) Order, 1947. G. O. 20 of 1947).

6 Subs. by G. G. O. 20 of 1947, Sch., for the original clause (10).

7 Subs. by G. G. O. 20 of 1947, Sch., for the original clause (11) as amended by the A. O., 1937.

1909] [1][or the Government of India Act 1915) [2][or by the local Leg slature or the Governor of the Presidency of Bengal under the Government of Ind a Act] [3][or by the Provincial Leg slature or the Governor of Bengal under the Government of India Act 1935)

[4]* * * * * * * * *

[5]* * * * * * * * *

[6]* * * * * * * * *

(6) Bombay Act shall mean an Act made by the Governor of Bombay in Council under [7](the Indian Councils Act 1861, or) the Indian Councils Acts 1861 and 1892 [8](or the Indian Councils Acts, 1861 to 1909) [1][or the Government of India Act 1915] [2][or by the local Leg slature or the Governor of the Presidency of Bombay under the Government of India Act] [3][or by the Provincial Legislature or the Governor of Bombay under the Government of India Act 1935] Bombay Act

[9][(7) ' British India shall mean as respects the period before the [10]commencement of Part III of the Government of India Act 1935 all territories and places within H s Majesty s dominions which were for the time being governed by His Majesty through the Governor General of India or through any Governor or officer subord nate to the Governor General of Ind a and as respects any period after that date [11]and before the establ shment of the Federation of Pakistan] means all territories for the time be ng comprised w thin the Governors Provinces and the Ch ef Commissioners Provinces except that a reference to British India in an Indian law passed or made before the [12]commencement of Part III of the Government of India Act 1935 shall not include a reference to Berar] Br t sh Ind a

(8) British possession shall mean any part of Her Majesty s dominions exclusive of the United Kingdom and where parts of those dominions are under both a central and a local leg slature all parts under the central legislature shall for the purposes of this defin tion be deemed to be one British possession Br h pos ess on

[13]* * * * * * * * *

[14][(8aa) Central Act shall mean an Act of the Central Legislature and shall include except n section 5 an Act made by the Governor General under sect on 57B of the Government of Ind a Act [15]* * *] Central Act

[16][8(ab) Central Government shall— Cen ral Government

(a) in relation to anyth ng done before the [2]commencement of Part III of the Government of India Act 1935 mean the Governor General in Council or the authority competent

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1 Added by the Repeal ng and Amend ng Act 1917 (24 of 1917) s 2 and Sch 1

2 Added by the Repealing and Amend ng Act 1928 (18 of 1928) s 2 and Sch 1

3 Added by the A O 1937

4 Cl (5a) Relating to Berar wh ch was ins by the A O 1937 rep by the Federal Laws (Rev s on and Declarat on) Act 1951 (26 of 1951) s 3 and II Sch

5 The or g nal clau e (5a relat ng to B har and Orissa Act wh ch was ins by Act 10 of 1914 s 2 and Sch I and was re-numbered (5b) by the A O 1937 rep by Act 26 of 1951 s 3 and II Sch

6 Cl (5c) wh ch was ins by the A O 1937 rep by Act 26 of 1951 s 3 and Sch II

7 Ins by the Amend ng Act 1903 (1 of 1903) s 3 and Sch II

8 Added by Act 10 of 1914 s 2 and Sch I

9 Subs by the A O 1937 for the or ginal clause (7)

10 *I e* the 1st April 1937

11 Ins by the Pak stan (Adaptation of Existing Pak stan Laws) Order 1947 (G G O 20 of 1947)

12 *I e* the 1st Apr l 1937

13 Cl (8a) relat ng to Burma Act wh ch was ns by the Amend ng Act 1903 (I of 1903) s 3 and Sch II rep by he Federal Laws (Rev s on and Dec arat on) Act 1951 (26 of 1951) s 3 and II Sch

14 Ins by the A O 1937

15 The word and figures or sect on 44 of the Government of Ind a Act 1935 om tted by G G O 20 of 1947

16 S bs by G G O 20 of 1947 for clause (8ab) wh ch had been ns by the A O 1937

"Enactment." (17) "enactment" shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, [1]* or Bombay Code, and shall also include any provision contained in any Act or in any such Regulation as aforesaid:

"Father." (18) "father", in the case of any one whose personal law permits adoption, shall include an adoptive father:

[2]* * * * * * * * *

"Financial year." (19) "financial year" shall mean the year commencing on the first day of April:

"Good faith." [3](20) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not:

"Government." [4][(21) "Government" or "the Government" shall include both the Central Government and any Provincial Government:]

"Government securities." [5][(22) "Goverment securities" shall mean securities of the Central or any Provincial Government and shall include sterling securities of the Secretary of State for India in Council or the Secretary of State:]

[6]* * * * * * * * *

"High Court" (24) "High Court", used with reference to civil proceedings, shall mean the highest Civil Court of appeal [7][not including the Federal Court] [8]* * [9][in a Province or part thereof] in which the Act or Regulation containing the expression operates:

"Immoveable property." (25) "immoveable property" sall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth:

"Imprisonment." (26) "imprisonment" shall mean imprisonment of either description as defined in the Pakistan Penal Code : XLV of 1860

"India." [10][(27) "India" shall mean—

(a) as respects any period before the establishment of the Federation of Pakistan, British India together with all territories of any Indian ruler then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian ruler, and the tribal areas; and

(b) as respects any period after the establishment of the Federation of Pakistan, all territories for the time being included in the Dominion of India:]

[11]* * * * * * * * *

"Indian State." [12][(27b) "Indian State" shall mean any territory, [13]* * *, which [14][the Central Government] recognises as being such a State whether described as a State, an Estate, a Jagir or otherwise:]

"Local authority." (28) "local authority" shall mean a municipal committee, district board, body of port com-

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1 The word "Madras" omitted, *ibid.*

2 Clauses (18a) and (18b) relating to "Federal Government," and "Federal Railway Authority" respectively, omitted, *ibid.*

3 *Cf.* the Pakistan Penal Code (45 of 1860), s. 52, the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 90, and the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71, s. 62). For discussion in Council regarding this clause, *see* Gazette of India, 1897, Part VI, pp. 56 to 62 and 76 to 79.

4 Subs. by the A. O., 1937, for the original definition.

5 The original clause (22) defining "G. of I." was rep. and this clause ins. by the A. O., 1937.

6 Cl. (23) rep. by the Repealing and Amending Act, 1919 (18 of 1919), s. 3 and Sch. II.

7 Ins. by the A. O., 1937.

8 The words "in the" repealed by the Federal Laws (Revision and Declaration) Act, 1951 (26 of 1951), s. 3 and II Sch.

9 Subs. by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G. G. O. 20 of 1947), Sch., for "part of British India".

10 Subs. *ibid.*, for the clause (27) which had been substituted for the original clause by the A. O., 1937.

11 Clause (27a) relating to "Indian law", which was inserted by the A. O., 1937, omitted by G. G. O. 20 of 1947.

12 Subs. by the Repealing and Amending Act, 1940 (32 of 1940), for the original clause (27b), which was inserted by the A. O., 1937.

13 The words "not being part of British India", omitted by G. G. O. 20 of 1947, Sch.

14 Subs. *ibid.*, for "His Majesty".

(12) "commencement", used with reference to an Act or Regulation, shall [1]mean the day on which the Act or Regulation comes into force — "Commencement"

(13) "Commissioner" shall mean the chief officer in charge of the revenue administration of a division. — "Commissioner"

[2][(14) "Consular officer" shall include consul general, consul, vice consul, consular agent, pro consul and any person for the time being authorised to perform the duties of consul general, consul, vice consul or consular agent — "Consular Officer"

[3][(14a) "Crown contracts" and equivalent expressions shall include contracts made by or on behalf of the Secretary of State in Council, contracts made in the exercise of the executive authority of the Central or any Provincial Government, [4]* * *, and contracts [5][made before the fifteenth day of August, 1947 in connection] with the exercise of the functions of the Crown in its relations with Indian States] — "Crown contracts"

[3][(14b) "Crown debts" and equivalent expressions shall include debts due to the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, [6]* * * or the Crown Representative] — "Crown debts"

[3][(14c) "a grant" (including a transfer of land or of any interests therein or a payment of money) shall be deemed to be made by the Crown if it is made by or on behalf of His Majesty, the Secretary of State in Council, the Central Government, any Provincial Government, [6]* * * or the Crown Representative] — Crown grants

[3][(14d) "Crown liabilities" and equivalent expressions shall include the liabilities of the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, [6]* * * or the Crown Representative] — "Crown liabilities"

[3][(14e) "Crown property" and equivalent expressions shall include any property vested in His Majesty or otherwise held for the purposes of the Central or any Provincial Government [7][and with reference to a state of affairs existing after the commencement of Part III of the Government of India Act, 1935, and before the establishment of the Federation of Pakistan, includes also property vested in His Majesty, or otherwise held, for the purposes of the Crown Representative]] — Crown property

[8][(14f) "Crown Representative" shall mean His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States] — Crown Representative

[8][(14g) "Crown revenues" and equivalent expressions shall include any revenues vesting in His Majesty] — Crown revenues

(15) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction — District Judge

(16) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter — Document

[9][(16a) "Eastern Bengal and Assam Act" shall mean an Act made by the Lieutenant Governor of Eastern Bengal and Assam in Council under the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909] — Eastern Bengal and Assam Act

[10][(16b) "East Bengal Act" shall mean an Act made by the Provincial Legislature of East Bengal under the Government of India Act, 1935] — "East Bengal Act"

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1 *See* s 5 *infra*

2 *Cf* the Consular Salaries and Fees Act, 1891 (54 & 55, Vict, c 36), s 3

3 Ins by the A O, 1937

4 The words "contracts made by the Federal Railways Authority" omitted by the Pakistan (Adaptation of existing Pakistan Laws) Order, 1947 (G G O 20 of 1947), Sch

5 Subs *ib d* for the words "made in connection"

6 The words "the Federal Railway Authority" omitted, *ib d*

7 Subs by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G G O 20 of 1947), Sch, for the words "the Federal Railway Authority or the Crown Representative"

8 Ins by the A O, 1937

9 Ins by the Repealing and Amending Act, 1914 (10 of 1914) s 2 and Sch I

10 Ins by G G O 20 of 1947, Sch

"Provincial Government." [1][(43a) "Provincial Government"—

(a) as respects anything done or to be done after the establishment of the Federation of Pakistan, shall mean in a Governor's Province, the Governor, and in a Chief Commissioner's Province, the Central Government;

(b) as respects anything done before the establishment of the Federation of Pakistan, but after the [2]commencement of Part III of the Government of India Act, 1935, shall mean in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act, and in a Chief Commissioner's Province, the Central Government; and (26 Geo., 5, c. 2)

(c) as respects anything done before the commencement of Part III of the said Act, shall mean the authority or person authorised at the relevant date to administer executive government in the Province in question:]

"Public nuisance." (44) "public nuisance" shall mean a public nuisance as defined in the Pakistan Penal Code: (XLV of 1860.)

"Punjab Act." [3][(44a) "Punjab Act" shall mean an Act made by the Lieutenant-Governor of the Punjab in Council under the Indian Councils Acts, 1861 and 1892,] [4][or the Indian Councils Acts, 1861 to 1909,] [5][or the Government of India Act, 1915,] [6][or by the local Legislature or the Governor of the Punjab under the Government of India Act,] [7][or by the Provincial Legislature or the Governor of the Punjab under the Government of India Act, 1935:] (24 & 25 Vict., c. 67; 55 & 56 Vict., c. 14, 26 Geo. 5, c. 2.)

"Registered." (45) "registered", used with reference to a document shall mean registered in [8][a Province] under the law for the time being in force for the registration of documents:

'Regulation." (46) "Regulation" shall mean a Regulation made [7][by the Central Government] under the Government of India Act, 1870, [5][or the Government of India Act, 1915,] [9][or the Government of India Act,] [7][or under section 95 or section 96 of the Government of India Act, 1935]: (33 & 34 Vict., c.3; 5 & 6 Geo. 5, c. 61.)

"Rule." (47) "rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment:

"Schedule." (48) "schedule" shall mean a schedule to the Act or Regulation in which the word occurs:

"Scheduled District." (49) "Scheduled District" shall mean a "Scheduled District" as defined in the Scheduled Districts Act, 1874[10]: (XIV of 1874.)

"Section." (50) "section" shall mean a section of the Act or Regulation in which the word occurs:

"Ship." (51) "ship" shall include every description of vessel used in navigation not exclusively propelled by oars:

"Sign." (52) "sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions:

"Sind Act." [7][52a] "Sind Act" shall mean an Act made by the Provincial Legislature or the Governor of Sind under the Government of India Act, 1935:] (26 Geo. 5, c.2.)

"Son." (53) "son", in the case of any one whose personal law permits adoption, shall include an adopted son:

"Sub-section." (54) "sub-section" shall mean a sub-section of the section in which the word occurs:

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1 Subs. by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947, (G. G. O. 20 of 1947), Sch., for the clause (43a), which was ins. by the A. O. 1937.

2 I. e., the 1st April, 1937.

3 Ins. by the Amending Act, 1903 (1 of 1903), s. 3 and II Sch.

4 Added by the Repealing and Amending Act, 1914 (10 of 1914), s. 2 and Sch. I.

5 Added by the Repealing and Amending Act, 1917 (24 of 1917), s. 2 and Sch. I.

6 Added by the Repealing and Amendment Act, 1928 (18 of 1928), s. 2 and Sch. I.

7 Ins. by the A. O., 1937.

8 Subs. by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G. G. O. 20 of 1947), Sch., for "British India".

9 Ins. by the Repealing and Amending Act, 1928 (18 of 1928), s. 2 and Sch. I.

10 Rep. by the A. O., 1937.

missioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund

1* * * * * * * * *

2* * * * * * * * *

(31) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force — "Magistrate"

(32) "master", used with reference to a ship, shall mean any person (except a pilot or harbour-master) having for the time being control or charge of the ship — "Master" (of a ship)

(33) "month" shall mean a month reckoned according to the British calendar — "Month"

(34) "moveable property" shall mean property of every description, except immoveable property — "Moveable property"

3[(34a) "North-West Frontier Province Act" shall mean an Act made by the local Legislature or the Governor of the North-West Frontier Province under the Government of India Act, or by the Provincial Legislature or the Governor of the North West Frontier Province under the Government of India Act, 1935] — "North West Frontier Province Act"

4* * * * * * * * *

(36) "oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing — Oath

(37) "offence" shall mean any act or omission made punishable by any law for the time being in force — Offence

3[(37a) "official Gazette" or "Gazette" shall mean the Gazette of 5[Pakistan] or, as the case may bem the official gazette of a province] — Official Gazette"

6[(37b) "Pakistan Law" shall mean any Act, Ordinance, Regulation, rule, order or bye law which before the establishment of the Federation of Pakistan had the force of law in British India or any part thereof, or thereafter has the force of law in Pakistan or any part thereof other than a Federated State, but does not include any Act of Parliament or any Order in Council rule or other instrument made under an Act of Parliament] — Pakistan Law

7* * * * * * * * *

(38) "Part" shall mean a Part of the Act or Regulation in which the word occurs — Part

(39) "person" shall include any company or association or body of individuals, whether incorporated or not — Person

8[(40) "Political Agent" shall mean the principal officer by whatever name called representing the Central Government in an Acceding State or group of Acceding States or in any territory or place in the tribal areas or leased areas] — Political Agent

9* * * * * * * * *

10(42) "Privy Council" shall mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council — Privy Council

11[(43) "Province" shall mean 12* *, a Governor's Province, a Lieutenant Governor's Province or a Chief Commissioner's Province] — Province

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1 Clause (29) defining "L. G" was rep by the A O 1937

2 Clause (30) defining "Madras Act" rep by the Federal Laws (Revision and Declaration) Act 1951 (26 of 1951), s 3 and II Sch.

3 Ins by the A O, 1937

4 Clause (35) defining 'North Western Provinces and Oudh Act" rep by Act 26 of 1951 s 3 and II Sch

5 Subs by the Pakistan (Adaptation of Existing Pakistan Laws) Order 1947 (G G O 20 of 1947) Sch, for "India"

6 Ins, *ibid*

7 Cl (37b) relating to 'Orissa Act" omitted by the General Clauses (Amendment) Act, 1951 (27 of 1951) s (with effect from 14th August, 1947)

8 Cl (40) ins by G G O 4 of 1949 Sch The original clause (40) as amended by the A O, 1937 was omitted by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G G O 20 of 1947), Sch

9 Clause (41) defining 'Presidency town" omitted by G G O 20 of 1947, Sch

10 *Cf* the Interpretation Act, 1889 (52 & 53 Vict, c 63), s 12(5)

11 Subs by the A O, 1937 for the original clause

12 The words and comma, "a Presidency," rep by the Federal Laws (Revision and Declaration) Act, 1951 (26 of 1951), s. 3 and II Sch.

Crown in [1][Pakistan] include references to such person as the Provincial Government or the Central Government, as the case may be, may direct, and in any provision conferring power to make rules prescribing the conditions of service of persons serving His Majesty in a civil capacity in [1][Pakistan] include references to any person authorised by the Provincial Government or the Central Government, as the case may be, to make rules for the purpose.

(3) The references in any [2][Pakistan law] to servants of or under, or to service of or under, a Government or a Province, to property of, or belonging to, or vested in, the Secretary of State in Council or a Government or a Province, and to forfeitures to a Government or a Province, shall be construed as references respectively to persons in the service of the Crown, to the service of the Crown, to property vested in the Crown and to forfeitures to the Crown.]

GENERAL RULES OF CONSTRUCTION

Coming into operation of enactments.

5.—(1) Where any [3][Central Act] is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor General.

[4][(2) Where any [3][Central Act] is reserved, under section 68 of the Government of India Act, 1915, [5]* * * for the signification of His Majesty's pleasure thereon, then, if no later date is expressed, it shall come into operation, if assented to by His Majesty, on the day on which that assent is duly notified.]

(3) Unless the contrary is expressed, a [3][Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

[6][5A. [*Coming into operation of Governor-General's Act.*] *Omitted by the Pakistan (Adaptation of Existing Pakistan Laws) Order 1947 (G. G. O. 20 of 1947), Schedule.*

Effect of repeal.

6. Where this Act, or any [7][Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Repeal of Act making textual amendment in Act or Regulation.

[8][6A. Where any [7][Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [7][Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.]

Revival of repealed enactments.

[9]7.—(1) In any [7][Central Act] or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

(2) This section applies also to all [10][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

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1 Subs. *ibid.*, for "India".
2 Subs. by G. G. O. 20 of 1947, Sch., for "Indian law.
3 Subs. by the A. O., 1937, for "Act of the G. G. in C."
4 Subs. by the Repealing and Amending Act, 1917 (24 of 1917), s. 2 and Sch. I, for the original sub-section (2).
5 The words and figures "or under section 32 of the Government of India Act, 1935," which were ins. by the A. O., 1937, omitted by G. G. O. 20 of 1947, Sch.
6 S. 5A was ins. by the A. O., 1937.
7 Subs. by the A. O., 1937, for "Act of the G. G. in C.".
8 Ins. by the General Clauses (Amendment) Act, 1936 (19 of 1936), s. 2.
9 *Cf.* s. 11 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).
10 Subs. by the A. O., 1937, for "Acts of the G. G in C."

Suits by or against the Crown.

[1][(54a) suits by or against the Crown and equivalent express ons shall include suits by or against the Secretary of State the Secretary of State in Counc l the Central Government a Provin c al Government or the Crown Representative]

Swear

(55) swear w th its grammat cal var ations and cognate express ons shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing

[2]* * * * * * * * *

Vessel

[3](56) vessel shall nclude any ship or boat or any other descr pt on of vessel used in navigat on

West Punjab Act

[4][(56a) West Punjab Act shall mean an Act made by the Provinc al Leg slature of West Punjab under the Government of India Act 1935]

Will

[5](57) will shall include a codic l and every wr t ng mak ng a voluntary posthumous dispos t on of property

Writing

[6](58) express ons referr ng to writing shall be construed as includ ng references to printing l thography photography and other modes of representing or reproducing words in a vis ble form and

Year

(59) year shall mean a year reckoned according to the British calendar

Application of foreg ng defin ons p ev ous enactments

4 —(1) The defin t ons n sect on 3 of the following words and express ons that is to say affi dav t barrister 7* * D str ct Judge father 7* * * 8* * * 7* * immoveable property impr sonment 7* * Mag strate month moveable property oath person sect on son swear w ll and year apply also unless there s any hing repugnant in the subject or context to all [9][Central Acts] made after the th rd day of January 1868 and to all Regulat ons made on or after the fourteen h day of January 1887

(2) The definitions in the sa d sect on of the follow ng words and express ons that s to say abet chapter commencement financ al year local author ty master offence part publ c nuisance reg stered schedule sh p s gn sub sect on and wr t ng apply also unless there is anything repugnant n the subject or context to all [9][Central Acts] and Regulat ons made on or after the fourteenth day of January 1887

App ca ion of certa n d fin tions o a l P k tan law

[10][4A.—(1) The definit ons n sect on 3 of the express ons Br t sh Indi Central Act Central Government Central Leg slature Chief Controlling Revenue Author ty Ch ef Revenue Authority Crown contracts Crown debts Crown grants Crown l ab l t es Crown property Crown Representat ve Crown revenues [11]* * Gazette Go ernment Govern ment securit es H gh Court Ind a [12]* * Ind a State offic al Gazette [3][Pak stan law] Prov nc al Government and suits by or against the Crown apply also unless there s an thin re pugnant in the subject or context to all [14][Paki tan laws]

[15](2) In any [16][Pakistan law] references to the Prov nc al Government or Central Government in any prov s on conferring power to make appo ntments to the c vil serv ces of or c v l posts under the

1 Ins by the A O 1937

2 Clause (55a) defining Un ted P ovinces Act wh ch was nserted by the Amend ng Act 903 (l of 903) s 3 Sch II repealed by the Federal Laws (Rev on and Decl ration) Ac 95 (20 of 95) s 3 and II Sch

5 Cf the defin tion of w ll n s 2 of the Succes on Act 925 (39 of 925)

6 Cf s 20 of the Interpretat on Act 1889 (52 & 53 V ct c 63)

7 The words B h Ind a G of I H gh Court and L G rep by the A O 937

8 The words Her Ma esty or the Queen rep by the Repeal ng and Amend ng Act 9 9 (8 of 9 9) s 3 and Sch II

9 Subs by the A O 937 for Acts of the G G in C

10 Ins by the A O 937

11 The words and quotat ons Federal Government Federal Ra lway Autho ty om ed by the Pakis an (Adaptation of Existing Pak tan laws) Order 947 (G G O 20 of 1947) Sch

12 The words Ind an law om tted ib d

13 Ins ib d

14 Subs ib d for Indian laws

15 Cf s 24 of the G of I Act 1935 (26 Geo 5 c 2)

16 Subs by G G O 20 of 1947 Sch for Ind an law

Power to appoint to include power to appoint *ex officio*.

15. Where, by any [1][Central Act] or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the comencement of this Act, may be made either by name or by virtue of office.

Power to appoint to include power to suspend or dismiss.

16. Where, by any [1][Central Act] or Regulation a power to make any appointment is conferred, then, unless a different intention appears, the authority having [2][for the time being] power to make the appointment shall also have power to suspend or dismiss any person appointed [3][whether by itself or any other authority] in exercise of that power.

Substitution of functionaries.

17.—(1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all [4][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Successors.

18.—(1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

(2) This section applies also to all [5][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Official chiefs and subordinates.

19.—(1) In any [6][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

(2) This section applies also to all [5][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

PROVISIONS AS TO ORDER, RULES, ETC., MADE UNDER ENACTMENTS

Construction of orders, etc., issued under enactments.

[7]20. Where, by any [6][Central Act] or Regulation, a power to issue any [8][notification], order, scheme, rule, form or bye-law is conferred , then expressions used in the [8][notification], order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power.

Power to make, to include power to add to, amend, vary or rescind, orders, rules or bye-laws.

[9]21. Where, by any [6][Central Act] or Regulation, a power to [10][issue notifications], orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [8][notifications], orders, rules or bye-laws so [11][issued].

Making of rules or bye-laws and

[12]22. Where, by any [6][Central Act] or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the

1 Subs. by the A. O., 1937, for "Act of the G. G. in C.".
2 Ins. by the Repealing and Amending Act, 1928 (18 of 1928), s. 2 and Sch. I.
3 Subs. *ibid.*, for "by it".
4 Subs. by the A. O., 1937, for "Acts of the G. G. in C.".
5 Subs. by the A. O., 1937, for "Acts of the G. G. in C."
6 Subs. by the A. O., 1937, for "Act of the G. G. in C.".
7 *Cf.* s. 31 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).
8 Ins. by the Amending Act, 1903 (1 of 1903), s. 3 and Sch. II.
9 *Cf.* s. 32 (3) of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).
10 Subs. by s. 3 and Sch. II of the Amending Act, 1903 (1 of 1903), for "make".
11 Subs. *ibid.*, for "made".
12 *Cf.* s. 37 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).

8.—[1][(1)] [2]Where this Act or any [3][Central Act] or Regulation made after the commencement of this Act repeals and re-enacts with or without modification any provision of a former enactment then references in any other enactment or in any instrument to the provision so repealed shall unless a different intention appears be construed as references to the provision so re-enacted.

[4][(2) Where any Act of Parliament repeals and re-enacts with or without modification any provision of a former enactment then references in any [5][Central Act] or in any Regulation or instrument to the provision so repealed shall unless a different intention appears be construed as references to the provision so re-enacted.]

9.—(1) In any [5][Central Act] or Regulation made after the commencement of this Act it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time to use the word "from" and for the purpose of including the last in a series of days or any other period of time to use the word "to".

(2) This section applies also to all [6][Central Acts] made after the third day of January 1868 and to all Regulations made on or after the fourteenth day of January 1887.

10.—(1) Where by any [5][Central Act] or Regulation made after the commencement of this Act any act or proceedings is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period then if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act 1877 [7] applies.

(2) This section applies also to all [3][Central Acts] and Regulations made on or after the fourteenth day of January 1887.

[8]11. In the measurement of any distance for the purposes of any [Central Act] or Regulation made after the commencement of this Act that distance shall unless a different intention appears be measured in a straight line on a horizontal plane.

12. Where by any enactment now in force or hereafter to be in force any duty of customs or excise or in the nature thereof is leviable on any given quantity by weight, measure or value of any goods or merchandize then a like duty is leviable according to the same rate on any greater or less quantity.

13. In all [6][Central Acts] and Regulations unless there is anything repugnant in the subject or context—

(1) words importing the masculine gender shall be taken to include females,

(2) words in the singular shall include the plural and vice versa.

[9][13A. In all [10][Central Acts] and Regulations references to the Sovereign [illegible] unless a different intention appears be construed as references to the Sovereign [illegible]

POWERS AND FUNCTIONARIES

14.—(1) Where by any [11][Central Act] or Regulation made after the commencement of this Act any power is conferred [12]* * * then unless a different intention appears that power may be exercised from time to time as occasion requires.

(2) This section applies also to all [11][Central Acts] and Regulations made on or after the fourteenth day of January 1887.

1 The original s. 8 was renumbered as sub-section (1) of that section by the Repealing and Amending Act, 1919 (18 of 1919), s. 2 and Sch. I.

2 Cf. s. 38 (1) of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).

3 Subs. by the A. O., 1937 for "Act of the G. G. in C."

4 Sub-section (2) ins. by the Repealing and Amending Act, 1919 (18 of 1919), s. 2 and Sch. I.

5 Subs. by the A. O., 1937 for "Act of the G. G. in C."

6 Subs. ibid., for "Acts of the G. G. in C."

7 See now the Limitation Act, 19[illegible] of 19[illegible].

8 Cf. s. 34 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63), Coll. Stat.

9 Ins. by s. 2 and Sch. I of the Repealing and Amending Act, 19[illegible] of 19[illegible].

10 Subs. by the A. O., 1937 for "Acts of the G. G. in C."

11 Subs. by the A. O., 1937 for "Acts of the G. G. in C."

12 The words "on the G[illegible]" rep. by s. 2 and Sch. I of Act [illegible] of 19[illegible].

Power to appoint to include power to appoint *ex officio*.

15. Where, by any [1][Central Act] or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the comencement of this Act, may be made either by name or by virtue of office.

Power to appoint to include power to suspend or dismiss.

16. Where, by any [1][Central Act] or Regulation a power to make any appointment is conferred, then, unless a different intention appears, the authority having [2][for the time being] power to make the appointment shall also have power to suspend or dismiss any person appointed [3][whether by itself or any other authority] in exercise of that power.

Substitution of functionaries.

17.—(1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all [4][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Successors.

18.—(1) In any [1][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

(2) This section applies also to all [5][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Official chiefs and subordinates.

19.—(1) In any [6][Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

(2) This section applies also to all [5][Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

PROVISIONS AS TO ORDER, RULES, ETC., MADE UNDER ENACTMENTS

Construction of orders, etc., issued under enactments.

[7]20. Where, by any [6][Central Act] or Regulation, a power to issue any [8][notification], order, scheme, rule, form or bye-law is conferred , then expressions used in the [8][notification], order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power.

Power to make, to include power to add to, amend, vary or rescind, orders, rules or bye-laws.

[9]21. Where, by any [6][Central Act] or Regulation, a power to [10][issue notifications], orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [8][notifications], orders, rules or bye-laws so [11][issued].

Making of rules or bye-laws and

[12]22. Where, by any [6][Central Act] or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the

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1 Subs. by the A. O., 1937, for "Act of the G. G. in C.".

2 Ins. by the Repealing and Amending Act, 1928 (18 of 1928), s. 2 and Sch. I.

3 Subs. *ibid.*, for "by it".

4 Subs. by the A. O., 1937, for "Acts of the G. G. in C.".

5 Subs. by the A. O., 1937, for "Acts of the G. G. in C."

6 Subs. by the A. O., 1937, for "Act of the G. G. in C.".

7 *Cf.* s. 31 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).

8 Ins. by the Amending Act, 1903 (1 of 1903), s. 3 and Sch. II.

9 *Cf.* s. 32 (3) of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).

10 Subs. by s. 3 and Sch. II of the Amending Act, 1903 (1 of 1903), for "make".

11 Subs. *ibid.*, for "made".

12 *Cf.* s. 37 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63).

application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which or the fees for which, anything is to be done under the Act or Regulation then that power may be exercised at any time after the passing of the Act or Regulation, but rules, bye laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation

issuing of orders between passing and commencement of enactment

[illegible]

Provisions applicable to making of rules or bye laws after previous publication

(1) the authority having power to make the rules or bye laws shall, before making them, publish a draft of the proposed rules or bye laws for the information of persons likely to be affected thereby,

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires in such manner as the [2][Central Government] or the [3][Provincial Government] prescribes,

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration,

(4) the authority having power to make the rules or bye laws, and, where the rules or bye laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye laws from any person with respect to the draft before the date so specified,

(5) the publication in the [4][official Gazette] of a rule or bye law purporting to have been made in exercise of a power to make rules or bye laws after previous publication shall be conclusive proof that the rule or bye law has been duly made

[illegible]

Continuation of orders etc issued under enactments repealed and re enacted

section 5 or A of the Scheduled Districts Act, 1874[7], or any like law, has been extended to any local area has by a subsequent notification, been withdrawn from and re extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re enacted in such area or part within the meaning of this section]

MISCELLANEOUS

Recovery of fines

25 Sections 63 to 70 of the Pakistan Penal Code and the [8]provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye law unless the Act, Regulation rule or bye law contains an express provision to the contrary

Provision as to offences punishable under two or more enactments

26 Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence

1 Subs by the A O 1937 for Act of the G G in C
2 Subs ibid for G G in C
3 Subs ibid for L G
4 Subs ibid for Gazette
5 Ins by the Amending Act 1903 (I of 1903) s 3 and Sch II
6 Ins by the Second Repealing and Amending Act 1914 (17 of 1914), s 2 and Sch I
7 Rep by the A O 1937
8 See the Code of Criminal Procedure 1898 (5 of 1898) s 386 et seq

Meaning of service by post.

[1]27. Where any [2][Central Act] or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Citation of enactments.

[3]28.—(1) In any [2][Central Act] or Regulation, and in any rule, bye-law, instrument or document, made under, or with reference to, any such Act or Regulation, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any [2][Central Act] or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

Saving for previous enactments, rules and bye-laws.

[4]29. The provisions of this Act respecting the construction of Acts, Regulations, rules or bye-laws made after the commencement of this Act shall not affected the construction of any Act, Regulation, rule or bye-law made before the commencement of this Act, although the Act, Regulation, rule or bye-law is continued or amended by an Act, Regulation, rule or bye-law made after the commencement of this Act.

Application of Act to Ordinances.

[5][30. In this Act the expression '[2][Central Act]' wherever it occurs, except in section 5, and the word "Act" in clauses (9), (12), (38), (48) and (50) of section 3 and in section 25 shall be deemed to include an Ordinance made and promulgated by the Governor-General under section 23 of the Indian Councils Act, 1861 [6][or section 72 of the Government of India Act, 1915] [7][or section 42 [8]* * * of the Government of India Act, 1935].]

24 & 25 Vict., c. 67; 5 & 6 Geo. 5, c. 61; 26 Geo. 5, c. 2.

[9]30A. [*Application of Act to Acts made by the Governor General.*] *Rep. by the A. O.*, 1937.

[10]31. [*Construction of references to Local Government of a Province.*] *Rep. by the A. O.*, 1937.

THE SCHEDULE.—[ENACTMENTS REPEALED.] Rep. by the Amending Act, 1903 (*I of* 1903), *s.* 4 *and Schedule III.*

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1 *Cf.* the Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 26.
2 Subs. by the A. O., 1937, for "Act of the G. G. in C.".
3 *Cf.* the Interpretation Act, 1889 (52 & 53 Vict., c. 63) s. 35.
4 *Cf.* s. 40 *ibid.*
5 Ins. by the Second Repealing and Amending Act, 1914 (17 of 1914), s. 2 and Sch. I.
6 Ins. by the Repealing and Amending Act, 1917 (24 of 1917), s. 2 and Sch. I.
7 Ins. by the A.O., 1937.
8 The words and figures "or section 43" omitaed by the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G.G.O. 20 of 1947), Sch.
9 This section was ins. by the Repealing and Amending Act, 1923 (11 of 1923), s.2 and Sch. I.
10 This section was ins. by the Repealing and Amending Act, 1920 (31 of 1920), s.2 and Sch. I.

or Regulation then that power may be exer[illegible] but rules bye laws or orders so ma[illegible] shall not take eff[illegible] Regulation

23 Where by any [1][Central Act] [illegible] to be given subject to the condition of the rules [illegible] bye laws [illegible] the follow ng prov sions shall apply namely —

(1) the authority having power to make th[illegible] a draft of the propose[illegible] rules or bye laws [illegible] thereby

(2) the publicat on shall be mad[illegible] if the con[illegible] -[Central Government] or the [illegible]

(3) there shall be [illegible] will be taken [illegible]

(4) the author[illegible] are to be mad[illegible] rity also [illegible] having power [illegible] the date so [illegible]

(5) the publication [illegible] in exercise [illegible]

24. [illegible]

[illegible]

25. [illegible]

26. [illegible]

[illegible]

(a) for constituting the Province of West Pakistan;

(b) for the purpose of adaptation of laws, make repeals of, omissions from, additions to and modifications of any Act (other than this Act, the Government of India Act, 1935, or the Indian Independdence Act, 1947), or any Order-in-Council, Letters Patent, Ordinance or any rule, regulations, order, bye-law or public notification applying immediately before the appointed day to any specified territory;

(c) for authorizing the exercise, by any person or authority specified in the Order, of any of the functions of government in any specified territory between the date of this Act and the appointed day;

(d) for other matters supplemental, and incidental to and consequential upon the establishment of the Province of West Pakstan.

(2) The Governor-General may delagate any of his functions under clauses (b) and (c) of sub-section (1) of this section to the Governor of West Pakistan and any order of the Governor my include any matter supplemental or incidental to, or consequential upon, any provision made by such order:

Provided that the power exercisable under this section shall not extend beyond six months from the appointed day.

6. *Financial provisions*—(1) The proceeds of all taxes and other revenues payable in accordance with the laws in force immediately before the appointed day to the revenues or the public funds of any Governor's Province in the specified territories, or to the revenues or public funds of the State of Bahawalpur or the State of Khairpur or the Baluchistan States Union shall be payable to the revenues or public funds of the Province of West Pakistan, *as the case may be.*

(2) The proceeds of all taxes and other revenues payable in accordance with the laws in force immediately before the appointed day in any of the specified territories to the revenues or the public funds of the Federation but which would, if the specified territory had been a Governor's Province, have been payable to the revenues or the public funds of the Province, shall be payable to the revenues or the public funds of the Province of West Pakistan.

(3) There shall be paid from the revenues of the Federation to the revenues of the Province of West Pakistan—

(a) in respect of each complete financial year after the appointed day, a sum estimated by the Governor-General to be the difference between the proceeds of the taxes and other revenues referred to in sub-section (2) of this section in the last complete financial year before the appointed day and the expenditure of the Federation during that financial year in the specified territories to which that sub-section applies in respect of functions which are by or under this Act transferred to the Province of West Pakistan; and

(b) in respect of the financial year which includes the appointed day, such proportion of the sum payable under paragraph (a) of this sub-section as the Governor-General thinks equitable.

(4) Pending the exercise by the Legislative Assembly of West Pakistan of the powers vested in it by sections 78 to 81 of the Government of India Act, 1935, the Governor of West Pakistan shall have power to authenticate by his signature a schedule specifying—

(a) the sums required to meet expenditure charged upon the revenues of the Province; and

(b) the sums required to meet other expenditure proposed to be made from the revenues of the Province;

and any such schedule shall be sufficient authority for the expenditure of the sums specified therein and shall be valid for a period of not more than six months from the appointed day.

7. *High Courts*—(1) Notwithstanding anything to the contrary contained in any law, including the Government of India Act, 1935, the Governor-General may by order establish a High Court for the Province of West Pakistan to replace the High Court in Lahore, the Chief Court of Sind and the Judicial Commissioners' Courts in North -West Frontier Province and Baluchistan and any other Court functioning as High Court for any other specified territories, and the High Court so established and the judges thereof shall exercise jurisdiction in relation to the whole of the Province of West Pakistan, [1][except the Special Areas,] and the powers and authority exercisable by the High Court in Lahore and the Judges thereof, immediately before the date on which the order under this sub-section comes into force, shall be exercisable by the High Court of West Pakistan and the judges thereof in [2][the whole of the Province of West Pakistan, except the Special Areas,] and section 223 of the Government of India Act, 1935, shall be construed accordingly.

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1 Inserted by the Establishment of West Pakistan (Amendment) Act, 1955, sec. 2, with effect on and from 14th October, 1955.

2 Substituted for the words "the whole of West Pakistan", *ibid*, with effect on and from 14th October, 1955.

THE ESTABLISHMENT OF WEST PAKISTAN ACT, 1955

An Act to provide for the establishment of the Province of West Pakistan by integrating Provinces and States and for other purposes connected therewith

It is hereby enacted as follows —

1 *Short title and commencement*—(1) This Act may be called the Establishment of West Pakistan Act, 1955

(2) It shall come into force at once

2 *Integration of the Provinces and States into West Pakistan*—(1) The Governor General shall declare by public notification that as from the date specified in such notification, hereinafter referred to as the "appointed day", the territories which, before the appointed day were the territories of—

(i) the Governor's Provinces of the Punjab, the North West Frontier and Sind,

(ii) the chief Commissioner s Province of Baluchistan and the Capital of the Federation,

(iii) the States of Bahawalpur and Khairpur, and the Baluchistan States Union,

(iv) the Tribal Areas of Baluchistan the Punjab and the North West Frontier, and the States of Amb, Chitral, Dir and Swat (hereinafter referred to as the specified territories"),

shall be incorporated into the Province of West Pakistan

(2) Notwithstanding anything contained in the preceding sub section the Capital of the Federation shall be administered in accordance with the provisions of section 290 A of the Government of India Act, 1935

(3) Nothing in this Act shall authorise any change in the internal administration of the Tribal Areas of Baluchistan and the North West Frontier or the States of Amb Chitral, Dir and Swat (hereinafter referred to as the "special areas") except in accordance with this sub section and the following provisions shall apply to the special areas —

(a) The executive authority of the Province of West Pakistan shall extend to any special area therein, but no Act of the Federal Legislature or of the Provincial Legislature shall apply to a special area or any part thereof unless the Governor with the previous approval of the Governor General so directs, and in giving such a direction with respect to any Act the Governor may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions and modifications as he thinks fit

(b) The Governor may with the approval of the Governor General make regulations for the peace and good government of a special area or any part thereof and any regulation so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature or any other law in force in the Area,

(c) The Governor General may give such directions to the Governor relating to any special area as he may deem necessary and the Governor shall in the discharge of his function under this sub section, comply with such direction and

(d) The Governor General may at any time by order direct that the whole or any part of a special area shall cease to be a special area or alter the boundaries of any special area, and any such order may contain such incidental and consequential provision as appear to the Governor General to be necessary and proper

Provided that before making such an order the Governor General shall ascertain, in such manner as he considers appropriate, the views of the people of the special area or areas concerned

4 *Amendment of laws*—As from the appointed day any reference in any Act, including the Government of India Act, 1935, and the Indian Independence Act, 1947, or in any rule, regulation, order, bye law or public notification to any specified territory shall be construed as a reference to the Province of West Pakistan, or as the context may indicate, to a part thereof

5 *Orders of the Governor General*—(1) The Governor General may by order make such provision as appears to him to be necessary or expedient—

(a) for constituting the Province of West Pakistan;

(b) for the purpose of adaptation of laws, make repeals of, omissions from, additions to and modifications of any Act (other than this Act, the Government of India Act, 1935, or the Indian Independence Act, 1947), or any Order-in-Council, Letters Patent, Ordinance or any rule, regulations, order, bye-law or public notification applying immediately before the appointed day to any specified territory;

(c) for authorizing the exercise, by any person or authority specified in the Order, of any of the functions of government in any specified territory between the date of this Act and the appointed day;

(d) for other matters supplemental, and incidental to and consequential upon the establishment of the Province of West Pakstan.

(2) The Governor-General may delagate any of his functions under clauses (b) and (c) of sub-section (1) of this section to the Governor of West Pakistan and any order of the Governor my include any matter supplemental or incidental to, or consequential upon, any provision made by such order:

Provided that the power exercisable under this section shall not extend beyond six months from the appointed day.

6. *Financial provisions*—(1) The proceeds of all taxes and other revenues payable in accordance with the laws in force immediately before the appointed day to the revenues or the public funds of any Governor's Province in the specified territories, or to the revenues or public funds of the State of Bahawalpur or the State of Khairpur or the Baluchistan States Union shall be payable to the revenues or public funds of the Province of West Pakistan, as the case may be.

(2) The proceeds of all taxes and other revenues payable in accordance with the laws in force immediately before the appointed day in any of the specified territories to the revenues or the public funds of the Federation but which would, if the specified territory had been a Governor's Province, have been payable to the revenues or the public funds of the Province, shall be payable to the revenues or the public funds of the Province of West Pakistan.

(3) There shall be paid from the revenues of the Federation to the revenues of the Province of West Pakistan—

(a) in respect of each complete financial year after the appointed day, a sum estimated by the Governor-General to be the difference between the proceeds of the taxes and other revenues referred to in sub-section (2) of this section in the last complete financial year before the appointed day and the expenditure of the Federation during that financial year in the specified territories to which that sub-section applies in respect of functions which are by or under this Act transferred to the Province of West Pakistan; and

(b) in respect of the financial year which includes the appointed day, such proportion of the sum payable under paragraph (a) of this sub-section as the Governor-General thinks equitable.

(4) Pending the exercise by the Legislative Assembly of West Pakistan of the powers vested in it by sections 78 to 81 of the Government of India Act, 1935, the Governor of West Pakistan shall have power to authenticate by his signature a schedule specifying—

(a) the sums required to meet expenditure charged upon the revenues of the Province; and

(b) the sums required to meet other expenditure proposed to be made from the revenues of the Province;

and any such schedule shall be sufficient authority for the expenditure of the sums specified therein and shall be valid for a period of not more than six months from the appointed day.

7. *High Courts*—(1) Notwithstanding anything to the contrary contained in any law, including the Government of India Act, 1935, the Governor-General may by order establish a High Court for the Province of West Pakistan to replace the High Court in Lahore, the Chief Court of Sind and the Judicial Commissioners' Courts in North -West Frontier Province and Baluchistan and any other Court functioning as High Court for any other specified territories, and the High Court so established and the judges thereof shall exercise jurisdiction in relation to the whole of the Province of West Pakistan, 1[except the Special Areas,] and the powers and authority exercisable by the High Court in Lahore and the Judges thereof, immediately before the date on which the order under this sub-section comes into force, shall be exercisable by the High Court of West Pakistan and the judges thereof in 2[the whole of the Province of West Pakistan, except the Special Areas,] and section 223 of the Government of India Act, 1935, shall be construed accordingly.

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1 Inserted by the Establishment of West Pakistan (Amendment) Act, 1955, sec. 2, with effect on and from 14th October, 1955.

2 Substituted for the words "the whole of West Pakistan", *ibid*, with effect on and from 14th October, 1955.

(2) As from the date of the establishment of the High Court of West Pakistan under sub-section (1) of this section section 219 of the Government of India Act 1935 shall be omitted and the following shall be substituted therefor —

219—The following courts shall in relation to Pakistan be deemed to be High Courts for the purposes of this Act that is to say the High Court of East Bengal and the High Court of West Pakistan

Provided that—

(b) any person who was immediately before the date of the order serving as a temporary or additional Judge shall on that date become a temporary or additional Judge as the case may be in the High Court of West Pakistan and section 222 of the Government of India Act 1935 shall be construed accordingly

(4) An order under sub section (1) of this section shall make such provision as seems to the Governor General to be necessary or expedient for determining the places within the Provinces of West Pakistan at which the High Court or any Judges or division thereof may sit

[1][(5) All proceedings which immediately before the appointed day are pending in the High Court of Lahore the Chief Court of Sind and the Judicial Commissioner's Courts in the North West Frontier Province

(6) The power of the Governor General to make Order under this section shall include the power to make arrangements—

(a) for the disposal of the work in the High Court of West Pakistan including proceedings transferred to the High Court from the replaced High Courts

(b) for the transfer to the High Court of West Pakistan of the officers and servants of replaced High Courts and

(c) for all other matters consequential and incidental thereto

and he may delegate to the Chief Justice of the High Court any of the powers conferred upon him under this subsection]

8 *Public Services and Public Service Commission*—(1) The Governor of West Pakistan may by order establish a Public Service Commission for the Province of West Pakistan to replace the Joint Public Service Commission for the Punjab and North West Frontier Province the Public Service Commission for Sind and any other Public Service Commission functioning as such for any other specified territory

(2) As from the date of the establishment of the Public Service Commission for the Province of West Pakistan under sub section (1) of this section the Chairman and members of the Joint Public Service Commission for the Punjab and North West Frontier Province and of the Public Service Commission for Sind shall become members of the Public Service Commission of the Province of West Pakistan

Provided that—

(a) Nothing in this sub section shall extend the period of service of any person transferred under this sub section and

(b) A person transferred under this sub section shall be employed under terms and conditions not less favourable than the terms and conditions on which he was employed immediately before the appointed day

(3) All persons in the service of the Crown serving in connection with the affairs of the specified territories and all persons holding civil posts under the Government of the State of Bahawalpur or the State of

1 Subsection (5) and (6) added *ibid* with effect on and from 14th October 1955

Khairpur, or the Baluchistan States Union, shall, as from the appointed day, be deemed to be persons serving the Crown in connection with the affairs of the Province of West Pakistan on such terms and conditions as the Governor of the Province of West Pakistan may determine:

Provided that—

(a) such terms and conditions shall not be less favourable than the terms and conditions admissible to them immediately before the 10th day of August, 1955; and

(b) notwithstanding the terms of his appointment in the specified territory, any such person may be required to serve in any post or capacity and in any part of West Pakistan.

9. *Transfer of property, liabilities, etc.*—(1) All property and assets which immediately before the appointed day were vested in Her Majesty for the purposes of the Government of any Governor's Province included in the specified territories or in the Ruler of any State so included for the purposes of the government of that State shall vest in Her Majesty for the purposes of the Government of West Pakistan: and the rights, liabilities and obligations of any such Province or State shall be the rights, liabilities and obligations of the Province of West Pakistan.

(2) The Governor-General may by order declare that any property and assets which immediately before the appointed day were vested in Her Majesty for the purposes of the government of any other specified territory shall vest in Her Majesty for the purposes of the Government of West Pakistan and that any of the rights, liabilities and obligations of any such territory shall be the rights, liabilities and obligations of the Province of West Pakistan.

(3) The provisions of sub-section (1) of this section shall not apply to any property or assets recognized by the Governor-General as the private property of the Ruler of a State.

10. *Continuation of laws*—(1) Except as otherwise provided in this Act, and subject to any order of the Governor-General under section 5 of this Act and to the powers of any competent legislature, all laws in force in West Pakistan immediately before the appointed day shall continue to apply to the areas and the persons to whom they would have applied if this Act had not been passed.

(2) For the purposes of this section "law" includes any Act of the Parliament of the United Kingdom, any law passed by a competent legislature in India or Pakistan, and any Order-in-Council, Letters Patent, ordinance, order, regulation, rule, bye-law or public notification made or issued by a competent authority.

(3) For the purpose of bringing the provisions of the Government of India Act, 1935, into accord with the provisions of this Act, the Government of India Act, 1935, shall as from the appointed day be amended in accordance with the provisions of the First Schedule to this Act.

11. *Interim Legislature for West Pakistan*—(1) Notwithstanding anything in the Government of India Act, 1935, there shall be, until a Provincial Legislature is constituted for West Pakistan in accordance with that Act, an Interim Provincial Legislature for West Pakistan consisting of the Governor of West Pakistan and a Legislative Assembly, which shall be composed of three hundred and ten members as provided in the Second Schdeule to this Act:

Provided that the Interim Legislature shall, unless dissolved earlier in accordance with the provisions of the Government of India Act, 1935, or for the purpose of enforcement of the new Constitution to be framed by the Constitutent Assembly, stand dissolved on the expiration of eighteen months from the date of the commencement of this Act.

(2) A person shall be qualified for election to the Legislative Assembly constituted under this section if he is—

(a) a citizen of Pakistan;

(b) [1][not less than twenty-five years of age;]

(c) resident in West Pakistan; and

(d) not disqualified for being chosen as a member of a Provincial Legislative Assembly by section 69 of the Government of India Act, 1935.

(3) For the purposes of each election at the general election, the Governor of West Pakistan shall appoint a Returning Officer who shall conduct the election in accordance with the provisions of this Act:

Provided that for the purpose of first general election to the Interim Provincial Legislature the Returning Officers shall be appointed by the Governor-General.

(4) An election under this section shall be held on a day and at a place and time fixed by the Governor of West Pakistan:

Provided that for the purpose of the first general election to the Interim Provincial Legislature the date, place and time shall be fixed by the Governor-General.

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1 Substituted for the words "twenty-five years of age" by the Establishment of West Pakistan (Amendment) Act, 1955, section 3, with effect on and from 14th October, 1955.

(2) As from the date of the establishment of the High Court of West Pakistan under sub-section (1) of this section, section 219 of the Government of India Act, 1935, shall be omitted and the following shall be substituted therefor:—

"219—The following courts shall in relation to Pakistan, be deemed to be High Courts for the purposes of this Act, that is to say, the High Court of East Bengal, and the High Court of West Pakistan."

[illegible]

Provided that—

(a) a person who becomes a Judge of the High Court of West Pakistan in accordance with this sub-section shall be entitled to terms and conditions of service, including terms and conditions in respect of leave and pension, not less favourable than those to which he was entitled as a Judge of the High Court from which he is transferred under this sub-section, and section 221 of the Government of India Act, 1935, shall be construed accordingly,

(b) any person who was immediately before the date of the order serving as a temporary or additional judge shall on that date become a temporary or additional judge, as the case may be, in the High Court of West Pakistan, and section 222 of the Government of India Act, 1935, shall be construed accordingly

(4) An order under sub-section (1) of this section shall make such provision as seems to the Governor-General to be necessary or expedient for determining the places within the Provinces of West Pakistan at which the High Court or any Judges or division thereof may sit

[1][(5) All proceedings which immediately before the appointed day are pending in the High Court of Lahore, the Chief Court of Sind and the Judicial Commissioner's Courts in the North-West Frontier Province [illegible]

(6) The power of the Governor General to make Order under this section shall include the power to make arrangements—

(a) for the disposal of the work in the High Court of West Pakistan including proceedings transferred to the High Court from the replaced High Courts,

(b) for the transfer to the High Court of West Pakistan of the officers and servants of replaced High Courts, and

(c) for all other matters consequential and incidental thereto,

and he may delegate to the Chief Justice of the High Court any of the powers conferred upon him under this subsection]

8 *Public Services and Public Service Commission*—(1) The Governor of West Pakistan may by order establish a Public Service Commission for the Province of West Pakistan to replace the Joint Public Service Commission for the Punjab and North West Frontier Province, the Public Service Commission for Sind, and any other Public Service Commission functioning as such for any other specified territory

(2) As from the date of the establishment of the Public Service Commission for the Province of West Pakistan under sub-section (1) of this section, the Chairman and members of the Joint Public Service Commission for the Punjab and North-West Frontier Province and of the Public Service Commission for Sind shall become members of the Public Service Commission of the Province of West Pakistan :

Provided that—

(a) Nothing in this sub-section shall extend the period of service of any person transferred under this sub-section, and

(b) A person transferred under this sub-section shall be employed under terms and conditions not less favourable than the terms and conditions on which he was employed immediately before the appointed day.

(3) All persons in the service of the Crown, serving in connection with the affairs of the specified territories, and all persons holding civil posts under the Government of the State of Bahawalpur, or the State of

1 Subsection (5) and (6) added, *ibid*, with effect on and from 14th October 1955

14. *Forty per cent representation of Punjab*—For a period of ten years from the commencement of this Act, the number of persons elected to represent the territory which immediately before the commencement of this Act constituted the Province of Punjab shall not be more than forty per cent of the total number of members of the Legislature of the Province of West Pakistan.

Provision regarding administration of the Federal Capital at Knrachi. [see pages 62—64].

[1][290A—(1) Except in respect of matters relating to High Court, the Provincial Legislature shall have no power to make laws in respect of the Capital of the Federation.

(2) The Governor-General may by order make, in respect of the Capital of the Federation, such provisions—

(a) for its government and administration;

(b) for varying composition of the Legislature of the Province affected thereby and the representation in the Federal Legislature of that Province;

(c) with respect to the laws which are to be in force in the area;

(d) with respect to the expenses or revenues of any court theretofore exercising the jurisdiction of a High Court in the area;

(e) with respect to apportionments, and adjustments of, and in respect of, assets and liabilities; and

(f) with respect to other supplemental, incidental and consequential matters;

as he may deem necessary or proper.

(3) The Governor-General may by order alter, amend or modify any order made under this section

(4) The executive authority of the Federation extends to the Capital of the Federation and any order made under this subsection may be controlled or superseded by an Act of the Federal Legislature, which shall have also power to make laws for the Capital of the Federation with respect to matters enumerated in the Provincial Legislative List, other than matters relating to High Court.

(5) An order made under this section may authorise expenditure from the revenues of the Federation.]

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1 S. 290A, ins. by the Government of India (Second Amendment) Act, 1955, s. 9.. Section 290A previously added by G. G. O. 22 of 1947, Schedule, as amended by G. G. O. 14 of 1948, was omitted by the Establishment of West Pakistan Act, 1955, First Schedule, (with effect from the, 14th October, 1955).

(5) The Interim Provincial Legislature may by law make provision for the filling of casual vacancies

(6) The provisions of the Government *of India Act 1935, shall apply to the Interim Provincial Legislature* established under this Act as they apply to a Provincial Legislature under section 60 of the Government of India Act, 1935

Provided that—

(a) the composition of the Legislative Assembly shall be such as is specified in this section, and

(b) the Fifth and Sixth Schedules to that Act shall not apply

(7) On the appointed d[illegible] the Legisl[illegible] Assemblies of the Pro[illegible] of the P[illegible] the N[illegible] West [illegible]

Provided that the first meeting of the Interim Provincial Legislature shall be held within four months of the completion of the elections

12 *Disputes relating to election to Interim Legislature of West Pakistan* (1) If any doubt or dispute arises as to whether a person has or has not been validly elected to the Legislative Assembly constituted under section 11 of this Act, it shall be raised by a petition to the Governor of West Pakistan and if

(a) the petition is received by the Governor within a period of thirty days after the publication of the result of the election in the official Gazette, and

(b) before or at the same time as the petition is received by the Governor the petitioner has deposited in a treasury of the Government of West Pakistan the sum of rupees one thousand in cash as security for the cost of the investigation,

the Governor shall appoint a tribunal (hereinafter referred to as the " tribunal) in accordance with the provision of sub-section (2) of this section

(2) The tribunal shall consist of a chairman who shall be or has been a Judge of a High Court and two other persons, who shall be or have been District and Sessions Judges in Pakistan and shall be set up within six weeks of the receipt of the petition by the Governor

(3) The tribunal shall have all such powers of a High Court as it may deem necessary to investigate the question including the powers to enforce the attendance of witnesses and the production of documents and shall decide its own procedure

[illegible]

require

(5) *The tribunal shall report* to the Governor on the question submitted to it and the Governor shall make such consequential order as to him seems necessary to give effect to the report and any such order shall be final and shall not be questioned in any court

(6) The validity of an election under section 11 of this Act shall not be questioned in any court

[illegible] *Constituent Assembly* [illegible] ed day be substituted—

[illegible] eaker of the Assembly shall within seven days of the vacancy give notice [illegible] Gazette and as soon as may be reasonably practicable thereafter the Governor of East Bengal, or the Governor of West Pakistan, as the case may be, shall take steps to fill the vacancy, and shall appoint a returning officer, who shall conduct the election in accordance with the rules in the Schedule to this Act

(2) For the purposes of an election to fill a casual vacancy to which sub-section (1) of section 8 of the Constituent Assembly (Proceedings and Privileges) Act, 1955, applies, the following amendments shall as from the appointed day be made in the Schedule to that Act, that is to say—

(a) In rule 2 the words "in the case of East Bengal, the Punjab, the North-West Frontier Province and Sind" shall be omitted,

(b) Rule 3 shall be omitted.

(c) In rule 4, the words "or rule 3" shall be omitted.

(d) In rule 10, the words "or the Chief Commissioner, as the case may be" shall be omitted

1 Substituted for the words Legislative Assembly of the State of Khairpur", ibid., with effect on and from 14th Oct 1955

ACT XXXI OF 1957

REPRESENTATION OF THE PEOPLE ACT, 1957

(13th September 1957, Gazette, Extraordinary, 13th September 1957)

The following Act of the National Assembly received the assent of the President on the 10th September 1957 and was published for general information in the Gazette

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Chapter I—Administrative Arrangements

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Sections

2. *Interpretation.*—(1) In this Act, unless the context otherwise requires,—

"candidate" means a person who has been nominated as a candidate, whether the nomination was valid or not;

"constituency" means a constituency delimited for the election of a member to the National Assembly or to the Provincial Assembly, as the context may require;

"contesting candidate" means a candidate who has been validly nominated and has not withdrawn before the date and time fixed for the withdrawal of candidature;

"costs" means all costs, charges and expenses of or incidental to the trial of an election petition;

"election" means an election to fill a seat in the National Assembly or a Provincial Assembly;

"Election Commission" means the Election Commission appointed under the Constitution;

"election petition" means a petition presented in pursuance of Part III;

"Election Tribunal" or "Tribunal" means a tribunal appointed under this Act for the trial of election petitions;

"elector" in relation to an election, means any person whose name is for the time being on the electoral roll to be used at that election;

"official Gazette" means, in relation to anything which concerns the National Assembly, the Gazette of Pakistan, and in relation to anything which concerns the Assembly of a Province, the official Gazette of that Province;

"person" does not include a body of persons;

"prescribed" means prescribed by rules made under this Act;

"returned candidate" means a candidate whose name has been published under section 50 as duly elected.

(2) Where a Returning Officer is required or authorised by this Act to give any public notice, he may do so by advertisement in the Press and, if he thinks fit, by placard, handbill or such other means as he thinks best calculated to afford information to the electors.

PART II—CONDUCT OF ELECTIONS

Chapter I—Administrative Arrangements

3. *General election.*—(1) For the purpose of constituting the National Assembly and the Provincial Assemblies of East Pakistan and West Pakistan, as the case may be, in due time under the Constitution a general election shall be held.

(2) A general election shall also be held on the expiration of the duration of the National Assembly or a Provincial Assembly or upon the dissolution of the same in order that a new Assembly may be constituted.

4. *Notifications for election to the National Assembly and Provincial Assemblies.*—For the purpose of constituting the National Assembly or a Provincial Assembly the President shall by one or more notifications in the official Gazette call upon the constituencies of the Assembly concerned to elect members thereto in accordance with the provisions of this Act and the rules made thereunder, before such date as may therein be specified:

Provided that for the purpose of constituting an Assembly on the expiration of its duration, no such notification shall be issued at any time earlier than three months before the date of the expiration of its duration.

5. *Returning Officers and Assistant Returning Officers.*—(1) For every election, the Election Commission shall appoint for each constituency a Returning Officer who shall be an officer of the Central or a Provincial Government:

Provided that the same person may be appointed as the Returning Officer for two or more constituencies.

(2) The Election Commission may appoint one or more persons, being officers of the Central or a Provincial Government, Assistant Returning Officers to assist the Returning Officer in the exercise of his functions.

(3) The Assistant Returning Officer shall, subject to the control of the Returning Officer and such conditions and restrictions as may be imposed by the Election Commission, have power to perform all or any of the functions of the Returning Officer.

(4) It shall be the duty of a Returning Officer and of an Assistant Returning Officer performing the functions of a Returning Officer to do all such acts and things as may be necessary for effectively conducting an election in accordance with this Act and the rules made thereunder.

6. *Polling districts and polling stations.*—(1) It shall be the duty of the Returning Officer to provide, with the previous approval of the Election Commission, in each constituency a sufficient number of polling stations at places within such distances as may be prescribed.

An Act to provide for the conduct of elections to the National Assembly and the Provincial Assemblies the qualifications and disqualifications for membership of those Assemblies, corrupt and illegal practices and other offences at or in connection with such elections, the determination of doubts and disputes arising out of or in connection with such elections, and other matters arising out of or connected with the matters aforesaid

Whereas it is necessary to provide for the conduct of elections to the National Assembly and the Provincial Assemblies, the qualifications and diqualifications for membership of those Assemblies, corrupt and illegal practices and other offences at or in connection with such elections, the determination of doubts and disputes arising out of or in connection with such elections, and other matters arising out of or connected with the matters aforesaid,

It is hereby enacted as follows —

PART I—PRELIMINARY

1 *Short title and commencement* —(1) This Act may be called the Representation of the People Act, 1957

(2) It shall come into force on such day or days as the President may, by public notification, appoint, and different days may be appointed for different provisions of the Act

(2) No person shall be a proposer or a seconder for the purposes of this section unless his name appears on the electoral roll of the constituency in which the seat is to be filled:

Provided that no person may subscribe more than one nomination paper, either as proposer or as seconder; and if any person subscribes more than one nomination paper, all such nomination papers after the first received by the Returning Officer shall be void.

(3) On the presentation of a nomination paper, the Returning Officer shall acknowledge the receipt of it and satisfy himself that the names and electoral roll numbers of the candidate and his proposer and seconder as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that the Returning Officer shall permit any error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them in conformity with the corresponding entries in the electoral rolls; and where necessary, direct that any clerical or printing error in the said entries shall be overlooked.

(4) The Returning Officer shall endorse on nomination paper the name of the person presenting it and the date and time at which it is received and inform the candidate of the time and place at which he shall hold the scrutiny.

(5) The Returning Officer shall cause to be affixed at some conspicuous place in his office a notice of every nomination paper received by him containing descriptions identical with those contained in the nomination paper, both of the candidate and his proposer and seconder.

(6) Where a candidate is nominated in a constituency other than that in which his name is entered on the electoral roll as an elector it shall be sufficient for the purposes of sub-section (3) if he or his proposer or seconder produces before the Returning Officer a certified copy of the entry in that roll.

14. *Deposit.*—(1) Subject to the provisions of sub-section (2), no nomination paper shall be accepted unless a sum of five hundred or of two hundred and fifty rupees, accordingly as the election is to fill a seat in the National Assembly or a Provincial Assembly, is deposited by the candidate or on his behalf either in cash at the time of the delivery of the nomination paper, or the nomination paper is accompanied by a receipt showing that the appropriate sum has been deposited by the candidate or on his behalf at any branch of the National Bank of Pakistan or at a Government Treasury.

(2) No candidate who has been nominated in the same constituency by more than one nomination paper shall be required to make more than one deposit.

15. *Scrutiny.*—(1) On the scrutiny day, the candidates, their election agents, and proposer or proposers and seconder or seconders, as the case may be, and one other person duly authorised in writing by each candidate, may attend at the time and place specified by the Returning Officer, and the Returning Officer shall give such persons all reasonable opportunities for examining all nomination papers delivered to him in accordance with section 13 of this Act.

(2) The Returning Officer shall then examine the nomination papers and decide any objection made to any nomination and may, either on such objection or of his own motion, and after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—

(a) that the candidate is not qualified to be elected to fill the seat under the Constitution or this Act;

(b) that the proposer or seconder is disqualified from subscribing to nomination papers under this Act; or

(c) that any of the provisions of section 12 or section 13 or section 14 has not been complied with; or

(d) that the signature of the proposer or seconder is not genuine:

Provided that—

(i) if a nomination paper is rejected, the candidate's nomination shall not be refused if he is validly nominated by another nomination paper; and

(ii) the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of substantial character, and may allow any such defect to be remedied forthwith.

(3) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting it, and where he rejects a nomination paper he shall record on it a brief statement of his reasons for rejecting it, and except as provided in sub-section (4) the decision of the Returning Officer shall be final.

(4) Where the Returning Officer rejects all the nomination papers of a candidate, he shall forthwith refer the matter to the Election Commission, together with those papers and the statements referred to in sub-section (3), and the Commission, after giving to the parties concerned such opportunity of representing their case as it may deem fit, shall take a decision in the matter before the withdrawal day, and such decision shall be final:

Provided that the election may be questioned in an election petition on the ground of the improper rejection of the nomination paper of a candidate.

(2) No polling station shall be located in the premises belonging to or under the control of any of the candidates

(3) There shall be separate polling for male and female electors

(4) The Election Commission shall cause a list of the polling stations in each constituency to be published in the official Gazette and at such place or places as it may think fit in the constituency and may consider any [illegible]

7. *Presiding officer and polling officer* —(1) For each polling station the Returning Officer shall appoint a presiding officer and such number of polling officers as he thinks necessary, but no person shall be so appointed if he is or has at any time been employed by or on behalf of any of the candidates in the election

(2) It shall be the duty of the presiding officer to maintain order in the polling station, to carry out the provisions of this Act and the rules thereunder in relation to the conduct of the poll, and to report to the Returning Officer any fact or incident which may in his opinion affect the fairness of the poll, and it shall be the duty of each polling officer to assist the presiding officer in the discharge of his duties under this Act

[illegible]

(4) The Returning Officer may at any time during the poll, for reasons to be recorded, suspend any presiding officer or polling officer from the exercise of his functions and make such arrangements as he may consider necessary for the exercise of the functions of the officer so suspended

8. *Notification of days for different stages of an election* —As soon as may be after a notification under section 4 has been published the Election Commission shall in respect of each election and in relation to each constituency by public notification appoint the following days, that is to say —

(a) a day (hereinafter referred to as the "nomination day") for the receipt of nomination papers not earlier than fourteen days from the date of the said notification,

(b) a day (hereinafter referred to as the "scrutiny day") for the scrutiny of nominations not earlier than at least twenty four hours after the nomination day,

(c) a day (hereinafter referred to as the "withdrawal day") for the withdrawal of candidature not earlier than seven days after the nomination days,

(d) a day at least thirty days after the nomination day (hereinafter referred to as the "polling day") on which a poll shall, if necessary, be taken, and

(e) a day (hereinafter referred to as the "counting day") or days on which votes shall, if necessary, be counted

[illegible]

Chapter II—Nomination of Candidates

10. *Nomination* —A candidate may be nominated in the same constituency by more than one nomination paper.

11. *Who may be nominated* —(1) Any person whose name appears on the electoral roll of any constituency for the National Assembly and who is not otherwise disqualified for election to that Assembly may be nominated as a candidate for election to that Assembly in any constituency thereof

(2) Any person whose name appears on the electoral roll of any constituency for a Provincial Assembly and who is not otherwise disqualified for election to that Assembly may be nominated as a candidate for election to that Assembly in any constituency thereof

12. *Who may nominate* —Any elector in a constituency may nominate a person as a candidate for election to fill a seat in that constituency if such person is qualified to be elected to fill that seat under the provisions of the Constitution and this Act

13. *Method of nomination* —(1) Each candidate shall be nominated by a separate nomination paper, in the prescribed form, signed by his proposer and seconder, and containing a certificate signed by the proposer that the candidate has consented to the nomination and such nomination paper shall be delivered to the Returning Officer by the candidate himself, or his proposer or seconder, at the place specified in the notice under section 9, on the nomination day between the hours of nine o'clock in the morning and five o'clock in the afternoon

(3) A candidate deemed to be his own election agent shall, so far as circumstances permit, be subject to the provisions of this Act both as candidate and as election agent, and except where the context otherwise requires any reference in this Act to an election agent shall be construed as a reference to him acting as his own election agent.

(4) Not more than one election agent shall be appointed for each candidate, and any such appointment may be revoked in writing.

(5) If an appointment is revoked under subsection (4) or an election agent dies, the candidate may appoint another election agent, and if he does so, the name, father's name and address in writing of the person so appointed shall be delivered to the Returning Officer who shall give public notice thereof.

(6) No person shall be appointed an election agent if he is disqualified for such appointment under this Act.

24. *Office of election agent.*—Every election agent shall have an office to which all claims, notices, summons and documents may be sent, and his address shall be the address delivered to the Returning Officer under section 23 and any claim, notice, writ, summons or documents addressed to the election agent and delivered at such office shall be deemed to have been served on the election agent.

25. *Duties and functions of election agent.*—It shall be the duty of the election agent to keep such books of account and enter therein such particulars of receipt and expenditure as may be prescribed and to perform such other functions as are by or under this Act to be performed by such agent.

26. *Polling and counting agents.*—(1) A contesting candidate or his election agent may, before the commencement of the poll, appoint in the manner prescribed such number of polling agents as may be prescribed to act as polling agents at the polling stations.

(2) A contesting candidate or his election agent may, before the counting of votes begins, appoint in the manner prescribed one and only one counting agent to attend at the counting of votes.

(3) Every appointment of a polling agent and a counting agent shall forthwith be communicated to the Returning Officer, or, to the presiding officer who shall inform the Returning Officer.

(4) The appointment of any polling agent or counting agent may be revoked by the contesting candidate or his election agent, and a notice of such revocation shall be delivered to the Returning Officer or, to the presiding officer who shall inform the Returning Officer.

(5) If a polling agent or a counting agent dies, or becomes incapable of acting, or his appointment is revoked, the contesting candidate or his election agent may apppoint another person in his place and shall give notice in writing of such appointment to the Returning Officer, or, to the presiding officer who shall inform the Returning Officer.

(6) The functions of a polling agent and a counting agent respectively shall be those provided by or under this Act.

27. *Attendance of contesting candidate at polling station or place of counting.*—(1) A contesting candidate may attend at any polling station or place of counting votes, and may himself do or assent his polling agent or counting agent in doing any act or thing which such agent is authorised by or under this Act to do.

(2) The provisions of subsection (1) apply to the election agent of a contesting candidate as they apply to the contesting candidate himself.

28. *Absence of polling or counting agents.*—Where by or under this Act, any act or thing is required or authorised to be done in the presence of polling or counting agents, the failure of any such agent to attend at the time and place appointed for the purpose shall not invalidate any act or thing otherwise duly done.

Chapter IV—Poll

29. *Hours of poll.*—Subject to any direction issued by the Election Commission, the Returning Officer shall determine the hours during which the poll shall be taken and shall give public notice thereof in the prescribed manner:

Provided that the total period allotted on any one day for polling at an election in a constituency shall not be less than eight hours and shall be unbroken.

30. *Adjourned poll.*—(1) If at any time the poll at any polling station is interrupted or obstructed by riot or open violence, beyond the control of the executive authorities, or by reason of any natural calamity it is not possible to proceed with the poll, the presiding officer at that polling station may stop the poll and shall forthwith so inform the Returning Officer.

(2) When a poll is stopped under subsection (1) the Returning Officer shall immediately report the circumstances to the Election Commission and as soon as may be, with the approval of the Commission, appoint

Explana ion —For the purpose of this subsect on any member of the Elect on Comm ss on appointed by the Ch ef Elect on Comm ss oner in th s behalf shall be deemed to be the Elect on Comm ss on

16. *W thdrawal* —(1) Any cand date may thdraw h s candidature by no ce n wr t ng n the pre scr bed form s gned by him and del ered to the Re urn ng Off cer w th n the t me fixed for w hdrawal and no such not ce of withdrawal shall be subject to cancellat on

(2) The Return ng Off cer shall on receiv ng such not ce of w hd awal and on be ng sat sfied that the s gnature is that of the candidate cause a not ce thereof to be affixed at some consp cuous place n h s office

17 *Ret rement f om contest at elect ons* —(1) A contest ng cand date may ret re from the contest by a

(2) No person who has g ven a not ce of ret rement under sub sect on ( ) shall be allowed to cancel the not ce

(3) The Return ng Officer shall upon rece ng a not ce of ret ement under sub sect on ( ) cause a copy thereof to be aff xed to h s notice l oard and al o to l e publ he l n such manner as may be prescr bed

(4) Any person who has g ven a not ce of ret rement under subsect on ( ) shall therafter be deemed subject to the pro isions of sections 51 and 90 not to be a contest ng cand date

18 *Publ ca on of val d nom nat on* —The Return ng Off cer shall mn ed ately after the exp ry of the time fixed for withdrawal prepare and publ h a l t of al d n m nat ons n such manner as may be prescr bed

19 *Death of cand da e af er nom na on* If af er the clo ng of n m nat on and before the poll s taken any contest ng cand date d es the Returning Officer shall by publ c no e cancel all p oceed ngs relat ng to that elect on and f esh proceed ngs shall commence an l ne v dates shall be fixed for nom nat on scrut ny and w th d awal in accordance w th the forego ng prov s ons of th s Part

20 *Postponement on account of eme g n s* If the Return ng Off cer s sat sfied that proceed ngs relat ng to nominat on scrut ny or w thdrawal cannot take pl ce on the da e fixed therefor by rea on of r ot or natural clam ty he may postpone or adjourn the proceed ngs and w th the approval of the Elect on Comm s on by publ c not ce fix a new date for such proceed ngs and for any pr ceed ngs follo ving therefrom

21 *Contested and uncon ested elect on* —(1) If after scrut ny under sect on 15 the Return ng Officer dec des that only one person has been val dly nom nated for elect on or f af er any w hdrawal or ret rement only one person remains val dly nom nated for elect on the Returning Off cer shall decla e that person to be elected a member for the const tuency concerned shall g e publ c not ce of such elect on and shall make a return of the elect on n the prescr be l manner to the Elec on Comm on and to the Secretary to the appro pria e As embly

(2) The return so made shall be publ shed n the official Gazette by the Elect on Comm ss on

(3) If on the exp ry of the per od fixed for w hdra al more than one cand date rema ns duly nom nated the Returning Officer shall n the prescr bed manner and form—

(a) prepare and publ h a l st of val d non nat ons and

(b) g ve not ce of the poll

22 *Id n fy ng symbol* —(1) The Elect on Comm ss on shall prescr be a l st of symbols by wh ch con test ng cand dates may be ident fied

(2) A cand date or h s proposer or seconder may del ver to the Returning Officer w h h s nom nat on paper a declarat on stat ng the cand date s order of preference among the symbols prescr bed under sub sect on (1)

(3) Subject to any general or spec al ins ruct ons issued by the Elect on Comm ss on the Returning Officer shall allocate a symbol to each contest ng cand date and such symbol shall be ind cated in the l st of al d nominat ons publ shed under subsect on (3) of section 21 aga nst the name of the cand date to whom t has been alloca ed

Prov ded that subject to instruct ons as aforesa d the Return ng Officer shall in allocat ng symbols g ve effect as nea ly as may be to any preference stated under sub sect on (2)

Chapter III—El ct on Ag n s

23

some othe

(2)

the name

the nominat on paper

(b) the number of the elector shall be marked on the counterfoil;

(c) a mark shall be placed on the electoral roll against the number of the elector to denote that a ballot paper has been issued but without showing the particular ballot paper which has been issued; and

(d) the ballot paper shall be stamped with the official mark.

(3) The elector, on receiving the ballot paper, shall forth-with enter the screened compartment referred to in sub-section (3) of section 33 and there secretly place his ballot paper in the box bearing the name and symbol of the candidate for whom he wishes to vote.

(4) The elector shall vote without undue delay, and shall leave the polling station as soon as he has put his ballot paper into the ballot box.

(5) No person shall at any election vote in more than one constituency of the same class, nor shall any person vote more than once in the same constituency notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he votes in contravention of this subsection all his votes shall be void.

38. *Votes by presiding officer, etc.*—(1) At the request of an elector incapacited from voting in the manner required by or under this Act, the presiding officer shall, if he is satisfied that the elector is so incapacited, cause, in the presence of the polling agents, the elector's ballot paper to be placed in the ballot box bearing the name and symbol of the candidate for whom the elector wishes to vote.

(2) The name and number on the electoral roll of every elector whose vote is marked in pursuance of sub-section (1) and the reason why it is so marked, shall be entered on a list hereinafter called "the list of votes cast by the presiding officer."

(3) If any such elector as is referred to in subsection (1), states that he is blind and requests the presiding officer to allow him to vote with the assistance of another person the presiding officer shall, if he is satisfied that the elector is blind and is also satisfied by the companion that the companion is a qualified person within the meaning of this section, grant the request; and thereupon anything which is by this Act required to be done to or by the said elector in connection with the giving of the vote may be done to or with the assistance of the companion.

(4) For the purposes of subsection (3), a person shall be qualified to assist a blind elector to vote, if that person is either—

(a) entitled to vote at the election in that constituency; or

(b) the father, mother, brother, sister, husband, wife, son or daughter of the blind elector and has attained the age of twenty-one years, and has not previously assisted more than one blind person to vote at the election.

(5) The name and number in the electoral roll of every elector whose vote is given in accordance with subsection (3) and the name and address of the companion shall be entered in a list hereinafter called "the list of blind electors assisted by companion".

39. *Questions to be put to elector.*—(1) The presiding officer may, and if required by a candidate or his election or polling agent shall, put to any person applying for a ballot paper at the time of his application, but not afterwards, the following questions, or either of them, in a language which the Presiding Officer believes to be understandable by the person so applying, namely:—

(a) Are you the person registered in the electoral roll as follows?

(Here the whole entry in the roll shall be read).

(b) Have you already voted here or elsewher at this election ?

(2) No ballot paper shall be delivered to any person who refuses to answer or who answers the first squetion in the negative or the second question in the affimative.

40. *Tendered ballot papers.*—(1) If a person representing himself to be an elector applies for a ballot paper when another person has already represented himself to be that elector and has voted under the name of the person applying he shall, on satisfactorily answering the questions permitted by section 39, be entitled, subject to the provisions of this section, to take a ballot paper (in this Act called "tendered ballot paper") in the same manner as any other elector.

(2) A tendered ballot paper shall, instead of being put into the ballot box, be given to the presiding officer and endorsed by him with the name of the person applying and his number in the electoral roll, and set aside in a separate packet endorsed with the name of the candidate for whom he wishes to vote.

(3) The name of the person applying and his number on the electoral roll be entered in a list (hereinafter called "the tendered votes list").

41. *Challenge of elector.*—(1) If at the time a person applies for a ballot paper for the purposes of voting or after he has applied and before he has left the polling station a candidate or his polling agent declares to the

a day on which a fresh poll shall be taken an l shall fix the pl ce date and hours dur ng w h ch such poll shall be taken

(3) The Return ng Off cer shall not count any vot s alrea ly cast by the electors at such elect on and all such electors shall be allo e l to cast their votes afresh

31 *Poll to be by ballot* —(1) Except as prov de l in subsect on (2) the votes at the poll shall be cast by ballot the result shall be ascerta ned by count ng the votes g en to each contest ng cand date and the contesting cand date recei ng the largest number of al d votes shall be declared to be elected

(2) Rules may be made un ler th s Act to prov le for postal v t ng by persons who have been reg stered n an electoral roll in pursuance of rules ma le under the Electoral Rolls Act 957 (XXI of 1957)

32 *Ballot papers* —(1) The ballot of every elector shall cons st of a ballot paper wh ch shall be in such form and marked and numbered in such manner as may l spec fi d by the Elect on Comm ss on

(2) In spec fy ng the form and manner un ler sub sect on ( ) the Comm ss on shall ensure the secrecy of voting and the security of the ballot paper

33 *Ball t boxes* —(1) The Return ng Officer shall prov le each p es d ng off cer w th one ballot box for e ery cand date and with as many ballot boxes to be held n reserve as the Return ng Officer may cons der necessary

(2) The ballot boxes shall be of such mater al and de gn as may be spec fied by the Elect on Comm ss on

(3) Immed ately l efore the commencement of the p ll the I res d ng Officer shall show each ballot box empty to the contest ng can l date or h s elect on or poll ng a ent so that they may see th t t s empty and shall then proceed to close an l seal it in such manner as may l e presc bed and shall place the box n a screened compartment in the poll ng stat on rea ly to rece e the ballot papr s

34 *Adm ss on to poll ng stat on* —Subject to su h nstru t ons s may be g ven by the Elect on Comm ss on the Pres d ng Officer shall regulate the number of electors to be a lm tt d to the poll ng stat on at the same t me and shall exclude all other persons except—

(a) the contest ng can l lates and the r elect on an l poll ng a n s

(b) the poll ng officers and other officers ap po nt d b the R turn ng Officer to attend at the poll ng s a on

(c) any ch ld in arms accompany ng an ele tor

(d) the compan ons of bl nd electors and

(e) any other person on duty n connect on th the elec on

35 *Pre d ng off cer to keep ord r* (1) The P es d ng Officer shall keep or ler at the poll ng stat on

(2) Any person who misconducts h mself n a polling stat n or fa ls to obey the la ful orders of the presiding off cer may immed ately by order of th pres d ng ff cer be remo e l from the poll ng stat on by any pol ce officer or by any other person author sed n wr t ng by the Return ng Officer to remove h m and the person so removed shall not without the perm ss on of the pres d ng off cer aga n enter the polling stat on dur ng the day

(3) Any person so removed may f charged w th the comm ssion of an offence n the polling stat on be dealt w th as a person arrested w thout warrant

(4) The powers conferred by th s sect on shall not be so exerc ed as to depr ve an elector other w se ent tled to vote of an opportun ty to vote at that or another poll ng stat on

36 *Spec al procedure for prevent ng mpe ona on* —(1) Every person who appl es for a ballot paper at a polling stat on shall be requ re l to recei e a personal mark made w th nd l ble nk in such manner as may be spec fied by the Election Comm ss on before a ballot paper is han led to h m

(2) Where such requ rement s mposed a ballot paper may be refused to a person who appl es therefor if when applying he alrea ly bears such a mark

(3) Every person as aforesaid n sub ection (1) may also be requ red before a ballot paper is handed to h m to s gn or place h s thumb mark on a statement n such form as may be prescribed cert fy ng h s dent ty and h s part culars in the electoral roll

37 *Vo na n or l* —( ) The poll ng officer shall lel er a ballot paper to every person who appl es for

(2) Immed ately before the ballot paper is del vered to the elector—

(a) the number name and descript on of the elector as stated n the electoral roll shall be called out

(2) No person other than the Returning Officer and his clerks, the candidates and their election agents and counting agents shall be present at the count.

(3) The Returning Officer shall give the counting agents all such reasonable facilities for observing the count and all such information with respect thereto as he can give consistently with the orderly conduct of business and the discharge of his duties in connection therewith.

46. *The count.*—(1) Before the Returning Officer begins the count he shall, in the presence of the counting agents, collect together all the principal packets referred to in subsection (1) of section 44 into separate groups, candidate by candidate, and having opened the principal packets and the packets enclosed in them shall count and record the number of the ballot papers in each principal packet in succession until the entire group has been counted.

(2) Tendered ballot papers shall not be included in the count.

(3) The votes shall be counted in the following manner:—

(a) the votes shall be counted at a table, or as many tables as may be convenient, by persons hereinafter called "tellers";

(b) not more than one teller at a time shall sit at any one table;

(c) all the votes given for one candidate shall be counted before the counting of the votes given for another candidate is begun;

(d) for the purposes of clause (c) the first candidate whose votes are counted shall be the candidate whose name appears first in the list published in pursuance of clause (a) of subsection (3) of section 21, the second candidate whose name so appears second, and so on.

(4) When counting the votes the Returning Officer shall keep the ballot papers in such a manner that the identity of the elector may not be disclosed.

(5) The Returning Officer shall, so far as practicable, proceed with the count continuously allowing time only for refreshment, but if he has to suspend the count by reason of the lateness of the hour he shall seal the ballot papers (keeping those counted separate from those uncounted) and other documents and allow such counting agents as desire to do so to affix their seals, and place the ballot papers and documents in a place of safety till the count is resumed.

47. *Recount.*—(1) A candidate or his election agent or counting agent may, if present when the count or any recount of the votes is completed, request the Returning Officer to have the votes recounted or again recounted, but the Returning Officer may refuse the request if in his opinion it is unreasonable.

(2) No further step shall be taken after the completion of the count or any recount unless the candidates and the election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by this section.

48. *Rejected ballot papers.*—(1) Any ballot paper—

(a) which does not bear the official mark, or

(b) on which anything except the printed number on the back is written or marked by which the elector can be identified

shall be void and not counted.

(2) The Returning Officer shall endorse the word "rejected", on every ballot paper which under this section is rejected, and shall add to the endorsement the words "rejection objected to" if a counting agent objects to the rejection.

(3) The Returning Officer shall draw up a statement in the prescribed form showing the number of ballot papers rejected in pursuance of each clause of subsection (1) and any counting agent may copy the statement.

(4) The decision of the Returning Officer on any question arising in respect of a ballot paper shall be final but shall be subject to review on an election petition.

49. *Equality of votes.*—Where, after the count (including any recount) is completed, an equality of votes exists between any contesting candidates and the addition of one vote would entitle one of those candidates to be declared elected, the Returning Officer shall forthwith decide between those candidates by lot and the candidate on whom the lot falls shall be deemed to have received the majority of votes.

Chapter VI—Final Proceedings

50. *Declaration of result.*—(1) After the result of the poll has been ascertained the Returning Officer shall—

(a) declare the candidate elected who has or is deemed under section 49 to have received the majority of votes;

presiding officer that he has reasonable cause to believe that that person has committed an offence of personation and undertakes to prove the charge in the Court of law, the presiding officer may, after complying with the provisions of section 39 and warning the person of the consequences of personation and if he is satisfied with the answers given by him issue a ballot paper to that person

(2) If the presiding officer issues a ballot paper under subsection (1) to such person he shall enter the name and address of that person in a list to be called "the challenged votes list" and obtain his signature or thumb impression thereon:

Provided that no action shall be taken by the presiding officer unless such sum as may be prescribed has been deposited in cash with the Presiding Officer by the candidate or his agent for each challenge made under this section

42. *Spoilt paper*—An elector who has inadvertently dealt with his ballot paper in such manner that it cannot conveniently be used as a ballot paper may, on delivering it to the Presiding Officer and proving to his satisfaction the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered (hereinafter called "the spoilt ballot paper"), and the spoilt ballot paper shall be immediately cancelled

[illegible] e hour of the close of [illegible] situated and who are [illegible]

(2) For the purposes of this section, a person is said to be present and waiting to vote if he has not voted and if—

(a) where the building, room, tent or other place aforesaid is—

(i) situated in an enclosed space, he is within that enclosed space or

(ii) not so situated, he is in a line of persons waiting to be admitted thereto for the purpose of voting, or

(b) he has been given such statement as is mentioned in subsection (3) of section 36 as a preliminary to applying for a ballot paper

44 [illegible]

then enclose all the packets relating to that candidate together with a certificate stating how many packets are enclosed in a principal packet bearing the like name and symbol and seal it

(2) The presiding officer shall then, in the presence of the polling agents seal in separate packets—

(a) the unused and spoilt ballot papers placed together

(b) the tendered ballot papers,

(c) the marked copies of the electoral rolls

(d) the counterfoils of the used ballot papers

(e) the certificates of employment on duty on the date of the poll

(f) the list of votes cast by the presiding officer

(g) the list of blind electors assisted by companions,

(h) the tendered votes list,

(i) the challenged votes list, and

(j) such other papers as the Returning Officer may direct,

and shall cause all the ballot boxes and packets to be delivered to the Returning Officer

(3) The [illegible] called "the ballot paper account") ma [illegible] nur [illegible] hir [illegible] Returning Officer as unused, spoilt and tendered ballot papers

(4) The presiding officer shall give a certified copy of the ballot paper account referred to in sub section (3) to each contesting candidate or his election or polling agent present

(5) It shall be the duty of the Returning Officer to provide for the safe transport and custody of all ballot boxes, packets and documents mentioned in this section until the votes have been counted

Chapter V—The Counting of votes

45 *Attendance at count*—(1) The Returning Officer shall count the votes on the counting day, or days, and shall give the candidates, or their election agents, if any, notice in writing of the time and place at which he shall begin the count

the election specified in the order, and any endorsement on any packet of ballot papers so produced shall be *prima facie* evidence that the ballot papers are what the endorsement states them to be.

(5) The production from proper custody of a ballot paper purporting to have been used at an election, and of a counterfoil marked with the same printed number and having a number marked thereon in writing, shall be *prima facie* evidence that the elector whose vote was given by that ballot paper was the elector who had on the electoral roll the same number as was written on the counterfoil;

(6) Save as in this section provided, no person shall be allowed to inspect any rejected or counted ballot paper in the possession of the Election Commission.

PART III—DISPUTE RELATING TO ELECTION

Chapter I—Presentation of Election Petition

56. *Election petitions.*—No election shall be called in question except by an election petition presented to the Election Commission in accordance with the provisions of this Part.

57. *Presentation of petition.*—An election petition may be presented by any elector or candidate and the petition shall be deemed to have been presented—

(a) when it is delivered in person to the Secretary to the Commission or to such other officer as may be appointed by the Commission in that behalf,—

(i) by the petitioner; or

(ii) by a person authorised in writing in this behalf by the petitioner; or

(b) when delivered by registered post to the Secretary to the Commission or to such other officer as aforesaid,

and not otherwise.

58. *Respondents to a petition.*—Where a petitioner has been a contesting candidate he shall join as respondents to his petition all the other contesting candidates, and a copy of the petition shall be served upon each respondent.

59. *Time for presentation or amendment of petition.*—(1) An election petition shall be presented within thirty days next after the return made to the Election Commission under section 21 or section 50, as the case may be, has been published:

Provided that—

(a) where the petition alleges that a corrupt or illegal practice has been committed in relation to election expenses, it may be presented within the fourteen days next following the day on which the Returning Officer received the return of election expenses under section 90; and

(b) where it alleges that a corrupt or illegal practice has been committed by the returned candidate since the date of the election, but within the two months next following the publication of the result of the election in the official Gazette, it may be presented within the twenty-eight days next following the date on which such corrupt or illegal practice was alleged to have been committed.

(2) An election petition may be amended within the period specified by clause (a) or clause (b) of the proviso to subsection (1) in order to include an allegation to which that clause applies.

60. *Contents of petitions.*—(1) An election petition shall—

(a) contain a precise statement of the material facts on which the petitioner relies;

(b) set forth full particulars of any corrupt or illegal practice or other illegal act alleged by the petitioner, including as full a statement as possible of the names of the persons alleged to have committed such practices or acts and the date and place of the commission of every such practice or act.

(2) Every petition and every schedule or annex to the petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1909), for the verification of pleadings.

61. *Relief claimed by the petitioner.*—A petitioner may claim any one of the following declarations—

(a) that the election of the returned candidate is void; or

(b) that the election of the returned candidate is void and that the petitioner or some other person has been duly elected; or

(c) that the election as a whole is void.

62. *Security for costs.*—(1) Every petition shall be accompanied by a receipt showing that the petitioner has deposited a sum of two thousand rupees in a Government Treasury or in the State Bank of Pakistan in favour of the Secretary of the Election Commission as security for the costs of the petition.

(2) At any time during the trial of the petition the Election Tribunal appointed under section 65 may call upon the petitioner to increase the security deposited in pursuance of sub-section (1).

(b) give publ c not ce of h s n me an l the total number of votes g ven to each contest ng cand date and

(c) make a return in the prescr bed form to the Elect on Comm ss on and to the Secretary of the appro priate Assembly

(2) The return so made shall be publ shed in the off c al Gazette by the Elect on Comm ss on

51 *Return or forfe ture of depos t* —(1) Subject to the prov s ons of subsect ons (2) (3) and (4) the depos t made n pursuance of sect on 14 shall be returne l to the person n ak ng t or to h s legal represen at ve as soon as may be after the result of the elect on is declared

(2) If a cand date has with lrawn or the poll s countermanded by reason of h s death h s depos t shall be returned as soon as may be after h s w thdra al or death

(3) The depos t made in pursuance of sect on 14 hall not be returned n the case of a cand date ho retu es under sect on 17

(4) If a poll is taken and after the comj let on of the count n lud ng any recount) a contest ng cand date s found not to have polled more than one e gl h of the total nu b of votes polled by all the contest ng cand dates h s depos t shall be forfe ted to the Federat on

52 *Verificat on of ballot papers account* —Wh n the count on pleted the Return ng Officer shall seal up n separate packets the counted and rejected ballot papers and hall then n the presence of the cand dates and the r elect on agents and count ng agents ver fy each ballot paper account by con par ng t w th the number of ballot papers recorded by h m under subsect on ( ) of sect on 46 and open ng and reseal ng the packets conta n [illegible] s n h s [illegible] any [illegible] the u ked cop es of the e ectora rol

53 *Del very of documents to the Elec on Comm on* The Return ng Off cer shall in the prescr bed manner forward to the Elect on Comm ss on the follo n d cuments —

(a) the packets of ballot papers

(b) the ballot paper accounts the statements I rejected ballot papers and the statement prepared n accordance with section 52

(c) the tendered votes l sts the l sts of bl nd electors a s ed by compan ons and the l sts of votes cast by the pres ding off cer and the statements relat ng the eto

(d) the tendered ballot papers an l cert ficates relat ng thereto

(e) the packets conta n ng marked cop es of elector l rolls

endors ng on each packet a descr pt on of ts con en s tl e date of the elect on to h ch they relate and the name of the const tuency for which the elect on was held

54 *Retent on and publ c in pect on of documen* —( ) The Elect on Comm ss on shall reta n for a per od of one year all documents rece ved in accordance th the last preced ng sect on and thereafter shall unless otherwise directed by a H gh Court or an Elect on Tr bunal cause them to be lestroyed th conven ent speed

(2) The sa d documents except the ballot papers shall be open to publ c nspect on at such t me and subject to such cond t ons as may be prescr bed

(3) The Election Comm ss on shall on request supply cop es of or extracts from the documents open to publ c inspect on on payment of such fee and subject to such cond t ons as may be prescr bed

55 *Ord for product on of documen s* —(1) A H gh Court may make an order—

(a) for the inspect on or pro luct on of any rejected ballot paper or

(2) An Elect on Tribunal may order the open ng of a sealed packet of counterfo ls and cert ficates or the inspect on of any counted ballot papers

(3) An order under this sect on may be made subject to such cond t ons as to persons t me place and mode of nspect on production or opening as the Court or Tr bunal mak ng the order may th nk expedient

Provided that in mak ng and carry ng nto effect an order for the nspect on of counted ballot papers care shall be taken that no vote shall be disclosed until it has been proved to ha e been g ven and to have been declared by a competent Court or tr bunal to be nval d

(4) Where an order is made under th s sect on the product on by the Elect on Comm ss on of the docu ment in such manner as may be d rected by the order shall be conclus ve ev dence that the document relates to

a petition to be amended in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial and for determining the real questions at issue in the trial.

70. *Appearance before the Tribunal.*—Any appearance, application or act before the Tribunal may be made or done by a party in person or by an advocate or pleader or any person entitled or allowed to plead in any Civil Court and duly appointed to act on his behalf;

Provided that the Tribunal may, where it considers it necessary, direct any party to appear in person.

71. *Powers of the Tribunal.*—(1) The Tribunal shall have the same powers as are vested by the Code of Civil Procedure, 1908 (Act V of 1908) in a Court trying a civil suit, and in particular powers in respect of—

(a) discovery and inspection;

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) receiving evidence taken on affidavit; and

(g) issuing commissions for the examination of witnesses,

and it may summon and examine *suo moto* any person whose evidence appears to it to be material.

(2) The Tribunal shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898)

(3) For the purpose of enforcing the attendance of witnesses, the local limits of the jurisdiction of the Tribunal shall be the limits of the Province in which the election was held.

72. *Further provision relating to evidence and witnesses.*—(1) Notwithstanding anything in any enactment to the contrary no document shall be inadmissible in evidence at the trial of an election petition only on the ground that it is not duly stamped or registered.

(2) No witness shall be excused from answering any question as to any matter relevant to a matter in issue in the trial of an election petition upon the ground that the answer to such question may incriminate or tend to incriminate him, or that it may expose or tend to expose him to any penalty or forfeiture:

Provided that—

(a) no witness or other person shall be required to state for whom he has voted at an election;

(b) a witness who answers truly all questions which he is required to answer shall be entitled to receive a certificate of indemnity from the Tribunal; and

(c) an answer given by a witness to a question put by or before the Tribunal shall not, except in the case of any criminal proceeding for perjury in respect of his evidence, be admissible in evidence against him in any civil or criminal proceeding.

(3) A certificate of indemnity granted to any witness may be pleaded by him in any Court and shall be a full and complete defence to or upon any charge under Chapter IX-A of the Pakistan Penal Code (Act XLV of 1850), or under this Act arising out of the matter to which such certificate relates, but it shall not be deemed to relieve him from any disqualification in connection with an election imposed by this Act or any other law for the time being in force.

(4) The reasonable expenses incurred by any person in attending to give evidence may be allowed to him by the Tribunal and shall, unless the Tribunal otherwise directs, be deemed to be part of the costs.

73. *Recrimination when seat is claimed.*—(1) When in an election petition a declaration is claimed that any candidate other than the returned candidate has been duly elected, the returned candidate or any other party may give evidence to prove that the election of such other candidate would have been declared void had he been the returned candidate and had a petition been presented calling his election in question:

Provided that the returned candidate or such other party as aforesaid shall be entitled to give such evidence unless he has within the fourteen days next following the commencement of the trial given notice to the Tribunal of his intention so to do and has also deposited the security, or increased security, referred to in section 62.

(2) Every notice referred to in sub-section (1) shall be accompanied by such statement and particulars as are required by section 60 in the case of an election petition, and shall be signed and verified in like manner.

74. *Decision of the Tribunal.*—(1) At the conclusion of the trial of an election petition the Tribunal shall make an order—

(a) dismissing the petition; or

(b) declaring the election of the returned candidate to be void; or

(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or

63 *Dismissal of petition by Election Commission*—If in respect of any petition presented to the Election Commission any provision of sections 57 to 62 has not been complied with the petition shall be forthwith dismissed

Chapter II—Trial of Election Petitions

64 *Petitions to be referred to Election Tribunal*—If an election petition is not dismissed under section 63 Election Commission shall refer it for trial to an Election Tribunal appointed in accordance with the provisions of section 65

Provided that where more than one petition is presented in respect of the same election in the same constituency all such petitions shall be referred to the same Tribunal and the Tribunal may try such petitions either separately or in one or more groups

65 *Appointment of Tribunal*—(1) The Election Commission shall appoint the District Judge having jurisdiction in the area included in any constituency to be the Tribunal to hear election petitions made in respect of that constituency

(2) Where the area included in any constituency is under the jurisdiction of more District Judges than one the Election Commission shall appoint one of those District Judges to be the Tribunal to hear election petitions made in respect of that constituency

(3) Every such appointment shall be made in virtue of office and not by name and for the purposes of this section the expression District Judge shall not include an Additional District Judge

(4) Where any District Judge so appointed is succeeded in his office by another person or persons as District Judge the trial of any petition begun before one District Judge may be continued by his successor or successors

66 *Power of Election Commission to transfer petition*—(1) The Election Commission either of its own motion or on an application made to it in this behalf by any of the parties may at any stage transfer any election petition from the Election Tribunal to which it has been referred for trial under section 64 to any District Judge and notwithstanding anything contained in section 65 constitute such District Judge as the Election Tribunal for the purpose of trial of the petition and the Tribunal so constituted shall proceed with the trial of the petition from the stage at which it was transferred

Provided that such Tribunal may if it thinks fit recall and re-examine any of the witnesses already examined

(2) The provisions of sub-section (3) and sub-section (4) of section 65 shall apply to every Tribunal constituted under sub-section (1)

67 *Place of trial*—(1) The trial shall be held at such place within the constituency for which the election was held as the Tribunal may think fit

Provided that on being satisfied that special circumstances exist rendering it desirable that the hearing of the petition should be held or continued elsewhere the Tribunal may appoint some other place whether within or without the constituency for the hearing

(2) The trial shall not be invalid only by reason that the place where it is held is outside the territorial jurisdiction of the District Judge appointed to the Tribunal for the trial of that election petition

68 *Attorney General to assist the Tribunal*—If the Election Commission so directs the Attorney General or the Advocate General of a Province shall assist the Tribunal at the hearing of an election petition in such manner as the Tribunal may require

69 *Procedure before the Tribunal*—(1) Subject to the provisions of this Act and the rules made thereunder every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure 1908 (Act V of 1908) to the trial of suits

Provided—

(*a*) that unless it is satisfied that there is a special reason for taking the evidence of any witness down in writing the Tribunal may make a memorandum of the substance of the evidence of each witness as his examination proceeds and

(*b*) *that the Tribunal may refuse to examine a witness if it considers that his evidence is not material or* that he is called on frivolous grounds or for the purpose of delaying the proceedings

(2) Subject to the provisions of this Act the Evidence Act 1872 (I of 1872) shall apply for the trial of an election petition

(3) Notwithstanding anything in section 63 an election petition may be dismissed by the Tribunal if any provision of sections 57 to 62 has not been complied with

(4) The Tribunal may at any time upon such terms and on payment of such costs as it may direct

78. *Equality of votes on a scrutiny.*—(1) If during the trial of an election petition it appears that there is an equality of votes between any contesting candidates then—

(a) any decision made by the Returning Officer under the provisions of this Act shall, in so far as it determines the question between those candidates, apply also for the purposes of the petition; and

(b) in any other case the Tribunal shall decide between them by lot drawn in the presence of the candidates and proceed as if candidate on whom the lot falls had received an additional vote

(2) Before proceeding to decide by lot under clause (b) of sub-section (1) the Tribunal shall give notice to the contesting candidates between whom there is an equality of votes, and shall proceed to decide by lot on the day and at the time and place stated in the notice:

Provided that if the contesting candidates concerned are present when it appears that there is an equality of votes between them the Tribunal may proceed forthwith to decide by lot without giving notice as aforesaid.

79. *Other provisions relating to order of a Tribunal.*—(1) Every order of a Tribunal under section 74 or section 77 shall take effect as soon as it is made

(2) An order of the Tribunal under section 77 shall be communicated to the Election Commission which shall publish it in the official Gazette

(3) The records of the Tribunal shall be deemed to be records of the Court of the District Judge appointed to be the Tribunal

80. *Order as to costs* —(1) Costs shall be in the discretion of the Tribunal

(2) If in any order as to costs under the provisions of this Part there is a direction for the payment of costs by any party to any person such costs shall, if they have not already been paid, be payable in full, and shall upon application in writing in that behalf made within six months of the order by the person to whom costs have been awarded be paid as far as possible out of the security for costs deposited by such party under section 62

(3) Where no costs have been awarded against a party who has deposited security for costs, or where no application for payment of costs have been made within the aforesaid six months, or where a residue remains after costs have been paid out of the security, such security or the residue thereof as the case may be shall upon application in writing therefor by the person who made the deposit or by his legal representative be returned by the Election Commission to the person making the deposit

(4) Any order for costs may be enforced by an application to the Court of the District Judge appointed to be the Tribunal as if it was a decree passed by that Court:

Provided that no proceedings shall be brought under this sub section except in respect of costs which cannot be recovered by an application under sub section (2)

81. *Appeal* —(1) Save as expressly provided in this section no appeal shall lie from any order made by a Tribunal

(2) An appeal shall lie to the High Court from an order passed by a Tribunal under section 74 and an order granting leave under section 82.

82. *Withdrawal of petition* —(1) An election petition may be withdrawn—

(a) before a Tribunal has been appointed, by leave of the Election Commission ; and

(b) after a Tribunal has been appointed, by leave of the Tribunal

(2) Where an application for leave to withdraw a petition is made notice thereof shall be served on the other parties to the petition and shall be published in the official Gazette

(3) No application for leave to withdraw a petition shall be granted unless the Commission or the Tribunal, as the case may be, is satisfied that no agreement or bargain has been made or that the terms of the agreement or bargain are such that the application may be allowed

(4) If the application is granted—

(a) the petitioner shall, if the application has been made to the Tribunal, be ordered to pay the costs of the respondents thereto, or such portion thereof as the Tribunal may allow,

(b) within fourteen days after such publication any person who might himself have been a petitioner may apply to the Commission or the Tribunal, as the case may be, for leave to be substituted as petitioner and, if he complies with the provisions of section 62 as to security for costs, he may be so substituted and may continue the proceedings on such terms as the Commission or the Tribunal may decide

(5) Where leave to withdraw a petition is granted by the Tribunal and no person has been substituted as petitioner under subsection (4), the Tribunal shall report such withdrawal to the Election Commission and the Commission shall publish the report in the official Gazette.

83. *Abatement on death of petitioner.*—(1) An election petition shall abate on the death of a sole petitioner or of the survivor of several petitioners

(d) declaring the election as a whole to be void

(2) At the time of making an order under sub section (1) the Tribunal shall also make an order—

(a) where the petition alleges any corrupt or illegal practice recording—

(i) a finding whether any corrupt or illegal practice has been committed by, or with the connivance of, any candidate or his agent at the election, and if so, the nature of that practice, and

(ii) the names of all persons, if any, found guilty of any corrupt or illegal practice, and the nature of it together with any recommendation the Tribunal may think proper to make for the exemption of any persons from disqualification incurred in this connection under section 117, and

(b) fixing the costs to be paid and specifying the persons by and to whom they are to be paid

Provided that no person shall be named in an order made under sub clause (ii) of clause (a) unless—

(a) he has been given notice to appear before the Tribunal to show cause why he should not be so named, and

(b) if he has appeared in pursuance of the notice, he has been given an opportunity of cross examining any witness who has already given evidence against him, and of calling evidence in his own defence and of being heard

75. *Grounds for declaring election void* —The Tribunal shall declare an election to be void if it is satisfied that—

(a) the rejection of the nomination paper of a candidate was improper, or

(b) the nomination of the returned candidate was invalid, or

(c) on the nomination day the returned candidate was not qualified for or was disqualified from being elected for the constituency, or

(d) the failure of any person to comply with the provisions of the Constitution or this Act or the rules thereunder has materially affected the result of the election, or

(e) the result of the election has been materially affected by the improper acceptance or rejection of any nomination, or

(f) *the improper reception or refusal of any vote, or the reception of any vote which should not have* been received, has materially affected the results of the election, or

(g) the election of the returned candidate has been procured or induced by any corrupt or illegal practice or

(h) a corrupt or illegal practice has been committed by the returned candidate or his agent or by any other person with the connivance of the candidate or his agent, or

(i) corrupt or illegal practices or illegal payments, employments or hirings have so extensively prevailed at the election that they may be reasonably supposed to have affected the result

Provided that if the Tribunal is satisfied that a corrupt practice has been committed by an agent of the candidate other than his election agent, the Tribunal may decide that the election of the returned candidate was not void if it is also satisfied that—

(i) no such corrupt or illegal practice was committed at the election by the candidate or his election agent, and that such corrupt practice was committed contrary to the order, and without the sanction or connivance of the candidate or his election agent,

(ii) clause (c) of this section did not apply, and

(iii) the candidate and his election agent took all reasonable precautions to prevent corrupt or illegal practices at the election

76. *Votes to be struck off for corrupt or illegal practices* —Where in an election petition a seat is claimed for any candidate—

(a) if it is proved that the candidate or any agent on his behalf has been guilty of bribery or undue influence in respect of any person who voted at the election there shall be struck off one vote for every person who voted at the election and is proved to have been so bribed or unduly influenced

(b) if any person guilty of a corrupt or illegal practice or of illegal payment, employment or hiring, voted at the election his vote shall be void, and

(c) if any person disqualified from voting voted at the election his vote shall be void

77 *Declaration that some other candidate was elected* —If in an election petition it is claimed that a contesting candidate other than the returned candidate should have been declared elected, the Tribunal shall if satisfied that such other contesting candidate obtained the majority of the valid votes cast, declare him duly elected and the election of the returned candidate void

(b) a candidate shall not be liable, nor shall his election be avoided, for a corrupt practice under this sub section committed by an agent without his consent or connivance

89. *Limitation of election expenses*.—(1) No sum shall be paid and no expenses shall be incurred by a candidate or his election agent, whether before, during or after an election, on account of or in respect of the conduct or arrangement of the election, in excess of four annas for each entry in the register of electors to be used at the election and a candidate or election agent knowingly acting in contravention of this sub section shall be guilty of an illegal practice

(2) The sum specified in subsection (1) shall not be required to cover the candidate's personal expenses under section 87.

90. *Return of election expenses*.—(1) Within the thirty-five days next following the day on which the result of the election is published in the official Gazette in pursuance of sub-section (2) of section 50, the election agent of every contesting candidate who has not withdrawn and of every candidate who has retired under section 17 before the election shall transmit to the Returning Officer a true return in the prescribed form, or to the like effect, containing as respects that candidate a statement of all payments made by the election agent together with all the bills and receipts

(2) The return shall also contain as respects that candidate—

(a) a statement of the amount of personal expenses, if any, paid by the candidate,

(b) a statement of all disputed claims of which the election agent is aware,

(c) a statement of all the unpaid claims, if any, of which the election agent is aware,

(d) a statement of all money, securities and equivalent of money received by the election agent from the candidate or any other person for the purposes of election expenses incurred or to be incurred, with a statement of the name of every person from whom they have been received

Provided that where the candidate is his own election agent a statement of all money, securities and equivalent of money paid by the candidate shall be substituted for the statement of all money, securities and equivalent of money received by the election agent from the candidate

(3) The return transmitted under sub section (1) shall be accompanied if the candidate is his own election agent by an affidavit sworn by him in the prescribed form, and if he employs an election agent by such affidavits sworn by the candidate and the election agent severally

(4) Any election agent, who fails to transmit a return in the form and within the time required under the foregoing sub sections shall be given notice permitting him under a penalty of two hundred and fifty rupees to transmit the return within such further time as may be stated in the notice, and in default he shall be deemed to have failed to comply with the requirements of this section

(5) Subject to the provisions of section 91, if a candidate or election agent fails to comply with the requirements of this section he shall be guilty of an illegal practice

(6) Nothing in this section applies to a candidate who has withdrawn in pursuance of section 16.

91. *Authorised excuses*.—The Election Commission may, on application made to it, remove any disqualification incurred in respect of the provisions of section 90 if for reason to be recorded by it in writing it is satisfied that failure to lodge the return within the time prescribed therefor or any error or false statement in any such return arose from circumstances beyond the applicant's control

92. *Inspection of returns and affidavits*.—Returns, affidavits and any accompanying documents sent to the Returning Officer under section 90 shall be kept at the Office of the Returning Officer or some convenient place appointed by him and shall at all reasonable times during the twelve months next following the day they are received by him be open to inspection by any person on payment of such fee as may be prescribed, and the Returning Officer shall on demand furnish copies thereof or of any part thereof at such fee as may be prescribed.

PART V—OFFENCES, PENALTY AND PROCEDURE

93. *Prohibition of public meetings on polling day*.—(1) No person shall convence, hold or attend any public meeting within any constituency on the polling day in that constituency

(2) Any person who contravenes the provisions of this section shall be punishable with fine not exceeding two hundred and fifty rupees

94 *Disturbance of election meetings*.—Any person who at a public meeting to which this section applies acts, or incites others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting has been called together, shall be punishable with fine not exceeding two hundred and fifty rupees

(2) This section applies to any public meeting of a political character held in any constituency between

(2) Where a pet t on abates under sub-sect on (1) after a Tr bunal has been appo nted not ce of the aba ement shall be g ven by the Tr bunal to the Elect on Comm ss on

(3) Where a pet t on abates before a Tr bunal has been appo nted or where not ce s g ven under sub-section (2) the Elect on Comm ss on shall g ve not ce of the abaten ent n the off c al Gazette and w th n the fourteen days next follow ng such publ cat on any person who m ght h mself have been a pet oner may apply to the Comm ss on or the Tr bunal as the case may be for leave to be subst tuted as pet oner and f he com pl es w th the pro s ons of sect on 62 as to secur ty for costs he may be so subst tuted and may cont nue the proceedings on such terms as the Comm ss on or the Tr bunal may dec de

84 *D ath or w hd awal of respond nt* —If before the conclus on of the tr al of an elect on pet t on a

85 *Fa lu e of pet oner to appear* —(1) Where at any stage n the trial of a pet t on no pet t oner appears the Tr bunal may on the appl cat on of any person who n ght h mself have been a pet t oner order that that person may be subst tuted for the or g nal pet tioner or pet t oners on such terms as t may think proper

(2) If no appl cat on for subst tut on is made under sub sect on (1) the pet t on shall be d sm ssed for default but the Tr bunal may make such order as to costs as it th nks proper

PART IV—E ECTION EXPENSES

86 *Paym nt of elect on e pen e* —(1) Except as pro ded by sect ons 87 and 89 no pa ment and no ad vance or depos t shall be made by a cand date or by an agent or any other person on h s behalf at any t me n respect of elect on expenses other v se than by or through the elect on agent and every payment made by an elect on agent n respect of elect on expenses shall except where the amount s less than twenty five rupees be vouched for by a b ll stat ng the part culars and by a rece pt

(2) All money prov ded by any person other than the cand late for elect on expenses whe her as g f loan advance or depos t shall be pa d to the can l date or h s elect on agent and not otherw se

87 *Pe sonal expenses of cand da es and p y e p n* —(1) The can l date may pay any personal expenses n curred by h m on account of or in connection w th or nc dental to the elect on but the amount shall not exceed seven hundred and fifty rupees n all and any further personal expen es so nc rred by h m shall be pa d by h s elect on agent

(2) Any person may if so author sed in wr t ng by the elect on agent pay any necessary expenses for sta onery po tage telegrams and other petty expenses to a total amount not exceed ng h t named n the author ty but any excess above the amount so named shall be pa d by the elect on agent

(3) A written statement of the amount spent by the candidate under sub sect on ( ) and of the part culars of payment made under sub sect on (2) shall be sent to the elect on agent with n fourteen days of the d y on which the result of the elect on is declared and p yments under sub sect on (2) shall be ouched for by a b ll containing the rece pt of the person mak ng such payments

88 *P oh b t on of unauthor sed expen es* —(1) No expenses shall w th a v ew to promot ng or procuring the elect on of a candidate be ncurred by any person o her than the cand date h s elect on agent and persons au hor sed n wr t ng by the elect on agent or by the pol t cal organ sa on to wh ch the dand date belongs on account of—

(a) hold ng publ c meet ngs or organis ng any publ c d splay or

(b) ssuing advert sements banners c culars or publ cat ons or

(c) otherw se present ng to the electors the cand date or h s v ews or h s symbol or the extent o nature of the support he enjoys or d sparag ng another cand date

Prov ded that clause (c) of th s sub sect on shall not—

( ) restr ct the publ cat on of any matter relating to elect on n a newspaper or other per od cal or

contravent on of th s section he shall be gu lty of a corrupt pract ce

Prov ded that—

(a) the court before whom a pe son s conv cted under th s sub sect on may f t th nks fit n the spec al c rcumstances of the case m t gate or ent rely rem t any ncapac ty mposed by sect on 117 and

(4) A candidate shall not be liable, nor shall his election be avoided, for a corrupt practice under sub-section (2) or subsection (3) committed by his agent other than an election agent, unless the corrupt practice was committed with the knowledge and consent of the candidate or his election agent.

(5) Where an offence under this section is committed by a body or association corporate every office-holder and officer thereof shall, unless he proves the offence was committed without his knowledge, be deemed to have committed the offence.

98. *Appeal to communal prejudices.*—Any person who calls upon or attempts to persuade any person to vote, or to refrain from voting, for any candidate merely on the ground that the candidate belongs to a particular caste, race, tribe, sect, community or religion, shall be guilty of a corrupt practice:

Provided that a candidate shall not be liable in respect of, nor shall his election be void for, the corrupt practice under this section committed by his agent other than his election agent.

99. *Use of vehicles and vessels.*—(1) No person in order to support or oppose any candidate at an election shall let, lend or employ, or hire, borrow or use any vehicle or vessel for the purpose of conveying electors to or from the poll, and a person knowingly acting in contravention of this sub-section shall be guilty of a corrupt practice:

Provided that no candidate shall be liable, nor shall his election be avoided, for a corrupt practice under this sub-section committed without his consent or connivance by an agent other than his election agent.

(2) Nothing in this section shall—

(a) prevent any person from employing a vehicle or vessel for the purpose of conveying to or from the poll himself or any members of the household to which he belongs, or from borrowing a vehicle or vessel from a member of that household to be employed for that purpose; or

(b) prevent an elector, or several electors together, from hiring or using a vehicle or vessel for the purpose of conveying himself, or themselves, to or from the poll.

100. *Bribery.*—(1) A person shall be guilty of a corrupt practice if he is guilty of bribery.

(2) A person shall be guilty of bribery if he directly or indirectly by himself or by any other person on his behalf gives, offers, or promises any gratification to any person for purposes of inducing—

(a) a person to stand or not to stand as, or to withdraw or retire from being, a candidate at an election; or

(b) an elector to vote or to refrain from voting at an election, or for the purpose of rewarding—

(i) a person for having stood or not stood, or for having withdrawn or retired from being, a candidate at an election; or

(ii) an elector for having voted or refrained from voting at an election.

(3) A person shall be guilty of bribery if before or during an election he directly or indirectly, by himself or by any other person receives, agrees, or contracts for any gratification for standing or not standing, or withdrawing or retiring from being a candidate at an election or for voting or refraining from voting at the election.

(4) For the purposes of this section "gratification" includes a gratification in money or estimable in money and all forms of entertainment and all forms of employment for reward, but does not include the payment of any election expenses incurred *bona fide* and duly entered in the return of election expenses.

101. *Undue influence.*—(1) A person shall be guilty of a corrupt practice if he is guilty of undue influence—

(2) A person shall be guilty of undue influence—

(a) if he directly or indirectly by himself or by any other person on his behalf makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatents to inflict by himself or by any other person any injury, damage, harm or loss upon or against any person or to call down divine displeasure or the displeasure of any saint or *Pir* upon or to give a religious sentence against or in respect of any person or uses official influence or governmental patronage in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting, or to induce him not to offer himself as a candidate for election or to withdraw his candidature; or

(b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise by an elector, or thereby compels, induces or prevails upon an elector either to vote or to refrain from voting.

(3) For the purposes of this section "harm" includes social ostracism or excommunication or expulsion from any caste or community.

102. *Personation.*—(1) A person shall be guilty of a corrupt practice if he commits, abets, counsels or procures the commission of the offence of personation.

the date of issue of a notification under this Act calling upon the constituency to elect a member or members and the polling day

[illegible]

the police officer may arrest him without warrant

95 *Prohibition of canvassing in or near polling station* —(1) Any person who on any day on which a poll is taken at a polling station does any of the following acts within a radius of 400 yards of the polling station that is to say—

(a) canvasses for votes, or

(b) solicits the vote of any elector or

(c) persuades any elector not to vote at the election or not to vote for a particular candidate or

(d) exhibits any notice sign banner or flag designed to encourage electors to vote for or discourage electors from voting for, any contesting candidate,

shall be guilty of an offence which shall be cognizable and punishable with fine not exceeding two hundred and fifty rupees

[illegible]

(3) If a police officer has reason to believe that an offence is being committed under clause (d) of sub section (1) he may remove the notice, sign banner or flag

96 *Disorderly conduct near polling station* —(1) If while polling is in progress at a polling station any person does any act which disturbs or cause annoyance to any elector visiting the polling station for the purpose of casting a vote or interferes with the performance of the duty of a presiding officer polling officer or polling agent the person so acting shall be guilty of an offence under this section

(2) Without prejudice to the generality of sub section (1) a person shall be guilty of an offence under this section if he—

(a) uses in such manner as to be audible within the polling station any gramophone megaphone loud speaker or other apparatus for reproducing or amplifying sounds or

(b) persistently shouts in such manner as to be audible within the polling station or shouts with the intention of being audible within that station

(3) Any person who abets an offence under this section shall be guilty of an offence under this section

(4) An offence under this section shall be punishable with imprisonment for a term not exceeding three months or with fine or with both

(5) If the presiding officer has reason to believe that any person is committing or has committed an offence under this section he may direct a police officer to arrest such person and thereupon the police officer shall arrest him without warrant

(6) Any police officer may take such steps and use such force as may be reasonably necessary for preventing the commission of an offence under this section and may seize any apparatus to which sub section (2) applies

97 *False statements as to candidates* —(1) Any person who before or during an election makes or publishes any false statement of fact concerning the personal character of a candidate or in such a way as to affect the candidate, concerning the personal character of a relation of the candidate for the purpose of affecting or procuring the return of any candidate at the election shall be guilty of a corrupt practice unless he can show that he had reasonable grounds for believing and did believe, the statement to be true

Provided that a candidate shall not be liable nor shall his election be avoided for any corrupt practice under this sub-section committed by his agent other than his election agent unless—

[illegible] consented to the committing of the corrupt practice by [illegible]

[illegible] rially affected in

(2) Any person who before or during an election knowingly publishes a false statement relating to the symbol of any candidate whether that symbol has been allocated to the candidate or not shall be guilty of a corrupt practice

(3) Any person who, before or during an election knowingly publishes a false statement of the withdrawal of a candidate at the election for the purpose of promoting or procuring the election of another candidate shall be guilty of a corrupt practice

107. *Requirement of secrecy.*—(1) The following persons, that is to say—

(a) every Returning Officer, presiding officer or polling officer: and

(b) every candidate and election agent or polling agent attending at a polling station;

shall maintain and aid in maintaining the secrecy of voting and shall not, except for some purpose authorised by law communicate to any person before the poll is closed any information as to—

(i) the name or number on the electoral roll of any elector who has or has not applied for a ballot paper or voted at a polling station; or

(ii) the official mark.

(2) Every person attending at the counting of votes shall maintain and aid in maintaining the secrecy of voting and shall not—

(a) ascertain or attempt to ascertain at the counting of the votes the number on the back of any ballot paper; and

(b) communicate any information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper.

(3) No person whosoever shall—

(a) interfere or attempt to interfere with an elector when recording his vote; or

(b) otherwise obtain or attempt to obtain in a polling station information as to the candidate for whom an elector in that station is about to vote or has voted;

(c) communicate at any time any information obtained in a polling station as to the candidate for whom an elector in that station is about to vote or has voted, or as to the number on the back of the ballot paper given to an elector at that station.

(4) No person having undertaken to assist a blind elector to vote shall communicate at any time any information as to the candidate for whom that elector intends to vote or has voted or as to the number on the back of the ballot paper given for the use of that elector.

(5) If any person acts in contravention of this section he shall be guilty of an offence punishable with imprisonment for a term not exceeding six months or with fine or with both.

108. *Officials at election not to act for candidates.*—(1) No person who is a Returning Officer, or an Assistant Returning Officer, or presiding or polling officer at a polling station, or any officer or clerk appointed by the Returning Officer or the presiding officer to perform any duty in connection with an election shall in the conduct or the management of the election do any act other than that of voting to further or to hinder the election of a candidate.

(2) No such person as aforesaid, and no member of a police force, shall endeavour—

(a) to persuade any person to give his vote at the election; or

(b) to dissuade any person from giving his vote at the election; or

(c) to influence the voting of any person at the election in any manner.

(3) The provisions of subsections (2) and (4) shall apply to the members of any organised body of persons who are on duty in connection with the election under the authority of any law or with the permission of the presiding officer.

(4) Any person who contravenes the provisions of this section shall be punishable with imprisonment for a term not exceeding six months or with fine or with both.

109. *Obtaining assistance of Government officer prohibited.*—(1) No candidate or election agent, and no other person with the connivance of a candidate or his election agent, shall obtain or procure or abet or attempt to obtain or procure, any assistance prohibited by section 110.

(2) Any contravention of this section shall be an illegal practice.

110. *Assistance by Government officer prohibited.*—(1) No person in the service of Pakistan shall give any assistance to further or to hinder the election of a candidate except by giving his own vote, and shall not disclose for whom he has voted.

(2) If any person acts in contravention of this section he shall be guilty of an offence punishable with imprisonment for a term not exceeding two years or with fine or with both.

111. *Prosecution for corrupt or illegal practices.*—(1) Any person who commits a corrupt practice shall be guilty of an offence, which shall be cognizable and punishable with imprisonment for a term not exceeding two years or a fine or both.

(2) Any person who commits an illegal practice shall be guilty of an offence punishable with a fine not exceeding five hundred rupees.

(2) A person shall be guilty of personat on at an elect on f he otes as some other person whether that o her person is l ving or dead or is a fict tious j erson

(3) For the purposes of th s sect on a person who has appl ed for a ballot paper for the purpose of vot ng shall be deemed to have voted

(4) If the pres d ng off cer has reason to bel e e th t any person is comm tt ng or has comm tted an offence under this sect on he may d rect a pol ce officer to arrest such person and thereupon the pol ce officer shall a rest h m w thout arrant

103 *Cau ng wa t ng elector to d pa t* —A person shall be gu lty of a corrupt pract ce f he cau es or at empts to cause any person present and wa t ng to vote with n the mean ng of sect on 43 to depa t hout ha ng voted

104 *O her vot ng off n e* —(1) A person shall be gu lty of an offence f he—

(a) votes knowing that he is d squal f ed from vot n or

(b) votes more than once in the same const tuency or

(c) votes in more than one con t tuency at a general elect on or

(d) remo es a ballot paper from a poll ng sta ion dur ng the poll or

(e) know ngly in luces or procures some other person to do an act h h s or but for tha other pe son s want of knowledge ould be an offence under th s sub sect on

(2) For the purposes of th s sect on a person ho has appl ed for a ballot pape for the purpo e of ot ng shall be deen ed to ha e voted

(3) An offence under th s sect on shall be an llegal pract ce

Prov ded that—

(a) the Court before wh ch a person s conv cted of any such offence may f t th nks t just in the spec al c rcums ances of the case m t gate or ent rely rem t any d squal ficat on mposed by sect on 117 and

(b) a cand date shall not be l able nor shall h s elect on be a o de l for an illegal pract ce under th s sect on by any agent of h s unless the off nce as comm tted w th h s knowledge or at h s nst gat on

105 *B ea he of offi al du y in conn ct on w h elect ons* —( ) If any Reg s rat on Officer Return ng Officer pres ding officer or any o her person employed by such an off cer in connect on w th h s offic al dut es and any person employed n the postal or telegraph c serv ces s w thout reasonable cause gu lty of any act or om on in breach of his offic al duty he shall be gu lty of an offence pun shable w th fine not exceed ng f e hundred rupees

(2) The exp ess on off c al duty shall for the purpose of th s sect on be con trued accord ngly bu shall not nclude dut es mposed otherw se than by or under th s Act

106 *Tamp ng w h pape s* —(1) A person shall be gu lty of an offence f at an elect on under th s Act he—

(a) f audulently defaces or frau lulently destroys any nom na on paper or

(b) fraudulently defaces or fraudulently destroys any ballot paper or the offic al mark on a ballot paper or

(c) w thout due author ty appl es any ballot paper or

(d) forges any ballot paper or offic al mark or

(e) f audulen ly puts nto any ballot box any ballot paper other than the ballot paper h ch he s autho ed by law to put n or

(f) f audulently takes out of the poll ng stat on any ballot paper or

(g) without due author ty destroys takes opens or o herw se nterferes w h any ballot box or packet of ballot paper in use for the purpo e of the elect on or

(h) without due au hor ty breaks any seal affixed in accordance w th th s Act or

(i) f audulently or w hout due author ty as the case may be attemp s to do any of the forego ng acts

(2) A person gu lty of an offence under th s sect on shall—

(a) f he s a Return ng Officer or pres d ng off cer or any o her officer or clerk on offic al duty in connec t on w th the elect on be pun shable w th mpr sonment for a term not exceed ng two years or w th fine or v th bo h or

(b) f he is any other person w h impr sonment fo a te m not exceed ng s x mon hs or w th fine or w h bo h

(3) Any offence pun hable under clause (b) of sub-sect on (1) shall be cogn zable

(3) No person who is not a citizen of India, shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

otection of rtain rights regarding freedom of peech, etc.

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business.

2[(2) Nothing in sub-clause (a) of clause(1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with freign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular , [nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.]

Protection in respect of conviction 'or offences.

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

rotection of :and personal liberty.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Protection against arrest and detention in certain cases.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) A prosecution under this section shall be commenced within six months of the commission of the offence or if the election was made the subject of an election petition and an order has been made by an election Tribunal in respect thereof within three months of the date of such order

(4) Where an offence under this section is alleged to have been committed by a citizen of Pakistan outside Pakistan proceedings may be taken before the appropriate court in Pakistan having jurisdiction in the place where the person to be charged may be found and the period of six months referred to in sub section (3) shall run from the date on which the person charged first arrived in Pakistan next after the commission of the offence

112 *Prosecution for offences by public officers*—(1) If the Election Commission has reason to believe that any offence punishable under sections 105 to 110 has been committed it shall be the duty of the Commission to cause such enquiries to be made and such prosecutions to be instituted as the circumstances of the case appear to it to require

(2) No court shall take cognizance of any such offence if it is alleged to have been committed by any person in respect of his official duty unless there is a complaint made by order of or under authority from the Election Commission

(3) For the purposes of subsection (2) court does not include an Election Tribunal

113 *Procedure*—Save as otherwise provided in this Act the provisions of the Code of Criminal Procedure 1898 (Act V of 1898) shall as far as applicable and with necessary modifications apply to the trial of offences punishable under this Act

114 *This Part not to apply to certain matters*—Nothing in this Part applies to a declaration of future administrative or political intentions or policy or to a promise of administrative or political action or to the exercise of a legal right without intent to interfere with an electoral right

PART VI—DISQUALIFICATIONS

115 *Provisions in addition to and not in derogation of other law*—The provisions of this Part shall be in addition to and not in derogation of the provisions of paragraph 4 in Part II of the Fourth Schedule to the Constitution

116 *Government contractors etc*—(1) Subject to the other provisions of this section a person shall be disqualified for being elected or being a member of the National Assembly or a Provincial Assembly if whether by himself or by any person or body or persons in trust for him or for his benefit or on his account he has any share or interest in a contract for the supply of goods to or for the execution of any works or the performance of any services undertaken by the Government

(2) A disqualification under subsection ( ) shall not here the share or interest in the contract devolves

(3) A person shall not be disqualified under sub section (1) by reason of his having a share or interest in a contract entered into between the Government and a public company as defined in section 2 of the Companies Act 1913 (VII of 1913) of which he is a shareholder but is neither a director holding an office of profit under the company nor a managing agent

(4) Nothing in sub section (1) shall extend to a contract entered into between a co operative society and the Government

h contract as referred to in sub

business any other member of the said family having no share or interest in that business shall not become subject to such disqualification

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(2) Where such an order has been made recording a finding that a corrupt or illegal practice has been committed by a person other than a candidate or his election agent such person shall be disqualified for being or being elected as a member of the National Assembly or a Provincial Assembly for a period of six years from the date of the order

Freedom as to payment of taxes for promotion of any particular religion

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination

Freedom as to attendance at religious instruction or religious worship in certain educational institutions

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto

Cultural and Educational Rights

Protection of interests of minorities

29 (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them

Right of minorities to establish and administer educational institutions

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Right to Property

Compulsory acquisition of property

31. (1) No person shall be deprived of his property save by authority of law.

[2][(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given, and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property]

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, *having been reserved for the consideration of the President*, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification, and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub section (2) of section 299 of the Government of India Act, 1935

Saving of laws providing for acquisition of estates etc

[3][31A. [4][(1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien, or

(b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7), or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4),

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention, and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4)

R ght aga nst Exploitation

23 (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

Proh b of traffi in huma be ngs a forced labour

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes and in imposing such service the State shall not make any discrimination on grounds only of religion race caste or class or any of them

24 No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment

Proh bi employ of child factorie

Right to Freedom of Relig on

25 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess practice and propagate religion

Freedom of consc and free profess pract ce propaga of rel g

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice,

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus

Explanation I—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion

Expl nat on II ... the reference to H nd s shall be construed as including a refe ... to Hindu religious institu t on ...

... ion or any section thereof shall have the right—

Freedo to man rel giou affairs

(a) to establish and maintain institutions for religious and charitable purposes

(b) to manage its own affairs in matters of religion,

(c) to own and acquire movable and immovable property, and

(d) to administer such property in accordance with law

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this Constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression "law in force" has the same meaning as in article 372.[1]

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 :

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent]

(2) In this article,—

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant [and in the States of Madras and Kerala, any *janmam* right],

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub proprietor, under proprietor, tenure holder [*raiyat*, *under raiyat* or other intermediary and any rights or privileges in respect of land revenue]

31B Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force] Validation of certain Acts and Regulations

Right to Constitutional Remedies

32 (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed *Remedies* for enforcement of rights conferred by this Part

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

Power to Parliament to modify the rights conferred by this Part in their application to Forces.

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Restrictions on rights conferred by this part while martial law is in force in any area

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under martial law in such area

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes o' both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

CONSTITUTION OF THE UNITED STATES OF AMERICA[1]

We the People of the United States, in Order to form a more perfect Union establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America

ARTICLE I

SECTION 1 All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives

SECTION 2 The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature

No Person shall be a Representative who shall not have attained to the age of twenty five Years and been seven Years a Citizen of the United States, and who shall not, when elected be an Inhabitant of that State in which he shall be chosen

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons including those bound to Service for a Term of Years and excluding Indians not taxed, three fifths of all other Persons The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct The Number of Representatives shall not exceed one for every thirty Thousand but each State shall have at Least one Representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six Virginia ten, North Carolina five, South Carolina five, and Georgia three

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies

The House of Representatives shall chuse their Speaker and other Officers, and shall have the sole Power of Impeachment

SECTION 3 The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years, and each Senator shall have one Vote

[illegible]

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States

The Senate shall have the sole Power to try all Impeachments When sitting for that Purpose, they shall be on Oath or Affirmation When the President of the United States is tried the Chief Justice shall preside And no Person shall be convicted without the Concurrence of two thirds of the Members present

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law

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1 The Constitution was submitted to the States for ratification on 28 September 1787 The ninth State ratified on 21 June 1788, and the Constitution went into effect on 4 March 1789

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of Union, and recommended to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

To constitute Tribunals inferior to the supreme Court,

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years,

To provide and maintain a Navy,

To make Rules for the Government and Regulation of the land and naval Forces,

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respecively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress,

ture of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals dock Yards, and other needful Buildings,—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof

SECTION 9 The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person

The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it

No Bill of Attainder or ex post facto Law shall be passed

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken

No Tax or Duty shall be laid on Articles exported from any State

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another, nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time

No Title of Nobility shall be granted by the United States And no Person hold ng any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present Emolument Office, or Title, of any kind whatever, from any King Prince, or foreign State

any Title of Nobility

No State shall, *without the Consent of the* Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States, and all such Laws shall be subject to the Revision and Controul of the Congress

Troops, or Ships of War

foreign Power, or engage

ARTICLE II

SECTION 1 The executive Power shall be vested in a President of the United States of America He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE [I][1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE [III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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1 The first ten amendments were proposed by Congress on 25 September 1789, and ratified by sufficient States by 15 December 1791.

ART CIE I I

SECTION 1 The Jud cial Power of the Un ted States shall be vested n one supreme Court and in such inferior Courts as the Congress may from t me to t me orda n and establ sh The Judges both of the supreme and nferior Courts shall hold the r Offices during good Behav our and shall at stated T mes rece e for the r Services a Compensat on which shall not be d m n shed during the r Con inuance in Office

SECTION 2 The jud c al Power shall extend to all Cases in Law and Equ ty ar s n under th s Const tu t on the Laws of the Un ted States and Treat es made or wh ch shall be made under the r Author ty —to all Cases affecting Ambassadors other publ c Min sters and Consuls —to all Cases of adm ralty and mar t me Jurisdiction —to Controvers es to which the Un ted States shall be a Party —to Controvers es between two o mo e States —between a State and C t zens of another Sta e —between C t zens of d fferent Sta es —between C tizens of the same State cla m ng Lands under Grants of d fferent Sta es and between a State or the C zens thereof and fore gn States C t zens or Subjects

tions as the Congress sha l make

The Trial of all Crimes except in Cases of Impeachment shall be by Jury and such Tr al shall be held in the State where the said Crimes shall have been comm tted but when not comm tted within any Sta e the Trial shall be at such Place or Places as the Congress may by Law have directed

SECTION 3 Treason aga nst the Un ted States shall cons st only in levying War against them or n adhering to the r Enem es giving them A d and Comfort No Person shall be conv cted of Treason unless on the Testimony of two W tnesses to the same overt Act or on Confess on in open Court

The Congress shall have Power to declare the Pun shment of Treason but no Atta nder of Treason shall wo k Corrupt on of Blood or Forfe ture except during the L fe of the Person atta ned

ARTICLE IV

SECTION 1 Full Faith and Cred t shall be g ven in each State to the Publ c Acts Records and judic al Proceedings of every other State And the Congress may by general Laws prescr be the Manner n which such Acts Records and Proceedings shall be proved and the Effects thereof

SECTION 2 The Citizens of each State shall be en tled to all Pr v leges and Immun ties of C tizens in the several States

A Person charged in any State with Treason Felony or other Cr me who shall flee from Just ce and be found in another State shall on Demand of the execu ve Author ty of the State from wh ch he fled be del vered up to be removed to the State having Jur sdict on of the Cr me

No Person held to Serv ce or Labour n one State under the Laws thereof escap ng nto another shall in Consequence of any Law or Regulat on there n be discharged from such Service or Labour but shall be deli vered up on Cla m of the Party to whom such Service or Labour may be due

SECTION 3 New States may be adm tted by the Congress into this Un on but no new State shall be formed or erected within the Jurisd ction of any other State nor any State be formed by the Junct on of two or more States or Parts of States without the Consent of the Legislature of the States concerned as well as of the Congress

The Congress shall have Power to dispose of and make all needful Rules and Regulat ons respecting the Territory or other Property belong ng to the Un ted States and nothing in this Const tution shall be so construed as to Prejudice any Cla ms of the United States or of any particular State

SECTION 4 The United States shall guar ntee to every State n this Un on a Republican Form of Go vernment and shall protect each of them aga nst In as on and on Appl cat on of the Legislature or of the Execu t e (when the Leg slature cannot be convened) aga nst domest c V olence

ARTICLE V

The Congress whenever t vo th rds of both Houses shall deem t necessary shall propose Amendments to this Const tut on or on the Appl cat on of the Legislatures of two thirds of the several States shall call a Conven on for proposing Amendments which n e ther Case shall be val d to all Intents and Purposes as Part of this Cons tut on when ratified by the Legislatures of three fourths of the several States or by Convent ons n three fourths thereof as the one or the other Mode of Rat ficat on may be proposed by the Congress Provided that no Amendment which may be made pr or to the Year One thousand eight hundred and e ght shall in any Manner affect the first and fourth Clauses n the Ninth Sect on of the first Art cle and that no State w thout its Consent shall be deprived of ts equal Suffrage in the Senate

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[3]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE [XVIII][4]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

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1 Proposed 27 February 1869, and declared ratified 30 March 1870.

2 Proposed 12 July 1909, and declared ratified 25 February 1913.

3 Proposed 13 May 1912, and declared ratified 31 May 1913.

4 Proposed 18 December 1917, and declared ratified 29 January 1919.

ARTICLE [VII]

[illegible] right of trial by [illegible] of the United [illegible]

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE [XI][1]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE [XII][2]

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall [illegible]

[illegible] shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. [illegible] devolve up[illegible] as in the [illegible] number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE [XIII][3]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIV][4]

SECTION [illegible] are citizens of [illegible] which shall abr[illegible]

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1 Proposed 4 March 1794, and declared ratified 8 January 1798.

2 Proposed 12 December 1803, and declared ratified 25 September 1804.

3 Proposed 1 February 1865, and declared ratified 18 December 1865.

4 Proposed 16 June 1866, and declared ratified 21 July 1868.

3rd June 1947

STATEMENT BY HIS MAJESTY'S GOVERNMENT

Introduction

1. On February 20th, 1947, His Majesty's Government announced their intention of transferring power in British India to Indian hands by June 1948. His Majesty's Government had hoped that it would be possible for the major parties to co-operate in the working-out of the Cabinet Mission's Plan of May 16th, 1946, and evolve for India a Constitution acceptable to all concerned. This hope has not been fulfilled.

2. The majority of the representatives of the Provinces of Madras, Bombay, the United Provinces, Bihar, Central Provinces and Berar, Assam, Orissa and the North-West Frontier Province, and the representatives of Delhi, Ajmer-Merwara and Coorg have already made progress in the task of evolving a new Constitution. On the other hand, the Muslim League Party, including in it a majority of the representatives of Bengal, the Punjab and Sind as also the representative of British Baluchistan, has decided not to participate in the Constituent Assembly.

3. It has always been the desire of His Majesty's Government that power should be transferred in accordance with the wishes of the Indian people themselves. This task would have been greatly facilitated if there had been agreement among the Indian political parties. In the absence of such agreement, the task of devising a method by which the wishes of the Indian people can be ascertained has devolved upon His Majesty's Government. After full consultation with political leaders in India, His Majesty's Government have decided to adopt for this purpose the plan set out below. His Majesty's Government wish to make it clear that they have no intention of attempting to frame any ultimate Constitution for India; this is a matter for the Indians themselves. Nor is there anything in this plan to preclude negotiations between communities for a united India.

The Issues to be decided

4. It is not the intention of His Majesty's Government to interrupt the work of the existing Constituent Assembly. Now that provision is made for certain Provinces specified below, His Majesty's Government trust that, as a consequence of this announcement, the Muslim League representatives of those Provinces, a majority of whose representatives are already participating in it, will now take their due share in its labours. At the same time, it is clear that any Constitution framed by this Assembly cannot apply to those parts of the country which are unwilling to accept it. His Majesty's Government are satisfied that the procedure outlined below embodies the best practical method of ascertaining the wishes of the people of such areas on the issue whether their Constitution is to be framed :—

(a) in the existing Constituent Assembly; or

(b) in a new and separate Constituent Assembly consisting of the representatives of those areas which decide not to participate in the existing Constituent Assembly.

When this has been done, it will be possible to determine the authority or authorities to whom power should be transferred.

Bengal and the Punjab

5. The Provincial Legislative Assemblies of Bengal and the Punjab (excluding the European members) will, therefore, each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the Province. For the purpose of determining the population of districts, the 1941 census figures will be taken as authoritative. The Muslim majority districts in these two Provinces are set out in the Appendix to this Announcement.

6. The members of the two parts of each Legislative Assembly sitting separately will be empowered to vote whether or not the Province should be partitioned. If a simple majority of either part decides in favour of partition, division will take place and arrangements will be made accordingly.

7. Before the question as to the partition is decided, it is desirable that the representatives of each part should know in advance which Constituent Assembly the Province as a whole would join in the event of the two parts subsequently deciding to remain united. Therefore, if any member of either Legislative Assembly demands, there shall be held a meeting of all members of the Legislative Assembly (other than Europeans) at which a decision will be taken on the issue as to which Constituent Assembly the Province as a whole would join if it were decided by the two parts to remain united.

ARTICLE [XIX][1]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex

Congress shall have power to enforce this article by appropriate legislation

ARTICLE [XX][2]

SECTION 1 The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January of the years in which such terms would have ended if this article had not been ratified, and the terms of their successors shall then begin

SECTION 2 The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day

SECTION 3 If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified declaring who shall then act as President, or the manner in which one who is to act shall be selected and such person shall act accordingly until a President or Vice President shall have qualified

SECTION 4 The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them

SECTION 5 Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article

SECTION 6 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission

ARTICLE [XXI][3]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed

SECTION 2 The transportation or importation into any State Territory or possession of the United [illegible]

[illegible] date of the submission hereof to the States by the Congress

ARTICLE [XXII][4]

SECTION 1 No person shall be elected to the office of the President more than twice and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once But this Article shall [illegible]

[illegible] mainder of such term

SECTION 2 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress

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1 Proposed 4 June 1919, and declared ratified 26 August 1920

2 Proposed 2 March 1932, and declared ratified 6 February 1933

3 Proposed 20 February 1933, and declared ratified 5 December 1933

4 Proposed 24 March 1947, and declared ratified 1 March, 1951

15. In accordance with the mandates given to them, the representatives of the various areas will either join the existing Constituent Assembly or form the new Constituent Assembly

Administrative Matters

15 Negotiations will have to be initiated as soon as possible on the administrative consequences of any partition that may have decided upon :—

(a) Between the representatives of the respective successor authorities about all subjects now dealt with by the Central Government, including Defence, Finance and Communications.

(b) Between different successor authorities and His Majesty's Government for treaties in regard to *matters arising out of the transfer of power*

(c) In the case of Provinces that may be partitioned, as to the administration of all provincial subjects such as the division of assets and liabilities, the police and other services, the High Courts, provincial institutions, etc.

The Tribes of the North-West Frontier

17 Agreements with tribes of the North-West Frontier of India will have to be negotiated by the appropriate successor authority

The States

18 His Majesty's Government wish to make it clear that the decisions announced above relate only to British India and that their policy *towards Indian States contained in the Cabinet Mission Memorandum of 12th* May 1946 remains unchanged

Necessity for Speed

19 In order that the successor authorities may have time to prepare themselves to take over power, it is important that all the above processes should be completed as quickly as possible To avoid delay, the different Provinces or parts of Provinces will proceed independently as far as practicable within the conditions of this Plan The existing Constituent Assembly and the new Constituent Assembly (if formed) will proceed to frame Constitutions for their respective territories they will of course be free to frame their own rules

Immediate Transfer of Power.

20 The major political parties have repeatedly emphasized their desire that there should be the earliest possible transfer of power in India With this desire His Majesty's Government are in full sympathy, and they are willing to anticipate the date of June, 1948, for the handing over of power by the setting up of an independent Indian Government or Governments at an even earlier date Accordingly, as the most expeditious, and indeed the only practicable way of meeting this desire, His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to the decisions taken as a result of this announcement This will be without prejudice to the right of the Indian Constituent Assemblies to decide in due course whether or not the part of India in respect of which they have authority will remain within the British Commonwealth

Further announcements by Governor-General

21 His Excellency the Governor-General will from time to time make such further announcements as may be necessary in regard to procedure or any other matters for carrying out the above arrangements.

APPENDIX

The Muslim majority districts of Punjab and Bengal according to 1941 census.

1. The Punjab

Lahore Division.—Gujranwala, Gurdaspur, Lahore, Sheikhupura, Sialkot.

Rawalpindi Division —Attock, Gujrat, Jhelum, Mianwali, Rawalpindi, Shahpur.

Multan Division —Dera Ghazi Khan, Jhang, Lyallpur, Montgomery, Multan, Muzaffargarh

2. Bengal.

Chittagong Division —Chittagong, Noakhali, Tippera

Dacca Division —Bakarganj, Dacca, Faridpur, Mymensingh

Presidency Division.—Jessore, Murshidabad, Nadia

Rajshahi Division —Bogra, Dinajpur, Malda, Pabna, Rajshahi, Rangpur

3rd June, 1947.

**The Viceroy's House,
New Delhi.**

8 In the event of partition being decided upon each part of the Legislative Assembly will on behalf of the areas they represent, decide which of the alternatives in paragraph 4 above to adopt

ary questions will be needed, and, as soon as a decision involving partition has been taken for either Province a Boundary Commission will be set up by the Governor General the membership and terms of reference of which will be settled in consultation with those concerned It will be instructed to demarcate the boundaries of the two parts of the Punjab on the basis of ascertaining the contiguous majority areas of Muslims and non Muslims It will also be instructed to take into account other factors Similar instructions will be given to the Bengal Bonndary Commission Until the report of a Boundary Commission has been put into effect the provisional boundaries indicated in the Appendix will be used

Sind

10 The Legislative Assembly of Sind (excluding the European members) will at a special meeting also take its own decision on the alternatives in paragraph 4 above

North West Frontier Province

present Legislative Assembly in the North West Frontier Province to choose which ...
tioned in paragraph 4 above they wish to adopt The refrendum will be held under the aegis of the Governor General and in consultation with the Provincial Government

British Baluchistan

General is examining how this can most appropriately be done

Assam

sultation with the Assam Provincial Government to decide whether the district of Sylhet should continue to form part of the Assam Province or should be amalgamated with the new Province of Eastern Bengal if that Province agrees If the referendum results in favour of amalgamation with Eastern Bengal a Boundary Commission with terms of reference similar to those for the Punjab and Bengal will be set up to demarcate the Muslim majority areas of Sylhet district and contiguous Muslim majority areas of adjoining districts which will then be transferred to Eastern Bengal The rest of the Assam Province will in any case continue to participate in the proceedings of the existing Constituent Assembly

Representation in Constituent Assemblies

14 If it is decided that Bengal and the Punjab should be partitioned, it will be necessary to hold fresh elections to choose their representatives on the scale of one for every million of population according to the principle contained in the Cabinet Mission s Plan of May 16th 1946 Similar elections will also have to be held for Sylhet in the event of its being decided that this district should form part of East Bengal The number of representatives to which each area would be entitled is as follows —

Province	General	Muslims	Sikhs	Total
Sylhet District	1	2	Nil	3
West Bengal	15	4	Nil	19
East Bengal	12	29	Nil	41
West Punjab	3	12	2	17
East Punjab	6	4	2	12

shall, in accordance with the provisions of sub-section (1) of this section, form part of the new Province of East Bengal.

(3) The boundaries of the new Provinces aforesaid and, in the event mentioned in subsection (2) of this section, the boundaries after the appointed day of the Province of Assam, shall be such as may be determined, whether before or after the appointed day, by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until the boundaries are so determined—

(a) the Bengal Districts specified in the First Schedule to this Act, together with, in the event mentioned in sub-section (2) of this section the Assam District of Sylhet, shall be treated as the territories which are to be comprised in the new Province of East Bengal ;

(b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal; and

(c) in the event mentioned in sub-section (2) of this section, the district of Sylhet shall be excluded from the Province of Assam.

(4) In this section, the expression "award" means, in relation to a boundary commission, the decisions of the Chairman of that commission contained in his report to the Governor-General at the conclusion of the commission's proceedings.

Punjab. 4. (1) As from the appointed day—

(a) the Province of the Punjab, as constituted under the Government of India Act, 1935, shall cease to exist, and

(b) there shall be constituted two new Provinces, to be known respectively as the *Punjab and East Punjab.

(2) The boundaries of the said new Provinces shall be such as may be determined, whether before or after the appointed day by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until the boundaries are so determined—

(a) the Districts specified in the Second Schedule to this Act shall be treated as the territories to be comprised in the new Province of the †Punjab, and

(b) the remainder of the territories comprised at the date of the passing of this Act in the Province of the Punjab shall be treated as the territories which are to be comprised in the new Province of East Punjab.

(3) In this section, the expression "award" means, in relation to a boundary commission, the decisions of the Chairman of that commission contained in his report to the Governor-General at the conclusion of the commission's proceedings.

The Governor-General of the new Dominions. 5. For each of the new Dominions, there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the Government of the Dominion:

Provided that, unless and until provision to the contrary is made by a law of the Legislature of either of the new Dominions, the same person may be Governor-General of both the new Dominions.

Legislation for the new Dominions. 6. (1) The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.

(2) No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

(3) The Governor-General of each of the new Dominions shall have full power to assent to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions.

(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion.

(5) No Order in Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United

* Substituted by the Indian Independence (Amendment) Act, 1950.
† Substituted by the Indian Independence (Amendment) Act, 1950.

THE INDIAN INDEPENDENCE ACT 1947

(10 AND 11 GEO 6 CH 30)

CHAPTER 30

An Act to make provision for the setting up in India of two Independent Dominions to substitute other provisions for certain provisions of the Government of India Act 1935 which apply outside those Dominions and to provide for other matters consequential on or connected with the setting up of those Dominions

[18TH JULY 1947]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows —

The new Dominions

1 (1) As from the fifteenth day of August nineteen hundred and forty seven two Independent Dominions shall be set up in India to be known respectively as India and Pakistan

(2) The said Dominions are *hereafter in this Act referred to as the new Dominions* and the said fifteenth day of August is hereafter in this Act referred to as the appointed day

Territories of the new Dominions

2 (1) Subject to the provisions of subsections (3) and (4) of this section the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under subsection (2) of this section are to be the territories of Pakistan

(2) Subject to the provisions of subsections (3) and (4) of this section the territories of Pakistan shall be—

(a) the territories which on the appointed day are included in the Provinces of East Bengal and the *Punjab as constituted under the two following sections

(b) the territories which at the date of the passing of this Act are included in the Province of Sind and the Chief Commissioner's Province of British Baluchistan and

(c) if whether before or after the passing of this Act but before the appointed day the Governor General declares that the majority of the valid votes cast in the referendum which at the date of the passing of this Act is being or has recently been held in that behalf under his authority in the North West Frontier Province are in favour of representatives of that Province taking part in the Constituent Assembly of Pakistan the territories which at the date of the passing of this Act are included in that Province

(3) Nothing in this section shall prevent any area being at any time included in or excluded from either of the new Dominions so however that—

(a) no area not forming part of the territories specified in subsection (1) or as the case may be subsection (2) of this section shall be included in either Dominion without the consent of that Dominion and

(b) no area which forms part of the territories specified in the said subsection (1) or as the case may be the said subsection (2) or which has after the appointed day been included in either Dominion shall be excluded from that Dominion without the consent of that Dominion

(4) Without prejudice to the generality of the provisions of subsection (3) of this section nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions

Bengal and Assam

3 (1) As from the appointed day—

(a) the Province of Bengal as constituted under the Government of India Act 1935 shall cease to exist and

(b) there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal

(2) If whether before or after the passing of this Act but before the appointed day the Governor General declares that the majority of the valid votes cast in the referendum which at the date of the passing of this Act is being or has recently been held in that behalf under his authority in the District of Sylhet are in favour of that District forming part of the new Province of East Bengal then as from that day a part of the Province of Assam

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*Substituted by the Indian Independence (Amendment) Act 1950

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure, and no Provincial Act shall be disallowed by His Majesty thereunder; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under sub-section (1) of this section.

(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by sub-section (2) of this section and the orders therein referred to operates to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub-section (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature.

rders for ıging this Act into force.

9. (1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient—

(a) for bringing the provisions of this Act into effective operation;

(b) for dividing between the new Dominions, and between the new provinces, to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist;

(c) for making omissions from, additions to and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions;

(d) for removing difficulties arising in connection with the transition to the provisions of this Act;

(e) for authorizing the carrying on of the business of the Governor-General in Council between the passing of this Act and the appointed day otherwise than in accordance with the provisions in that behalf of the Ninth Schedule to the Government of India Act, 1935;

(f) for enabling agreements to be entered into, and other acts done, on behalf of either of the new Dominions before the appointed day;

(g) for authorising the continued carrying on for the time being on behaf of the new Dominions, or on behalf of any two or more of the said new Provinces, of services and activities previously carried on on behalf of British India as a whole or on behalf of the former Provinces which those new Provinces represent;

(h) for regulating the monetary system and any matters pertaining to the Reserve Bank of India; and

(i) so far as it appears necessary or expedient in connection with any of the matters aforesaid, for varying the constitution, powers or jurisdiction of any legislature, court or other authority in the new Dominions and creating new legislatures, courts or other authorities therein.

(2) The powers conferred by this section on the Governor-General shall, in relation to their respective Provinces, be exercisable also by the Governors of the Provinces which, under this Act, are to cease to exist; and those powers shall, for the purposes of the Government of India Act, 1935, be deemed to be matters as respects which the Governors are, under that Act, to exercise their individual judgment.

(3) This section shall be deemed to have had effect as from the third day of June, nineteen hundred and forty-seven and any order of the Governor-General or any Governor made on or after that date as to any matter shall have effect accordingly, and any order made under this section may be made so as to be retrospective to any date not earlier than the said third day of June :

Provided that no person shall be deemed to be guilty of an offence by reason of so much of any such order as makes any provision thereof retrospective to any date before the making thereof.

(4) Any orders, made under this section, whether before or after the appointed day, shall have effect—

(a) up to the appointed day, in British India;

(b) on and after the appointed day, in the new Dominion or Dominions concerned; and

(c) outside British India, or, as the case may be, outside the new Dominion or Dominions concerned, to such extent, whether before, on or after the appointed day, as a law of the Legislature of the Dominion or Dominions concerned would have on or after the appointed day, but shall, in the case of each of the Dominions, be subject to the same powers of repeal and amendment as laws of the Legislature of that Dominion.

Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as the part of the law of that Dominion

(6) The power referred to in sub section (1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion

Consequences of the setting up of the new Dominions

7 (1) As from the appointed day—

(a) His Majesty's Government in the United Kingdom have no responsibility as respects the Government of any of the territories which, immediately before that day, were included in British India,

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligation of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise, and

(c) [illegible]

areas by treaty, grant, usage, sufferance or otherwise

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this sub section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements

(2) The assent of the Parliament of the United Kingdom is hereby give to the omission from the Royal Style and Titles of the words "Indian Imperator" and the words "Emperor of India' and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm

Temporary provision as to Government of each of the new Dominions

8 (1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly [1][Notwithstanding anything contained in this sub section or in the Government of India Act, 1935, the powers of the Constituent Assembly of Pakistan shall include and shall be deemed always to have included power to make constitutional provisions for the whole of the Federation of Pakistan as defined [illegible]

of law]

(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under sub section (1) of this section, each of the new Dominions and all Provinces and other [illegible] th the Government of India Act, [illegible] r instruments made thereunder, [illegible] with such omissions, additions, [illegible] eral under the next, succeeding section, have effect accordingly.

Provided that—

(a) [illegible]

(b) nothing in this sub-section shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof,

(c) so much of the said provisions as requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day,

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[1] Inserted by the Constitution (Amendment) Act 1954, s 2

new Dominions or elsewhere in the territories which, before the appointed day, were included in India, not being Indian forces.

(2) In its application in relation to His Majesty's military forces, other than Indian forces, the Army Act shall have effect on or after the appointed day—

(a) as if His Majesty's Indian forces were not included in the expressions "the forces", "His Majesty's forces" and "the regular forces"; and

(b) subject to the further modifications specified in Parts I and II of the Third Schedule to this Act.

(3) Subject to the provisions of sub-section (2) of this section, and to any provisions of any law of the Legislature of the Dominion concerned, all civil authorities in the new Dominions, and, subject as aforesaid and subject also to the provision of the last preceding section, all service authorities in the new Dominions, shall, in those Dominions and in the other territories which were included in India before the appointed day, performed in relation to His Majesty's military forces, not being Indian forces, the same functions as were, before the appointed day, performed by them, or by the authorities corresponding to them, whether by virtue of the Army Act or otherwise, and the matters for which provision is to be made by orders of the Governor-General under the preceding provisions of this Act shall include the facilitating of the withdrawal from the new Dominions and other territories aforesaid of His Majesty's military forces, not being Indian forces.

(4) The provisions of subsections (2) and (3) of this section shall apply in relation to the air forces of His Majesty, not being Indian air forces, as they apply in relation to His Majesty's military forces, subject, however, to the necessary adaptations, and, in particular, as if—

(a) for the references to the Army Act there were substituted references to the Air Force Act, and

(b) for the reference to Part II of the Third Schedule to this Act there were substituted a reference to Part III of that Schedule

...l Forces

13 (1) In the application of the Naval Discipline Act to His Majesty's Naval Forces, other than Indian Naval Forces, references to His Majesty's Navy and His Majesty's ships shall not, as from the appointed day, include references to His Majesty's Indian navy or the ships thereof.

(2) In the application of the Naval Discipline Act by virtue of any law made in India before the appointed day to Indian Naval Forces, references to His Majesty's navy and His Majesty's ships shall, as from the appointed day, be deemed to be and to be only, references to His Majesty's Indian navy and the ships thereof.

(3) In section 90-B of the Naval Discipline Act (which, in certain cases, subjects officers and men of the Royal Navy and Royal Marines to the law and customs of the ships and naval forces of other parts of His Majesty's dominions) the words "or of India" shall be repealed as from the appointed day, wherever those words occur.

Provisions as to the ...cretary of ...te and the Auditor of ...ian Home Accounts

14 (1) A Secretary of State, or such other Minister of the Crown as may be designated in that behalf by Order in Council under the Ministers of the Crown (Transfer of Functions) Act, 1946, is hereby authorised to continue for the time being the performance, on behalf of whatever Government or Governments may be concerned, of functions as to the making of payments and other matters similar to the functions which up to the appointed day, the Secretary of State was performing on behalf of Governments constituted or continued under the Government of India Act, 1935.

(2) The functions referred to in subsection (1) of this section include functions as respects the management of, and the making of payments in respect of, Government debt, and any enactments relating to such debt shall have effect accordingly·

Provided that nothing in this subsection shall be construed as continuing in force so much of any enactment as empowers the Secretary of State to contract sterling loans on behalf of any such Government as aforesaid or as applying to the Government of either of the new Dominions the prohibition imposed on the Governor-General in Council by section 315 of the Government of India Act, 1935, as respects the contracting of sterling loans.

(3) As from the appointed day, there shall not be any such advisers of the Secretary of State as are provided for by section 278 of the Government of India Act, 1935, and that section and any provisions of that Act which require the Secretary of State to obtain the concurrence of his advisers, are hereby repealed as from that day

(4) The Auditor of Indian Home Accounts is hereby authorised to continue for the time being to exercise his functions as respects the accounts of the Secretary of State or any such other Minister of the Crown as is mentioned in subsection (1) of this section, both in respect of activities before, and in respect of activities after the appointed day, in the same manner, as nearly as may be, as he would have done if this Act had not passed

...l proceed...ngs by and ...gainst the

15. (1) Notwithstanding anything in this Act, and in particular, notwithstanding any of the provisions of the last preceding sections, any provision of any enactment which, but for the passing of this Act, would authorise legal proceedings to be taken, in India or elsewhere by or against the Secretary of State in respect of

(5) No order shall be made under this section by the Governor of any Province, after the appointed day, or, by the Governor-General, after the thirty first day of March, nineteen hundred and forty-[nine][1], or such earlier date as may be determined, in the case of either Dominion, by any law of the Legislature of that Dominion

(6) If it appears that a part of the Province of Assam is, on the appointed day, to become part of the new Province of East Bengal, the proceeding provisions of this section shall have effect as if, under this Act, the Province of Assam was to cease to exist on the appointed day and be reconstituted on that day as a new Province

10 (1) The provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts — *Secretary of State s service*

(2) Every person who—

(a) having been appointed by the Secretary of State, or Secretary of State in Council, to a civil service of the Crown in India continues on and after the appointed day to serve under the Government of either of the new Dominions or of any Province or part thereof, or

(b) having been appointed by His Majesty before the appointed day to be a Judge of the Federal Court or of any Court which is a High Court within the meaning of the Government of India Act, 1935, continues on and after the appointed day to serve as a judge in either of the new Dominions,

shall be entitled to receive from the Government of the Dominions and Provinces or parts which he is from time to time serving or, as the case may be, which are served by the courts in which he is from time to time a judge, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office , or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day

[2][Provided that the Government of the Dominion of Pakistan may in the case of any such person or class of persons other than persons of non Asiatic Domicile, for special reasons impose such reduction in the remuneration as may be deemed necessary]

(3) Nothing in this Act shall be construed as enabling the rights and liabilities of any person with respect to the family pension funds vested in Commissioners under section two hundered and seventy three of the Government of India Act, 1935, to be governed o herwise than by Orders in Council made (whether before or after the passing of this Act or the appointed day) by His Majesty in Council and rules made (whether before or after the passing of this Act or the appointed day) by a Secretary of State or such other Minister of the Crown as may be designated in that behalf by Order in Council under the Ministers of the Crown (Transfer of Functions) Act, 1946

[3][10A For the removal of doubts it is hereby declared that subject to the other provisions of this Act and of the C [illegible]

11 (1) The orders to be made by the Governor-General under the preceding provisions of this Act shall make provision for the division of the Indian armed forces of His Majesty between the new Dominions, and for the command and governance of those forces until the division is completed — *Indian armed forces*

(2) As from the appointed day, while any member of His Majesty's forces, other than His Majesty's Indian forces, is attached to or serving with any of His Majesty's Indian forces—

(a) he shall, subject to any provision to the contrary made by a law of the Legislature of the Dominion or Dominions concerned or by any order of the Governor General under the preceding provisions of this Act, have, in relation to the Indian forces in question, the powers of command and punishment appropriate to his rank and functions, but

(b) nothing in any enactment in force at the date of the passing of this Act shall render him subject in any way to the law governing the Indian forces in question

12 (1) Nothing in this Act affects the jurisdiction or authority of His Majesty's Government in the United Kingdom, or of the Admiralty, the Army Council, or the Air Council or of any other United Kingdom authority, in relation to any of His Majesty's forces which may, on or after the appointed day, be in either of the — *[illegible]*

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1 Substituted by the Indian Independence (Amendment) Act, 1948

2 Inserted by the Indian Independence (Second Amendment) Act, 1948.

3 Inserted by the Constitution (Second Amendment) Act, 1951

(4) Nothing in this section affects any court outside the new Dominions, and the power conferred by section 2 of the Indian and Colonial Divorce Jurisdiction Act, 1926, to apply certain provisions of that Act to other parts of His Majesty's dominions as they apply to India shall be deemed to be power to apply those provisions as they would have applied to India if this Act had not passed.

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isting
, etc.

18. (1) In so far as any Act of Parliament, Order in Council, order, rule, regulation or other instrument passed or made before the appointed day operates otherwise than as part of the law of British India or the new Dominions, references therein to India or British India, however, worded and whether by name or not, shall, in so far as the context permits and except, so far as Parliament may hereafter otherwise provide, be construed as, or as including, references to the new Dominions taken together, or taken separately, according as the circumstances and subject matter may require:

Provided that nothing in this sub-section shall be construed as continuing in operation any provision in so far as the continuance thereof as adapted by this sub-section is inconsistent with any of the provisions of this Act other than this section.

(2) Subject to the provisions of sub-section (1) of this section and to any other express provisions of this Act, the Orders in Council made under sub-section (5) of section 311 of the Government of India Act, 1935, for adapting and modifying Acts of Parliament shall, except so far as Parliament may hereafter otherwise provide, continue in force in relation to all Acts in so far as they operate otherwise than as part of the law of British India or the new Dominions.

(3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

(4) It is hereby declared that the Instruments of Instructions issued before the passing of this Act by His Majesty to the Governor-General and the Governors of Provinces lapse as from the appointed day, and nothing in this Act shall be construed as continuing in force any provision of the Government of India Act, 1935, relating to such Instruments of Instructions.

(5) As from the appointed day, so much of any enactment as requires the approval of His Majesty in Council to any rules of court shall not apply to any court in either of the new Dominions.

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etc.

19. (1) References in this Act to the Governor-General shall, in relation to any order to be made or other act done on or after the appointed day, construed—

(a) where the order or other act concerns one only of the new Dominions, as references to the Governor-General of that Dominion;

(b) where the order or other act concerns both of the new Dominions and the same person is the Governor-General of both those Dominions, as references to that person; and

(c) in any other case, as references to the Governors-General of the new Dominions, acting jointly.

(2) References in this Act to the Governor-General shall, in relation to any order to be made or other act done before the appointed day, be construed as references to the Governor-General of India within the meaning of the Government of India Act, 1935, and so much of that or any other Act as requires references to the Governor-General to be construed as references to the Governor-General in Council shall not apply to references to the Governor-General in this Act.

(3) References in this Act to the Constituent Assembly of a Dominion shall be construed as references—

(a) In relation to India, to the Constituent Assembly the first sitting whereof was held on the 9th day of December 1946 modified—

(i) by the exclusion of the members representing Bengal, the Punjab, Sind and British Baluchistan; and

(ii) should it appear that the North-West Frontier Province will form part of Pakistan, by the exclusion of the members representing that Province; and

(iii) by the inclusion of members representing West Bengal and East Punjab; and

(iv) should it appear that, on the appointed day, a part of the Province of Assam is to form part of the new Province of East Bengal, by the exclusion of the members theretofore representing the Province of Assam, and the inclusion of members chosen to represent the remainder of that Province:

(b) in relation to Pakistan, to the Assembly set up or about to be set up at the date of the passing of this Act under the authority of the Governor-General as the Constituent Assembly for Pakistan:

Provided that nothing in this sub-section shall be construed as affecting the extent to which representatives of the Indian States take part in either of the said Assemblies, or as preventing the filling of casual vacancies in

any right or liability of India or any part of India shall cease to have effect on the appointed day, and any legal proceedings pending by virtue of any such provision on the appointed day shall, by virtue of this Act, abate on the appointed day, so far as the Secretary of State is concerned. Secretary of State

[illegible]

(a) in the case of proceedings in the United Kingdom, by or against the High Commissioner,

(b) in the case of other proceedings, by or against such person as may be designated by order of the Governor General under the preceding provisions of this Act or otherwise by the law of the new Dominion concerned.

and any legal proceedings by or against the Secretary of State in respect of any such right or liability as aforesaid which are pending immediately before the appointed day shall be continued by or against the High Commissioner or, as the case may be, the person designated as aforesaid

Provided that, at any time after the appointed day, the right conferred by this sub-section to bring or continue proceedings may, whether the proceedings are by, or are against the High Commissioner or person designated as aforesaid, be withdrawn by a law of the legislature of either of the new Dominions so far as that Dominion is concerned, and any such law may operate as respects proceedings pending at the date of the passing of the law

(3) In this section, the expression "the High Commissioner" means, in relation to each of the new Dominions, any such officer as may for the time being be authorised to perform in the United Kingdom, in relation to that Dominion, functions similar to those performed before the appointed day, in relation to the [illegible]

16 (1) Subsections (1) to (4) of section 288 of the Government of India Act, 1935 (which confer on His Majesty power to make by Order in Council provision for the Government of Aden) shall cease to have effect and the British Settlements Acts, 1887 and 1945 (which authorise His Majesty to make laws and establish institutions for British Settlements as defined in those Acts) shall apply in relation to Aden as if it were a British Settlement as so defined Aden

(2) Notwithstanding the repeal of the said sub sections (1) to (4), the Orders in Council in force thereunder at the date of the passing of this Act shall continue in force, but the said Orders in Council, any other Orders in Council made under the Government of India Act, 1935, in so far as they apply to Aden, and any enactments applied to Aden or amended in relation to Aden by any such Orders in Council as aforesaid may be repealed, revoked or amended under the powers of the British Settlements Acts, 1887 and 1945

(3) Unless and until provision to the contrary is made as respect Aden under the powers of the British Settlements Acts, 1887 and 1945, or, as respects the new Dominion in question, by a law of the Legislature of that Dominion, the provisions of the said Orders in Council and enactments relating to appeals from any courts in Aden to any courts which will, after the appointed day, be in either of the new Dominions, shall continue in force in their application both to Aden and to the Dominion in question and the last mentioned courts shall exercise their jurisdiction accordingly

17 (1) No court in either of the new Dominions shall, by virtue of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day, but, save as aforesaid and subject to any provision to the contrary which may hereafter be made by any Act of the Parliament of the United Kingdom or by any law of the Legislature of the new Dominion concerned, all courts in the new Dominions shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed Divorce jurisdiction

(2) Any rules made on or after the appointed day under subsection (4) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court in either of the new Dominions shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of the Dominion concerned, and so much of the said sub section and of any rules in force thereunder immediately before the appointed day as require the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect

(3) The reference in subsection (1) of this section to proceedings for a decree for the dissolution of a marriage include references to proceedings for such a decree of presumption of death and dissolution of a marriage as is authorised by section 8 of the Matrimonial Causes Act, 1937

PART

Modifications of Army Act applicable also to Air Force Act.

1. The proviso to section forty-one (which limits the jurisdiction of courts martial) shall not apply to offences committed in either of the new Dominions or in any of the other territories which were included in India before the appointed day.

2. In section forty-three (which relates to complaints), the words "with the approval of the Governor-General of India in Council" shall be omitted.

3. In sub-sections (8) and (9) of section fifty-four (which, amongst other things, require certain sentences to be confirmed by the Governor-General in Council) the words "India or," the words "by the Governor-General, or, as the case may be" and the words "In India, by the Governor-General, or, if he has been tried" shall be omitted.

4. In sub-section (3) of section seventy-three (which provides for the nomination of officers with power to dispense with courts martial for desertion and fraudulent enlistment) the words "with the approval of the Governor-General "shall be omitted.

5. The powers conferred by sub-section (5) of section one hundred and thirty (which provides for the removal of insane persons) shall not be exercised except with the consent of the officer commanding the forces in the new Dominions.

6. In sub-section (2) of section one hundred and thirty-two (which relates to rules regulating service prisons and detention barracks) the words "and in India for the Governor-General' and the words "the Governor-General" shall be omitted except as respects rules made before the appointed day.

7. In the cases specified in sub-section (1) of section one hundred and thirty-four, inquests shall be held in all cases in accordance with the provisions of sub-section (3) of that section.

8. In section one hundred and thirty-six (which relates to deductions from pay), in sub-section (1) the words "India or" and the words "being in the case of India a law of the Indian legislature", and the whole of sub-section (2) shall be omitted.

9. In paragraph (4) of section one hundred and thirty-seven (which relates to penal stoppages from the ordinary pay of officers), the words "or in the case of officers serving in India the Governor-General" the words "India or" and the words "for India or, as the case may be" shall be omitted.

10. In paragraph (12) of section one hundred and seventy-five and paragraph (11) of section one hundred and seventy-six (which apply the Act to certain members of His Majesty's Indian Forces and to certain other persons) the word "India" shall be omitted wherever it occurs.

11. In sub-section (1) of section one hundred and eighty (which provides for the punishment of misconduct by civilians in relation to courts martial) the words "India or" shall be omitted wherever they occur.

12. In the provision of section one hundred and eighty-three relating to the reduction in rank of non-commissioned officers, the words "with the approval of the Governor-General" shall be omitted in both places where they occur.

PART II

Modifications of Army Act.

Section 184-B (which regulates relations with the Indian Air Force) shall be omitted.

PART III

Modifications of Air Force Act.

1. In section 179-D (which relates to the attachment of officers and airmen to Indian and Burma Air Forces), the words "by the Air Council and the Governor-General of India, or, as the case may be", and the words "India or", wherever those words occur, shall be omitted.

2. In section 184-B (which regulates relations with Indian and Burma Air Forces) the words "India or" and the words "by the Air Council and the Governor-General of India or, as the case may be", shall be omitted.

3. Sub-paragraph (e) of paragraph (4) of section one hundred and ninety (which provides that officers of His Majesty's Indian Air Force are to be officers within the meaning of the Act) shall be omitted.

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the said Assemblies, or as preventing the participation in either of the said Assemblies in accordance with such arrangements as may be made in that behalf, of representatives of the tribal areas on the borders of the Dominion for which that Assembly sits, and the powers of the said Assemblies shall extend, and be deemed always to have extended, to the making of provision for the matters specified in this proviso

*[Provided further that nothing in this sub-section shall be construed as preventing any increase or reduction in the number of seats or any redistribution of seats in the Constituent Assembly for Pakistan, and the powers of the said Assembly shall extend to and be deemed always to have extended to the making of provision therefor]

(4) In this Act, except so far as the context otherwise requires—

References to the Government of India Act, 1935, include references to any enactments amending or supplementing that Act, and, in particular, references to the India (Central Government and Legislature) Act, 1946,

"India", where the reference is to a state of affairs existing before the appointed day or which would have existed but for the passing of this Act, has the meaning assigned to it by section 311 of the Government of India Act, 1935,

"Indian forces" includes all His Majesty's Indian forces existing before the appointed day and also any forces of either of the new Dominions,

"Pension" means, in relation to any person, a pension, whether contributory or not, of any kind whatsoever payable to or in respect of that person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or other additions thereto, of subscriptions to a provident fund,

"Province" means a Governor's Province,

"remuneration" includes leave pay, allowances and the cost of any privileges or facilities provided in kind.

(5) Any power conferred by this Act to make any order includes power to revoke or vary any order previously made in the exercise of that power.

20 This Act may be cited as the Indian Independence Act, 1947 Short Title

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SCHEDULES

First Schedule

Section 3

Bengal Districts provisionally included in the New Province of East Bengal

In the Chittagong Division, the districts of Chittagong, Noakhali and Tippera

In the Dacca Division, the districts of Bakarganj, Dacca, Faridpur and Mymensingh

In the presidency Division, the districts of Jessore, Murshidabad and Nadia

In the Rajshahi Division, the districts of Bogra, Dinajpur, Malda, Pabna, Rajshahi and Rangpur

SECOND SCHEDULE

Section 4

Districts provisionally included in the New Province of the †Punjab

In the Lahore Division, the districts of Gujranwala, Gurdaspur, Lahore, Sheikhupura and Sialkot

In the Rawalpindi Division, the districts of Attock, Gujrat, Jhelum, Mianwali, Rawalpindi and Shahpur

In the Multan Division, the districts of Dera Ghazi Khan, Jhang, Lyallpur, Montgomery, Multan and Muzaffargarh

THIRD SCHEDULE

Section 12.

Modifications of Army Act and Air Force Act in Relation to British Forces

* Inserted by the Indian Independence (Amendment) Act, 1949

† Substituted by the Indian Independence (Amendment) Act, 1950

masses and the poor. If you will work in co-operation, forgetting the past, burying the hatchet you are bound to succeed. If you change your past amd work together in a spirit that every one of you, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his colour, caste or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.

I cannot emphasise it too much. We should begin to work in that spirit and in course of time all these angularities of the majority and minority communities the Hindu community and the Muslim community—because even as regards Muslims you have Pathans, Punjabies, Shias, Sunnis and so on and among the Hindus you have Brahmins, Vashnvas, Khatris, also Bengalis, Madrasis, and so on—will vanish. Indeed if you ask me this has been the biggest hindrance in the way of India to attain the freedom and independence and but for this we would have been free peoples long long ago. No power can hold another nation, and specially a nation of 400 million souls in subjection; nobody could have conquered you, and even if it had happened, nobody could have continued its hold on you for any length of time but for this. Therefore we must learn a lesson from this. You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion or caste or creed—that has nothing to do with the business of the State. As you know, history shows that in England conditions some time ago were much worse than those prevailing in India today. The Roman Catholics and the Protestants persecuted each other. Even now there are some States in existence where there are discriminations made and bars imposed against a particular class. Thank God we are not starting in those days. We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one state. The people of England in course of time had to face the realities of the situation and had to discharge the responsibilities and burdens placed upon them by the Government of their country and they went through that fire step by step. Today you might say with justice that Roman Catholic and Protestants do not exists; what exists now is that every man is a citizen, an equal citizen, of Great Britain and they are all members of the Nation.

Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.

Well, gentlemen, I do not wish to take up any more of your time and thank you again for the honour you have done to me. I shall always be guided by the Principles of justice and fair-play without any, as is put in the political language, prejudice or ill will, in other words partiality, or favouritism. My guiding principle will be justice and complete impartiality, and I am sure that with your support and co-operation, I can look forward to Pakistan becoming one of the greatest Nations of the world.

I have received a message from the United States of America addressed to me. It reads:

"I have the honour to communicate to you, in Your Excellency's capacity as President of the Constituent Assembly of Pakistan, the following message which I have just received from the Secretary of State of the United States;

"On the occasion of the first meeting of the Constituent Assembly for Pakistan, I extend to you and to members of the Assembly, the best wishes of the Government and the people of the United States for the successful conclusion of the great work you are about to undertake."

QUAID-I-AZAM'S PRESIDENTIAL ADDRESS TO THE CONSTITUENT ASSEMBLY OF PAKISTAN ON THE 11TH AUGUST 1947

Mr. President: Ladies and Gentlemen, I cordially thank you with the utmost sincerity for the honour you have conferred upon me—the greatest honour that is possible for this Sovereign Assembly to confer—by electing me as your first pr[illegible]
their personal references tc
this Constituent Assembly a
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observation that I would like to make is this You will no doubt agree with me that the first duty of a Government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State

The second thing that occurs to me is this One of the biggest curses from which India is suffering—I do not say that other countries are free from it, but, I think, our condition is much worse—is bribery and corruption That really is a poison We must put that down with an iron hand and I hope that you will take adequate measures as soon as it is possible for this Assembly to do so

[illegible] that black marketeers are frequently caught and
es only are imposed Now you have to tackle this
our distressed conditions, when we constantly face
A citizen who does black marketing commits, I think, a greater crime than the biggest and most grievous of crimes These black marketeers are really knowing intelligent and ordinarily responsible people, and when they indulge in black marketing, I think they ought to be very severely punished, because they undermine the entire system of control and regulation of food stuffs and essential commodities, and cause, wholesale starvation and want and even death

The next thing that strikes me in this Here again is a legacy which has been passed on to us Along with many oth[illegible]
il of nepotism and jobbery This evil
I never tolerate any kind of jobbery,
Wherever I find that such a practice
[illegible] anywhere, low or high, I shall certainly not countenance it

I know there are people who do not quite agree with the division of India and the partition of the Punjab and Bengal Much has been said against it, but now that it has, been accepted, it is the duty of every one of us to loyally abide by it and honourably act according to the agreement which is now final and binding on all But you must remember, as I have said, that this mighty revolution that has taken place is unprecedented One can quite understand the feeling that exists between the two communities wherever one community is in majority and the other is in minority But the question is whether it was possible or practicable to act otherwise than has been done A division had to take place On both sides, in Hindustan and Pakistan, there are sections of people who may not agree with it, who may not like it, but in my judgment there was no other solution and I am sure future history will record its verdict in favour of it And what is more it will be proved by actual experience as we go on that that was the only solution of India's constitutional problem Any idea of a United India could never have worked and in my judgment it would have led us to terrific disaster May be that [illegible] is correct, may be it is not, that remains to be seen All the same, in this division it was impossible to [illegible] the question of minorities being in one Dominion or the other Now that was unavoidable There [illegible] other solution Now what shall we do? Now, if we want to make this great State of Pakistan h[illegible] prosperous we should wholly and solely concentrate on the well being of the people, and especially [illegible]

the Machiavellian ideas regarding a polity where spiritual and ethical values should play no part in the governance of the people and, therefore, it is also perhaps a little out of fashion to remind ourselves of the fact that the State should be an instrument of beneficence and not of evil. But we, the people of Pakistan, have the courage to believe firmly that all authority should be exercised in accordance with the standards laid down by Islam so that it may not be misused. All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man so that it does not become an agency for tyranny or selfishness. I would, however, point out that this is not a resuscitation of the dead theory of divine right of kings or rulers, because, in accordance with the spirit of Islam, the Preamble fully recognises the truth that authority has been delegated to the people, and to none else, and that it is for the people to decide who will exercise that authority.

For this reason it has been made clear in the Resolution that the State shall exercise all its powers and authority through the chosen representatives of the people.

This is the very essence of democracy, because the people have been recognised as the recipients of all authority and it is in them that the power to wield it has been vested.

Sir, I just now said that the people are the real recipients of power. This naturally eliminates any danger of the establishment of a theocracy. It is true that in its literal sense theocracy means the Government of God; in this sense, however, it is patent that the entire universe is a theocracy, for is there any corner in the entire creation where His authority does not exist? But in the technical sense, theocracy has come to mean a Government by ordained priests, who wield authority as being specially appointed by those who claim to derive their rights from their sacerdotal position. I cannot over-emphasise the fact that such an idea is absolutely foreign to Islam. Islam does not recognise either priesthood or any sacerdotal authority, and, therefore, the question of a theocracy simply does not arise in Islam. If there are any who still use the word theocracy in the same breath as the polity of Pakistan, they are either labouring under a grave misapprehension, or indulging in mischievous propaganda.

You would notice, Sir, that the Objectives Resolution lays emphasis on the principles of democracy, freedom, equality, tolerance and social justice, and further defines them by saying that these principles should be observed in the constitution as they have been enunciated by Islam. It has been necessary to qualify these terms because they are generally used in a loose sense. For instance, the Western Powers and Soviet Russia alike claim that their systems are based upon democracy, and, yet, it is common knowledge that their polities are inherently different. It has, therefore, been found necessary to define these terms further in order to give them a well-understood meaning. When we use the word democracy in the Islamic sense, it pervades all aspects of our life, it relates to our system of Government and to our society with equal validity, because one of the greatest contributions of Islam has been the idea of the equality of all men. Islam recognises no distinctions based upon race, colour or birth. Even in the days of its decadence, Islamic society has been remarkably free from the prejudices which vitiated human relations in many other parts of the world. Similarly, we have a great record in tolerance, for under no system of Government, even in the Middle Ages, have the minorities received the same consideration and freedom as they did in Muslim countries. When Christian dissentients and Muslims were being tortured and driven out of their homes, when they were being hunted as animals and burnt as criminals—even criminals have never been burnt in Islamic society—Islam provided a haven for all who were persecuted and who fled from tyranny. It is a well-known fact of history that, when anti-Semitism turned the Jews out of many a European country, it was the Ottoman Empire which gave them shelter. The greatest proof of the tolerance of Muslim peoples lies in the fact that there is no Muslim country where strong minorities do not exist, and where they have not been able to preserve their religion and culture. Most of all, in this sub-continent of India, where the Muslims wielded unlimited authority, the rights of non-Muslims were cherished and protected. I may point out, Sir, that it was under Muslim patronage that many an indigenous language developed in India. My friends from Bengal would remember that it was under the encouragement of Muslim rulers that the first translations of the Hindu scriptures were made from Sanskrit into Bengali. It is this tolerance which is envisaged by Islam, wherein a minority does not live on sufferance, but is respected and given every opportunity to develop its own thought and culture, so that it may contribute to the greater glory of the entire nation. In the matter of social justice as well, Sir, I would point out that Islam has a distinct contribution to make. Islam envisages a society in which social justice means neither charity nor regimentation. Islamic social justice is based upon fundamental laws and concepts which guarantee to man a life free from want and rich in freedom. It is for this reason that the principles of democracy, freedom, equality, tolerance and social justice have been further defined by giving to them a meaning which, in our view, is deeper and wider than the usual connotation of these words.

The next clause of the Resolution lays down that Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the *Sunnah*. It is quite obvious that no non-Muslim should have any objection if the Muslims are en-

MR. LIAQUAT ALI KHAN'S SPEECH ON "OBJECTIVES RESOLUTION"

In moving the Motion on Aims and Objects, on the 7th March, 1949, the Honourable Mr Liaquat Ali Khan delivered the following speech —*

Mr President, I beg to move the following Objectives Resolution embodying the main principles on which the constitution of Pakistan is to be based

"In the name of Allah the Beneficent, the Merciful ,

WHEREAS sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust,

This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan,

WHEREIN the State shall exercise its powers and authority through the chosen representatives of the people,

WHEREIN the principles of democracy freedom equality tolerance and social justice as enunciated by Islam shall be fully observed,

WHEREIN the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the *Sunnah* †

WHEREIN adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures,

WHEREBY the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed

WHEREIN adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes,

WHEREIN the independence of the judiciary shall be fully secured,

WHEREIN the integrity of the territories of the Federation its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity "

Sir, I consider this to be a most important occasion in the life of this country next in importance only to the achievement of independence, because by achieving independence we only won an opportunity of building up a country and its polity in accordance with our ideals I would like to remind the House that the Father of the Nation, Quaid i Azam, gave expression to his feelings on this matter on many an occasion, and his views were endorsed by the nation in unmistakable terms Pakistan was founded because the Muslims of this sub-continent wanted to build up their lives in accordance with the teachings and traditions of Islam, because they wanted to demonstrate to the world that Islam provides a panacea to the many diseases which have crept into the life of humanity to-day [illegible]
has not been able to keep pace [illegible]
genius has produced in the form [illegible]
society but its material environm[illegible]
that if man had not chosen to ignore the spiritual values of life and if his faith in God had not been weakened, this scientific development would not have endangered his very existence It is God-consciousness alone which can save humanity, which means that all power that humanity possesses must be used in accordance with ethical standards which have been laid down by inspired teachers known to us as the great Prophets of different religions [illegible]
that it [illegible]
Therefo[illegible]
tion of [illegible]

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*The Honourable *Mr Liaquat Ali Khan, Prime Minister of Pakistan, was elected by the Muslim Constituency of* East Bengal

†Traditions of the Holy Prophet

to all its members. Everyone will be equal before the law, but this does not mean that his personal law will not be protected. We believe in the equality of status and justice. It is our firm belief, and we have said this from many a platform, that Pakistan does not stand for vested interests of the wealthy classes. It is our intention to build up an economy on the basic principles of Islam which seeks a better distribution of wealth and the removal of want. Poverty and backwardness—all that stands in the way of the achievement of his fullest stature by man—must be eradicated from Pakistan. At present our masses are poor and illiterate. We must raise their standards of life, and free them from the shackles of poverty and ignorance. So far as political rights are concerned, everyone will have a voice in the determination of the policy pursued by the Government and in electing those who will run the State, so that they may do so in the interests of the people. We believe that no shackles can be put on thought and, therefore, we do not intend to hinder any person from the expression of his views. Nor do we intend to deprive anyone of his right of forming associations for all lawful and moral purposes. In short, we want to base our polity upon freedom, progress and social justice. We want to do away with social distinctions, but we want to achieve this without causing suffering or putting fetters upon the human mind and lawful inclinations.

Sir, there are a large number of interests for which the minorities legitimately desire protection. This protection the Resolution seeks to provide. The backward and depressed classes are our special charge. We are fully conscious of the fact that they do not find themselves in their present plight for any fault of their own. It is also true that we are not responsible by any means for their present position. But now that they are our citizens, it will be our special effort to bring them up to the level of other citizens, so that they may bear the responsibilities imposed by their being citizens of a free and progressive State, and share them with others who have been more fortunate than themselves. We know that so long as any sections amongst our people are backward, they will be a drag upon society and, therefore, for the purpose of building up our State we must necessarily look to the interests of these sections.

Mr. President, in the end we firmly believe that by laying the foundations of our constitution on the principles enunicated in this Resolution, we shall be able to put Pakistan on the path of progress, and the day is not far distant when Pakistan will become a country of which its citizens, without distinction of class or creed, will be proud. I am confident that our people have great potentialities. Through their unparalleled sacrifices and commendable sense of discipline, displayed at the time of a grave disaster and crisis, they have earned the admiration of the world. Such a people, I am sure, not only deserves to live, but is destined to make a contribution to the welfare and progress of humanity. It is essential that it should keep alive its spirit of sacrifice, and its adherence to its noble-ideals, and Destiny itself will lead it to its place of glory in the affairs of the world, and make it immortal in the annals of humanity. Sir, this people has traditions of great achievement to its credit; its history is replete with deeds of glory; in every sphere of life it has contributed its full measure of achievement; its heroism adorn the pages of military chronicles; its administrators created traditions which have withstood the ravages of time; in creative art, its poetry, architecture and sense of beauty have won their tribute of appreciation; in the matter of spiritual greatness it has few parallels. It is this people which is again on the march, and, given the necessary opportunities, it will surpass its previous record of glorious achievement. This Objectives Resolution is the first step in the direction of the creation of an environment which will again awaken the spirit of the nation. We, whom Destiny has chosen to play a part, howsoever humble and insignificant, in this great drama of national resurrection, are overwhelmed with the magnitude of the opportunities which are before us. Let us use these opportunities with wisdom and foresight, and I have not the least doubt that these humble efforts will bear fruit far in excess of our wildest expectations, through the help of a Providence which has brought Pakistan into existence. It is not every day that great nations come into their own; it is not every day that peoples stand on the threshold of renaissance; it is not every day that Destiny beckons the down-trodden and the subjugated to rise and greet the dawn of a great future. It is the narrow streak of light heralding the brilliance of the full day, that we salute in the form of this Resolution.

abled to order their lives in accordance with the dictates of their religion You would also notice, Sir, that the State is not to play the part of a neutral observer, wherein the Muslims may be merely free to profess and practise their religion, because such an attitude on the part of the State would be the very negation of the ideals which

Quaid i Azam and other leaders of the Muslim League always made unequivocal declarations that the Muslim demand for Pakistan was based upon the fact that the Muslims had a way of life and a code of conduct They also reiterated the fact that Islam is not merely a relationship between the individual and his God, which should not, in any way, affect the working of the State Indeed, Islam lays down specific directions for social behaviour, and seeks to guide society in its attitude towards the problems which confront it from day to day Islam is not just a matter of private beliefs and conduct It expects its followers to build up a society for the purpose of 'Good life"—as the Greeks would have called it, with this difference that Islamic good life" is essentially based upon spiritual values For the purpose of emphasizing these values and to give them validity, it will be

of God and the life of the Prophet are the basic sources of his inspiration In these there is no difference of opinion amongst the Muslims and there is no sect in Islam which does not believe in their validity Therefore, there should be no misconception in the mind of any sect which may be in a minority in Pakistan about the intentions of the State The State will seek to create an Islamic society free from dissensions, but this does not mean that it would curb the freedom of any section of the Muslims in the matter of their beliefs No sect, whether a majority or a minority, will be permitted to dictate to the others, and in their own internal matters and sectional beliefs, all sects shall be given the fullest possible latitude and freedom Actually we hope that the various sects will act in accordance with the desire of the Prophet who said that the differences of opinion amongst his followers are a blessing It is for us to make our differences a source of strength to Islam and Pakistan not to exploit them for narrow interests which will weaken both Pakistan and Islam Differences of opinion very

In our desire to build up an Islamic society we have not ignored the rights of the non Muslim Indeed it would have been un Islamic to do so, and we would have been guilty of transgressing the dictates of our religion if we had tried to impinge upon the freedom of the minorities In no way will they be hindered from professing or protecting their religion or developing their cultures The history of the development of Islamic culture itself shows that the cultures of the minorities, who lived under the protection of Muslim States and empires, contributed to the richness of the heritage which the Muslims built up for themselves I assure the minorities that we are fully conscious of the fact that if the minorities are able to make a contribution to the sum total of human knowledge and thought, it will redound to the credit of Pakistan and will enrich the life of the nation Therefore, the minorities may look forward, not only to a period of the fullest freedom, but also to an understanding and appreciation on the part of the majority which has always been such a marked characteristic of Muslims throughout history

Sir, the Resolution envisages a federal form of Government because such is the dictate of geography It would be idle to think of a unitary form of Government when the two parts of our country are separated by more than a thousand miles I, however, hope that the Constituent Assembly will make every effort to integrate the un

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Mr President, it has become fashionable to guarantee certain fundamental rights, but I assure you that it is not our intention to give these rights with one hand and take them away with the other I have said enough to show that we want to build up a truly liberal Government where the greatest amount of freedom will be given

[*X.*] We are deceived on this point by a sophism so natural, that it entirely escapes our attention. Because man acts, he thinks he acts alone; and because he has the consciousness of his liberty, he forgets his dependence. In the physical order, he listens to reason; for although he can, for example, plant an acorn, water it, etc., he is convinced that he does not make the oaks, because he witnesses their growth and perfection without the aid of human power; and moreover, that he does not make the acorn; but in the social order, where he is present, and acts, he fully believes that he is really the sole author of all that is done by himself. This is, in a sense, as if the trowel should believe itself the architect. Man is a free, intelligent, and noble being: without doubt; but he is not less an *instrumental of God*, according to a happy expression of Plutarch, in a beautiful passage which here introduces itself of its own accord:

We must not wonder, he says, *if the most beautiful and greatest things in the world are done by the will and providence of God; seeing that in all the greatest and principal parts of the world there is a soul : for the organ and tool of the soul is the body, and the soul is the* INSTRUMENT OF GOD. *And as the body has of itself many movements, and as the greater and more noble are derived from the soul, even so it is with the soul; some of its operations being self-moved, while in others it is directed, disciplined, and guided, by God, as it pleases Him; being itself the most beautiful organ and ingenious instrument possible : for it would be a strange thing indeed that the wind, the water, the clouds, and the rains, should be instruments of God, with which He nourishes and supports many creatures, and also destroys many others, and that He should never make use of living beings to perform any of His works. For it is far more reasonable that they depending entirely on the power of God, should obey His direction, and accomplish all His will, than that the bow should obey the Scythians, the lyre and flute the Greeks.*[1]

No one could write better: and I do not believe that these beautiful reflections could be more justly applied, than to the formation of political constitutions, where it may be said, with equal truth, that man does every thing, and does nothing.

[*XII.*] Let us now consider some one political constitution, that of England, for example. It certainly was not made *a priori*. Her Statesmen never assembled themselves together and said, *Let us create three powers, balancing them in such a manner, etc.* No one of them ever thought of such a thing. The Constitution is the work of circumstances, and the number of these is infinite. Roman laws, ecclesiastical laws, feudal laws; Saxon, Norman, and Danish customs; the privileges, prejudices, and claims of all orders; wars, revolts, revolutions, the Conquest, Crusades; virtues of every kind, and all vices; knowledge of every sort, and all errors and passions;—all these elements, in short, acting together, and forming, by their admixture and reciprocal action, combinations multiplied by myriads of millions, have produced at length, after many centuries, the most complex unity, and happy equilibrium of political powers that the world has ever seen.

[*XIII.*] Now since these elements, thus projected into space, have arranged themselves in such beautiful order, without a single man, among the innumerable multitude who have acted in this vast field, having ever known what he had done relatively to the whole, nor foreseen what would happen, it follows, inevitably, that these elements were guided in their fall by an infallible hand, superior to man. The greatest folly, perhaps, in an age of follies, was in believing that fundamental laws could be written *a priori*, whilst they are evidently the work of a power above man; and whilst the very committing them to writing, long after, is the most certain sign of their nullity.

[*XVII.*] The English doubtless, would never have asked for the *Great Charter*, had not the privileges of the nation been violated; nor would they have asked for it, if these privileges had not existed before the Charter. What is true of the State, in this respect, is also true of the Church: if Christianity had never been attacked, there never would have been any writings to settle the dogmas; nor would the dogmas have been settled by writing, had they not pre-existed in their natural state, which is the *oral*.

[*XIX.*] These ideas (taken in their general sense) were not unknown to the ancient philosophers: they keenly felt the impotency, I had almost said the nothingness, of writing, in great institutions; but no one of them has seen this truth more clearly, or expressed it more happily, than Plato, whom we always find the first upon the track of all great truths. According to him, "the man who is wholly indebted to writing for his instruction, *will only possess the appearance of wisdom.*[2] The word is to writing, what the man is to his portrait. The productions of the pencil present themselves to our eyes as living things; but *if we interrogate them, they maintain a dignified silence.* It is the same with writing, *which knows not what to say to one man, nor what to conceal from another.* If you attack it or insult it without a cause, it cannot defend itself; *for its author is never present to sustain it.* So that he who imagines himself capable of establishing, clearly and permanently, one single doctrine, by writing alone, IS A GREAT BLOCK-HEAD. If he really possessed the true germs of truth, he would not indulge the thought, that *with a little black liquid and a pen* he could cause them to germinate in the world, defend them from the inclemency of the season, and communicate to them the necessary efficacy. As for the man who undertakes to write *laws or civil constitutions*, and who fancies that, because he has written them, he is able to give them adequate evidence and stability, whoever he may be, a private man or legislator, he disgraces himself, whether we say it or

1 Plutarch's Banquent of the Seven Sages. 2 Plat. in Phaedr., Edit. Bipont, X, p. 381.

ESSAY ON THE GENERATIVE PRINCIPLE OF POLITICAL CONSTITUTIONS

(By Joseph de Maistre)

I The Fallacy of the Written Constitution

[*I*] One of the grand errors of an age, which professed them all, was to believe that a political constitution could be written and created *a priori*, whilst reason and experience unite in establishing, that a constitution is a Divine work, and that that which is most fundamental, and most essentially constitutional, in the laws of a nation, is precisely what cannot be written.

[illegible] so much importance existed only because it was written, it is certain that any authority whatsoever which may [illegible] character of sacredness and [illegible] mental law, is, that no one [illegible] agreement of the people is [illegible] unless there is a superior authority by which it is guarantied

Hence it is that the good sense of antiquity happily anterior to sophisms, has sought, on every side, the sanction of laws, in a power above man, either in recognizing that sovereignty comes from God or in revering certain unwritten laws as proceeding from him

[*IV*.] Ask Roman history what was precisely the power of the Senate she is silent, at least as to the exact limits of that power We see, indeed, in general, that the power of the people and that of the Senate mutually balanced each other, and that the opposition was unceasing, we observe also that patriotism or weariness, weakness or violence, terminated these dangerous struggles but we know no more about it

[*V*] The English Constitution is an example nearer to us, and, therefore, more striking Whoever examines it with attention, will see *that it goes only in not going* (if this play upon words is permissible) It is maintained only by the exceptions The *habeas corpus*, for example, has been so often and for so long time suspended, that it is doubted whether the exception has not become the rule Suppose for a moment that the authors of this famous act had undertaken to fix the cases in which it should be suspended, they would *ipso facto* have annihilated it

[*VI*] At the sitting of the House of Commons June 26, 1807, a lord cited the authority of a great statesman to show that the king had no right to dissolve Parliament during the session, but this opinion was contradicted Where is the law? Attempt to make a law, and to fix exclusively *by writing* the case where the King has this right, and you will produce a revolution *The King*, said one of the members, *has this right when the occasion is important*, but what is an *important* occasion? Try to decide this too by writing

[illegible] tions —

1 *That the fundamental principles of political constitutions exist before all written law*

2 That a constitutional law is, and can only be, the developement or sanction of an unwritten preexisting right

3 That which is most essential, most intrinsically constitutional, and truly fundamental, is never written, and could not be, without endangering the state

4 That the weakness and fragility of a constitution are actually in direct proportion to the multiplicity of written constitutional articles

perimental politics, and we shall there invariably find the cradle of nations surrounded by priests, and the Divinity constantly invoked to the aid of human weakness. Fable, much more true than ancient history, for eyes prepared, comes in to strengthen the demonstration. It is always an oracle, which founds cities; it is always an oracle, which announces the Divine protection, and successes of the heroic founder.

[*XXXIX.*] The most famous nations of antiquity, especially the most serious and wise, such as the Egyptians, Etruscans, Lacedæmonians, and Romans, had precisely the most religious constitutions; and the duration of empires has always been proportioned to the degree of influence which the religious principle had acquired in the political constitution: *the cities and nations most attached to Divine worship, have always been the most durable, and the most wise; as the most religious ages have also ever been most distinguished for genius.*

[*XL.*] Not only does it not belong to man to create institutions, but it does not appear that his power, *unassisted*, extends even to change for the better institutions already established. The word *reform*, in itself, and previous to all examination, will be always suspected by wisdom, and the experience of every age justifies this sort of instinct. We know too well what has been the fruit of the most beautiful speculations of this kind.

[*XLI.*] To apply these general maxims to a particular case, it is from the single consideration of the extreme danger of innovations founded upon simple human theories, that, upon the great question of parliamentary reform, which has agitated minds in England so powerfully, and for so long a time, I find myself constrained to believe, that this idea is pernicious, and that if the English yield themselves too readily to it, they will have occasion to repent. *But*, say the partisans of reform, (for it is the grand argument,) *the abuses are striking and incontestable; now can a formal abuse, a defect, be constitutional?* Yes, undoubtedly, it can be; for every political constitution has its essential faults, which belong to its nature, and which it is impossible to separate from it; and, that which should make all reformers tremble, is that these faults may be changed by circumstances; so that in showing that they are new, we cannot prove that they are not necessary. What prudent man, then, will not shudder in putting his hand to the work? Social harmony, like musical concord, is subject to the law of *temperament in the general key*. Adjust the *fifths* accurately, and the *octaves* will jar, and conversely. The dissonance being then inevitable, instead of excluding it, which is impossible, it must be *qualified* by distribution. Thus, on both sides, *imperfection is an element of possible perfection*. In this proposition there is only the form of a paradox.

[*XLII.*] Voltaire, who spoke of every thing, during an age, without having so much as penetrated below the surface, has reasoned very humorously on the sale of the offices of the magistracy which occurred in France; and no instance, perhaps, could be more apposite to make us sensible of the truth of the theory which I am setting forth. *That it is an abuse*, says he, *is proved by the fact, that it originated in another abuse.*[5] Voltaire does not mistake here as every man is liable to mistake. He shamefully mistakes. It is a total eclipse of common sense. *Every thing which springs from an abuse, an abuse!* On the contrary, one of the most general and evident laws of this power, at once secret and striking which acts and makes itself to be felt on every side, is, that the remedy of an abuse springs from an abuse, and that the evil, having reached a certain point, destroys itself.

[*XLIII.*] The error of this great writer proceeds from the fact, that, *divided between twenty sciences*, as he himself somewhere confesses, and constantly occupied in communicating instruction to the world, he rarely gave himself time to think. "A dissipated and voluptuous court reduced to the greatest want by its foolish expenses, devises the sale of the offices of the magistracy, and thus creates" (what it never could have done freely, and with a knowledge of the cause,) "it creates," I say, "*a rich magistracy*, irremovable and independent; so that the infinite power *playing in the world* makes use of corruption for creating incorruptible tribunals" (as far as human weakness permits). There is nothing, indeed, so plausible to the eye of a true philosopher; nothing more conformable to great analogies, and to that incontestable law, which wills that the most important institutions should be the results not of deliberation, but of circumstances. Here is the problem almost solved when it is stated, as is the case with all problems. *Could such a country as France be better judged than by hereditary magistrates?* If it is decided in the affirmative, which I suppose, it will be necessary for me at once to propose a second problem which is this: *the magistracy being necessarily hereditary, is there, in order to constitute it at first, and afterwards to recruit it, a mode more advantageous than that which fills the coffers of the sovereign with millions at the lowest price, and which assures, at the same time, the opulence, independence, and even the nobility* (of a certain sort) *of the supreme judges?* If we only consider venality as a means to the right of inheritance, every just mind is impressed with this, which is the true point of view. This is not the place to enter fully into this question; but enough has been said to prove that Voltaire has not so much as perceived it.

[*XLIV.*] Let us now suppose a man like him at the head of affairs: he will not fail to act in accordance with his foolish theories of laws and of abuses. He will borrow at six and two thirds per cent. to reimburse his nominal incumbents, creditors at two per cent.: he will prepare minds by a multitude of paid writings, which will insult the magistracy and destroy public confidence in it. Soon Patronage, a thousand times more foolish than Chance, will open the long list of his blunders: the distinguished man, no longer perceiving in the right of inheritance a counterpoise to oppressive labours, will withdraw himself, never to return, and the great tribunals will be abandoned to adventures without name, without fortune, and without consideration.

5 Precis du siecle de Louis XV, Chap. 42

not for he has proved thereby that he is equally ignorant of the nature of in p rat on and del rium r ght and wrong good and evil Now this ignorance is a reproach though the ent re mass of the vulgar should un te in ts praise

[XX] Af er hav ng heard the w *dom of the Gent les* t w ll not be useless to l sten further to Chr st an Ph losophy

It were indeed des rable for us says one of the most eloquent of the Greek fathers ne er to have requ red the a d of the written word but to have had the D ne precepts wr tten only in our hearts by grace as they are written w th ink in our books but s nce we have lost th s grace by our own fault let us then as it is

and laws became necessary The same proceeding s repeated under the emp re of the New Revela ion for Christ d d not lea e a s ngle writ ng to h s Apostles In tead of books he prom sed to them the Holy Sp *It is He* saith our Lord to them *who shall tea h you what you shall peak* But because n process of t me s nful men rebelled aga nst the fa th and aga nst moral ty t was necessary to have recourse to books [3]

II The Necessity for Reliance upon God

u) a e lo is sj eau terror arou u r e b u o pa a yze uer e e es g e y a ge u wa a on e over all her frontiers so that none of her ne ghbors could meddle n her affairs or l sturb her n her ope at ons Let th s nat on be illustrious in sc ence rich in ph losophy intox cated w th human power free f om all prejudice from every t e and from all superior nfluence bestow upon her e ery th ng she shall des re lest at some time she m ght say *th s was wan ng or that rest a n d me* let her n short act freely w th th s mmen s ty of means that at length she may become under Thy inexorable protect on an eternal les on to the human race

[XXV] We cannot it is true expect a comb nat on of c rcum tances wh ch would const tute l erally a m racle but events of the same order though less remarkable have man fested hemsel es here and there n h tory even n the history of our days and though they may not possess for the purpo e of example that deal force which I des red just now they conta n not less of memorable n truct on

We have been witnesses with n the last twenty five years of a solemn a tempt made for the regenera on of a great nation mortally s ck It was the first exper ment in the great work and the *p efa e* f I may be allowed to express myself thus of the fr ghtful book which we ha e been s nce called upon to read

[XXVI] *But* t w ll be sa d *we know the cau e wh h preven ed the su e s of that en erp e* How then? Do you wish that God should send angels under human gu ses comm ss oned to destroy a con tut on It w ll always be necessary to employ second causes th s or that what does t s gn fy? Every ns rument s good n the hands of the great Artificer but such is the bl ndness of men that if to morrow some const ut on monger should come to organ ze a people and to give them a const tution made *w h a l ttle bla k l qu d* the mult tude would again hasten to bel eve n the m racle announced It would be sa d aga n *no h ng wan ng all s fo e en all wr tten* whilst prec sely because all could be foreseen discu sed and wr tten t would be demonstrated tha the const tution is a null ty and presents to the eye merely an ephemeral appearance

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[3] S Chry ost Hom in Matth I

[4] The author was de Maistre himself

GOVERNMENT OF PAKISTAN

SUPREME COURT OF PAKISTAN

NOTIFICATION

Lahore, the 10th December 1956

No. F. 50/56-SCA.—The following is published for general information :—

THE SUPREME COURT RULES, 1956

PART I

GENERAL

ORDER I

INTERPRETATION, ETC.

1. (1) These Rules may be cited as the Supreme Court Rules, 1956, and shall come into force on the 28th November, 1956.

(2) The Federal Court Rules, 1950, are hereby revoked :

Provided that this revocation shall not affect any action taken, any order made or anything done under the said Rules prior to this revocation.

2. (1) In these Rules, unless the context otherwise requires :—

"Advocate" means a person entitled to appear and plead before the Supreme Court ;

"Attorney" means an Attorney enrolled as such under these Rules ;

"Chief Justice" means the Chief Justice of Pakistan ;

"Code" means the Code of Civil Procedure, 1908 ;

"Constitution" means the Constitution of the Islamic Republic of Pakistan ;

"Constitution Day" means the twenty-third of March, 1956 ;

"Court" and "this Court" means the Supreme Court of Pakistan ;

"Court appealed from" includes a tribunal and any other judicial body from which an appeal is preferred to the Court ;

"Judge" means a Judge of the Court ;

"Judgment" includes the decision or the statement given by a Court or a Judge of the grounds of a decree or order ;

"High Court" means a High Court within the meaning of Article 159 of the Constitution ;

"Party" and all words descriptive of parties to proceedings before the Court (as "appellant", "respondent", "plaintiff", "defendant" and the like) include, in respect of all acts proper to be done by an Attorney, the Attorney of the party in question, when he is represented by an Attorney ;

"prescribed" means prescribed by or under these Rules ;

"record" in Part II of these Rules means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before the Court at the hearing of the appeal ;

"Registrar" and "Registry" mean respectively the Registrar and Registry of the Court ;

"Branch Registry" means Branch Registry of the Court set up by the Chief Justice at the principal seat of a High Court and notified in the *Gazette of Pakistan* ;

"respondent" includes an intervener ;

"signed" save in the case of a judgment and decree, includes stamped.

(2) The General Clauses Act, 1897, applies for the interpretation of these Rules as it applies for the interpretation of an Act of Parliament.

3. Where by these Rules or by any order of the Court any step is required to be taken in connection with any cause, matter or appeal before the Court, that step shall, unless the context otherwise requires, be taken in the Registry or in the appropriate Branch Registry.

[*XLV*] Such is the natural picture of most reforms Man in relation with his Creator is sublime, and his action is creative on the contrary, so soon as he separates himself from God, and acts alone, he does not cease to be powerful, for this is a privilege of his nature, but his action is negative, and tends only to destroy

[*XLVII*] Withdrawn, by his vain sciences, from the single science which truly concerns him, man has believed himself endowed with power *to create* He has believed,—he who has not the power of producing a

while, again, it belongs to him only to see that every human language is *learned* and never invented He has believed that he could constitute nations, that is to say, in other terms, *that he could create that national unity, by virtue of which one nation is not another* Finally, he has believed that, since he had the power of creating institutions, he had, with greater reason, that of borrowing them from other nations, and transferring them to his own country, all complete to his hand, with the name which they bore among the people from whom they were taken in order, like those people, to enjoy them with the same advantages

[*LX*] If the formation of all empires, the progress of civilization, and the unanimous agreement of all history and tradition do not suffice still to convince us, the death of empires will complete the demonstration commenced by their birth As it is the religious principle which has created every thing so it is the absence of this same principle which has destroyed every thing The sect of Epicurus, which might be called *ancient incredulity*, corrupted at first, and soon after destroyed every government which was so unfortunate as to give it admission Every where *Lucretius* announced *Cesar*

[*LXIII*] It was only in the first part of the eighteenth century, that impeity became really a power We see it at first extending itself on every side with inconceivable activity From the palace to the cabin it insinuates itself every where, and infests every thing Soon a simple system becomes a formal association, which, by a rapid gradation, changes into a confederacy, and at length into a grand conspiracy which covers Europe

they oppose it to the last extreme, it is a war to the death

[*LXV*] However entire Europe having been civilized by Christianity, the civil and religious institutions were blended and, as it were, amalgamated in a surprising manner It was then inevitable that the philosophy of the age should unhesitatingly hate the social institutions, from which it was impossible to separate the religious principle This has taken place every government, and all the establishments of Europe, were offensive to it, *because* they were Christian, and *in proportion* as they were Christian, an inquietude of opinion, an universal dissatisfaction, seized all minds In France, especially, the philosophic rage knew no bounds, soon a single formidable voice, forming itself from many voices united, is heard to cry, in the midst of guilty Europe

[*LXVI*] "Depart from us! Shall we then forever tremble before the priests, and receive from them such instruction as it pleases them to give us? TRUTH throughout Europe, is concealed by the fumes of the censer, it is high time that she come out of this noxious cloud We shall speak no more of Thee to our children, it is for them to know, when they shall arrive at manhood, whether there is such a Being as Thyself, and what Thou art, and what Thou requirest of them Every thing which now exists displeases us, because Thy name is written upon every thing that exists We wish to destroy all, and to reconstruct the whole without Thee Leave our councils, leave our schools, leave our houses, we would act alone REASON suffices for us Depart from us!"

How has God punished this execrable madness? He has punished it, as He created the light, by a single word He spake, LET IT BE DONE!—and the political world has crumbled

[*LXVII*] Europe is guilty, for having closed her eyes against these great truths, and it is because she is guilty, that she suffers Yet she still repels the light, and acknowledges not the arm which gives the blow Few

(1814)

(c) to settle the index in cases where the record is to be prepared under the supervision of the Registry ;

(d) to direct any formal amendment of record.

ORDER IV

ADVOCATES AND ATTORNEYS

1. A person qualified as hereinafter mentioned may apply to be enrolled as an Advocate in the Court and if his application is granted shall, on payment of the prescribed fee, be entitled to be so enrolled and to appear and plead before the Court.

2. The Roll of Advocates shall be in two parts, one containing the names of Senior Advocates and the other the names of other Advocates.

3. A Senior Advocate shall have precedence over other Advocates who are not Senior Advocates, and the provisions of the First Schedule to these Rules shall apply with respect to Senior and other Advocates.

4. A person shall not be entitled to be enrolled as an Advocate unless he is, and has been for not less than ten years in the case of a Senior Advocate or five years in the case of any other Advocate, enrolled as an Advocate in the High Court of a Province.

In computing the said period of ten or five years the period during which a person was enrolled as an Advocate in a High Court in Pakistan before the Constitution Day or in any High Court in British India within three years next after the fourteenth day of August, 1947, may be taken into account by the Court.

The period during which a person was entitled as of right to practise as a vakil or pleader in a High Court in Pakistan before the Constitution Day or in a High Court in British India before the fourteenth day of August, 1947, immediately before his enrolment as an Advocate in that High Court, may be taken into account for the purpose of calculating the above mentioned period of ten or five years.

5. A person who in the case of an appeal before the Court has appeared as counsel, advocate or vakil in that case in the Court from which the appeal is brought shall be entitled to appear and plead in the appeal, notwithstanding that he has not been enrolled as an Advocate in the Court, provided that an Advocate of the Supreme Court is briefed with him.

6. *The Chief Justice and Judges may, if for any special reason they think it desirable so to do, permit* the enrolment of any other person who is in their opinion sufficiently qualified, or permit such person to appear as an Advocate in a particular case.

7. No Advocate shall appear in any case, unless he is instructed by an Attorney.

8. The Roll of Advocates shall be kept by the Registrar and shall contain such particulars as the Court may from time to time require.

9. All Advocates appearing before the Court shall wear such robes and costume as may from time to time be directed by the Chief Justice.

10. The enrolment fee for Senior Advocates shall be Rs. 500, for other Advocates Rs. 250, and for an Attorney Rs. 100.

11. The Attorney-General for Pakistan shall have precedence over all Advocates in the Court.

12. The Advocates-General of West Pakistan and East Pakistan shall in that order have precedence immediately after the Attorney-General for Pakistan.

13. The Attorney-General for Pakistan and an Advocate-General shall by virtue of their offices have the status and precedence of a Senior Advocate in the Supreme Court, notwithstanding that their names are not contained in the Roll of Senior Advocates.

14. Subject to the preceding rules of this Order, an Advocate appearing before the Court shall have precedence among the Senior or other Advocates, as the case may be, according to the date of his enrolment as a Senior or other Advocate, as the case may be, in the Court.

Provided that the seniority of Senior or other Advocates as already determined under the relevant rules before the Constitution Day shall be maintained :

Any question which arises with respect to the precedence of any Advocate shall be determined by the Court.

15. A person may apply to be enrolled as an Attorney in the Court if he is entitled to practise as an Attorney or solicitor in any High Court or if he is entitled to appear and plead in a High Court, and if the application is granted shall on payment of the prescribed fee be entitled to be so enrolled.

4 Where any particular number of days is prescribed by these Rules, the same shall be computed in accordance with the provisions of the Limitation Act, 1908

5 None of the provisions of the Code shall apply to any proceedings in the Court unless expressly made applicable by these Rules

ORDER II

OFFICES OF THE COURT SITTING AND VACATION, ETC

1 The offices of the Court, except during vacation and on Fridays and holidays, shall, subject to any order by the Chief Justice, be open daily from 9 30 A M to 4 30 P M , but no work, unless of an urgent nature shall be admitted after 3-30 P M

2 The offices of the Court shall, except during vacation be open on Fridays from 9 30 A M to 12 30 P M , but no work, unless of an urgent nature shall be admitted after 12 NOON

3 The offices of the Court shall be open during vacation, except on Saturdays and holidays at such times as the Chief Justice may direct

4 The Registrar shall not be absent from the Court without the leave of the Chief Justice nor any other officer of the Court without the leave of the Registrar

5 The Court shall hold one term annually commencing on the first Monday, in October in each year or, if that day is a Court holiday, then on the next working day, and continuing to the commencement of the long vacation in the year next following

6 The long vacation of the Court shall commence on such date as may be fixed in each year by the Chief Justice and notified in the *Gazette of Pakistan*

7 The Court shall not ordinarily sit on Saturdays, nor on the following days that is to say December 24th to January 6th both days inclusive, and on any other days notified as Court holidays in the *Gazette of Pakistan*

[illegible]

vacation

ORDER III

OFFICERS OF THE COURT, ETC

1 The Registrar shall be the executive head of the office He shall have the custody of the records of the Court and shall exercise such functions as are assigned to him by these Rules

2 In the absence of the Registrar, the Deputy Registrar or in the absence of the Deputy Registrar the Assistant Registrar may exercise all the functions of the Registrar

3 The Chief Justice may assign, and the Registrar may with the approval of the Chief Justice delegate [illegible]

5 The official Seal to be used in the Court shall be such as the Chief Justice may from time to time direct, and shall be kept in the custody of the Registrar

6 Subject to any general or special directions given by the Chief Justice, the Seal of the Court shall not be affixed to any writ, rule, order, summons or other process save under the authority in writing of the Registrar

7 The Seal of the Court shall not be affixed to any certified copy issued by the Court save under the authority in writing of the Registrar or of Deputy Registrar or Assistant Registrar if authorised in that behalf in writing by the Registrar

[illegible]

9 In addition to the other powers conferred by these Rules, the Registrar shall have the following powers subject to any general or special order of the Chief Justice —

(a) to require any plaint, petition of appeal, petition or other matters presented to the Court to be amended in accordance with the practice and procedure of the Court or to be represented after such requisition as the Registrar thinks proper in relation thereto, has been complied with ,

(b) to fix the dates of hearing of appeals petitions or other matters and issue notices thereof ,

ORDER V

BUSINESS IN CHAMBERS

1. The powers of the Court in relation to the following matters may be exercised by the Registrar :—

(1) Applications for revivor or substitution.
(2) Applications for leave to appeal or defend as pauper.
(3) Applications for discovery and inspection.
(4) Applications for delivery of Interrogatories.
(5) Certifying of cases as fit for employment of Advocate.
(6) Applications for substituted service.
(7) Registration of petitions, appeals, suits and other matters.
(8) Applications for time to plead, for production of documents and generally relating to conduct of cause, appeal or matter and to allow from time to time any period or periods not exceeding four weeks in the aggregate and for doing any other act necessary to make a cause, petition or appeal complete.
(9) Approval of Translator.
(10) Approval of Interpreter.
(11) Applications for payment into Court.
(12) Applications for change of Attorney.
(13) Applications by Attorneys for leave to withdraw.
(14) Applications for payment of money out of Court or handing document or record by parties to proceedings and third parties on payment of prescribed fees and charges.
(15) Applications to tax bills returned by Taxing Officer.
(16) Determination of the quantum of court-fee payable in respect of any document.
(17) Applications for issue of a refund certificate in respect of excess court-fee paid by mistake.
(18) Applications for a transcript record instead of printed record.

2. The powers of the Court in relation to the following matters may be exercised by a single Judge sitting in Chamber but subject to reconsideration, at the instance of any aggrieved party, by a bench of not less than three Judges, which may include the Judge who dealt with the matter :—

(1) Applications for production of documents outside Court premises.
(2) Applications for leave to compromise or discontinue pauper appeals.
(3) Applications for striking out or adding party.
(4) Applications for separate trials of causes of action.
(5) Applications for separate trials to avoid embarrassment.
(6) Rejection of plaint.
(7) Applications for setting down for judgment in default of written statement.
(8) Applications for better statement of claim or defence.
(9) Applications for particulars.
(10) Applications for striking out any matter in a pleading.
(11) Applications for amendment of pleading.
(12) Applications for enlargement of time to amend.
(13) Applications to withdraw suits, appeals, and petitions.
(14) Applications for search, inspection or getting copies of any over or discharge of security.
(15) Applications by third parties for return of documents.
(16) Applications for costs of taxation where one-sixth is taxed off.
(17) Applications for review of taxation by Court.
(18) Applications for enlargement or abridgement of time, except these covered by item 8 of rule 1 and applications for condonation of delay in filing petition for special leave to appeal.
(19) Applications for issue of commissions.
(20) Applications for security for costs.
(21) Applications for assignment of Security Bonds.
(22) Applications for enforcing payment of costs under directions of Registrar.
(23) Applications for extending returnable dates of warrants.
(24) Applications for order against clients for payment of costs.
(25) Applications for production of evidence by affidavit.
(26) Applications for taxation and delivery of bills of costs, and for the delivery by an Attorney of documents and papers.
(27) Applications for stay of execution of a decree or order in civil proceedings.
(28) Applications for stay of execution of sentence or order in criminal proceedings.
(29) Applications for the grant of bail.

16 An Attorney shall before enrolment subscribe before the Registrar a declaration, in such form as the Chief Justice may from time to time direct, undertaking to observe the rules, regulations, orders and practice of the Court and to pay all fees or charges due and payable in any cause, matter or appeal in the Court

17 Every applicant for enrolment as an Advocate or Attorney shall produce an authenticated copy of his enrolment certificate in his own High Court and a certificate that he is still an/a Attorney/Solicitor/Advocate of that High Court

19 Two or more Attorneys may enter into partnership with one another, and any one of them may act in the name of the partnership, provided that the firm has an office at the seat of the Court and is registered with the Registrar Any change in the composition of the firm shall be intimated to the Registrar

20 An Attorney who wishes to have his name removed from the Roll of Attorneys shall apply by petition, verified by affidavit, entitled " In the matter of . an Attorney in this Court , and stating the date of his enrolment as an Attorney, the reason why he wishes his name to be removed, that no application or other proceeding in any Court is pending, or is likely to be instituted against him, and that no fees are owing to the Court for which he is personally responsible

21 Every Attorney shall before acting on behalf of any person or party file in the Registry a power of Attorney in the prescribed form authorising him to act

22 No person having an Attorney on the record shall file a power or warrant of Attorney authorising another Attorney to act for him in the same case save with the consent of the former Attorney or by leave of the Court, unless the former Attorney is dead, or is unable by reason of infirmity of mind or body to continue to act

23 No Attorney may, without the leave of the Court, withdraw from the conduct of any case by reason only of the non payment by his client of fees, costs and other charges

24 Every Attorney on record shall be personally liable to the Court for due payment of all fees and charges payable to the Court

25 No person having an Attorney on the record shall be heard in person save by special leave of the Court

26 No Attorney shall authorise any person whatsoever, except another Attorney, to do any act in his name in any case The authorisation shall be in writing.

27 Where a party changes his Attorney, the new Attorney shall give notice of the change to all parties concerned.

28 No advocate shall act as Attorney nor Attorney as Advocate in any circumstances whatsoever

29 An Advocate or an Attorney *who wishes to suspend his practice by reason of his appointment to* any office of profit under the Government or his being engaged in another profession or for any other reason shall give intimation thereof to the Registrar

30 The names of all Senior Advocates, other Advocates and Attorneys enrolled as such in the Federal Court of Pakistan immediately before the Constitution Day shall be deemed to be transferred to the respective Rolls of the Supreme Court.

31 Where on the complaint of any person or otherwise, the Court is of opinion that an Advocate has been guilty of misconduct or of conduct unbecoming an Advocate, the Court may take such disciplinary action against him as it may deem fit, and may report him to his own High Court For purposes of this rule, an Advocate includes a Senior Advocate

33 For the purpose of the last two preceding rules the Court shall in the first instance direct a summons to issue returnable before the Court or before a Special Bench to be constituted *by the Chief Justice, requiring* the Advocate or Attorney, as the case may be, to show cause against the matters alleged in the summons, and the summons shall, if possible, be served personally upon him with copies of any affidavit or statement before the Court at the time of the issue of the summons

7. The Registrar may decline to receive any document which is presented otherwise than in accordance with these Rules.

ORDER VIII

AFFIDAVITS

1. The Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that no such order shall be passed where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced, without unreasonable delay or expense.

2. Upon any application evidence may be given by affidavit ; but the Court may, at the instance of other party, order the attendance for cross-examination of the deponent, in Court, unless he is exempted from personal appearance or the Court otherwise directs.

3. Every affidavit shall be intituled in the cause matter or appeal in which it is sworn.

4. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs to be numbered consecutively, and shall state the description, occupation, if any, and the true place of abode of the deponent.

5. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted, provided that the grounds thereof are stated.

6. The costs occasioned by any unnecessary prolixity in the title to an affidavit or otherwise shall be disallowed by the Taxing Officer.

7. An affidavit requiring interpretation to the deponent shall be interpreted by an interpreter nominated or approved by the Court, if made at the seat of the Court, and if made elsewhere shall be interpreted by a competent person who shall certify that he has correctly interpreted the affidavit to the deponent.

8. Affidavits for the purposes of any cause, matter or appeal before the Court may be sworn before any authority mentioned in section 139 of the Code or before the Registrar of this Court, or before a commissioner generally or specially authorised in that behalf by the Chief Justice.

9. Where the deponent is a *purdahnashin* lady she shall be identified by a person to whom she is known and that person shall prove the identification by a separate affidavit.

10. Every exhibit annexed to an affidavit shall be marked with the title and number of the cause, matter or appeal and shall be initialled and dated by the authority before whom it is sworn.

11. No affidavit having any interlineation, alteration or erasure shall be filed in Court unless the interlineation or alteration is initialled, or unless in the case of an erasure the words or figures written on the erasure are rewritten in the margin and initialled by the authority before whom the affidavit is sworn.

12. The Registrar may refuse to receive an affidavit where in his opinion the interlineations, alterations or erasures are so numerous as to make it expedient that the affidavit should be rewritten.

13. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used except by leave of the Court.

14. In this Order "affidavit" includes a petition or other document required to be sworn and "sworn" shall include "affirmed".

ORDER IX

INSPECTION, SEARCH, ETC.

1. Subject to the provisions of these Rules a party to any cause, matter or appeal who has appeared shall be allowed to search, inspect or get copies of all pleadings and other documents or records in the case, on payment of the prescribed fees and charges.

2. The Court, at the request of a person not a party to the cause, matter or appeal, may on good cause shown allow such search or inspection or grant such copies as is or are mentioned in the last preceding rule, on payment of the prescribed fees and charges.

3. A search or inspection under the last two preceding rules during the pendency of a cause, matter or appeal, shall be allowed only in the presence of an officer of the Court and after twenty four hours' notice in writing to the parties who have appeared and copies of documents shall not be allowed to be taken, but notes of the search or inspection may be made.

(30) Enrolment of Advocates and of Attorneys

(31) Setting down cause, appeal or matter *ex parte*

(32) Consent petitions

3 An appeal shall lie from the Registrar in all cases to the Judge in Chambers

4 An application for reconsideration under rule 2 and the appeal under rule 3 shall be filed within thirty days of the date of the order complained of

[illegible]

to the Court

ORDER VI

NOTICES OF MOTION

1 Except where otherwise provided by Statute or prescribed by these Rules all applications which in [illegible]

terms as to costs or otherwise, and subject to such undertaking, if any, as the Court may think just, pending orders on the main application by notice of motion

2 A notice of motion shall be intituled in the suit or matter in which the application is intended to be made and shall state the time and place of application and the nature of the order asked for and shall be addressed to the party or parties intended to be affected by it and their Attorney or Attorneys, if any, and shall be signed by the Attorney of the party moving, or by the party himself where he acts in person

[illegible]

party or parties

4 Notice shall be given to the other party or parties of all grounds intended to be urged in support of, or in opposition to, any motion

5 Save by leave of the Court, no affidavit in support of the application beyond those specified in the notice of motion, nor any affidavit in answer or reply filed later than the time prescribed in these Rules shall be used at the hearing or allowed on taxation

6 Unless otherwise ordered the costs of a motion in a suit or proceeding shall be treated as costs in that suit or proceeding

ORDER VII

DOCUMENTS

1 The officers of the Court shall not receive any pleading, petition, affidavit or other document, except original exhibits and certified copies of public documents, unless it is fairly and legibly transcribed on one side of standard petition paper, demy foolscap size

2 No document in a language other than English shall be exhibited or used for the purpose of any proceedings before the Court, unless it has been translated in accordance with these Rules

3 Every document required to be translated shall be translated by a translator nominated or approved by the Court on payment of prescribed fees

4 Every translator shall, before acting make an oath or affirmation that he will translate correctly and accurately all documents given to him for translation, and at the end of the document he shall certify in writing, signed by him, that the translation is correct [illegible]

concerned so far as may be applicable, shall apply in relation to appeals preferred to the Court under Articles 157 and 158 of the Constitution :

Provided that the Court may from time to time issue to High Courts any special directions for the purpose of presentation of appeals to the Supreme Court.

2. Where there are two or more appeals arising out of the same matter, and the High Court is of opinion that it would be for the convenience of this Court and all parties concerned that the appeals should be consolidated, the High Court may direct the appeals to be consolidated and make such order for security of costs as it may deem fit.

3. The security to be furnished under rule 7(1) (a) of Order XLV of the Code shall, unless otherwise ordered by the High Court, be in the sum of rupees two thousand :

Provided that the Court appealed from may, if it thinks fit in any appropriate case, require security to a larger amount, but in no case exceeding rupees five thousand.

4. Where the appellant, having obtained a certificate for the admission of an appeal from the High Court, fails to furnish the security or make the deposit required for the preparation and printing of the record, the High Court may, either on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal and may give such directions as to the costs of the appeal as it shall think fit and make such further or other order as the justice of the case requires.

5. An appellant who has obtained a certificate from the High Court may, at any time prior to the making of an order admitting the appeal, withdraw the appeal on such terms as to costs or otherwise as the High Court may direct.

6. Where an appellant whose appeal has been admitted desires, prior to the dispatch of the record to this Court, to withdraw his appeal, the High Court may upon an application in that behalf made by the appellant, grant him a certificate to the effect that the appeal has been withdrawn, and the appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without an express order of this Court, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the High Court may think fit to direct.

7. The liability of the parties to pay court-fee in this Court, unless otherwise ordered by this Court, shall not be affected by any order for consolidation of appeals made by the High Court or by this Court.

ORDER XIII

PETITIONS FOR SPECIAL LEAVE TO APPEAL IN CIVIL PROCEEDINGS

1. A petition for special leave to appeal shall be lodged in this Court within thirty days from the date of the refusal of leave to appeal by the High Court, or within sixty days of the judgment or order sought to be appealed from :

Provided that the Court may for sufficient cause extend the time.

2. Where the High Court has refused to give a certificate as provided in Article 157(1) and 158(c) of the constitution a petition for special leave to appeal shall be lodged in this Court within thirty days from the date of refusal of grant of the said certificate :

Provided that the Court may for sufficient cause extend the time.

3. A petition for special leave to appeal shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Court to determine whether such leave ought to be granted, and shall be signed by the counesl and attorney for the petitioner or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought. The petition shall also state whether the petitioner moved the High Court concerned for leave to appeal against its decision, and if so, with what result.

4. The petitioner shall lodge at least six copies of—

(i) his petition for special leave to appeal,

(ii) the judgment and order sought to be appealed from and the order of the High Court refusing leave to appeal, one copy each of which shall be certified to be correct,

(iii) the affidavit in support of allegations of fact prescribed by rule 4 of Order XVIII hereinafter contained, and

(iv) unless a caveat as prescribed by Order XVIII, rule 2, has been lodged by the other party who appeared in the court below, an affidavit of service of notice of the intended petition upon such party.

4 Copies required under any of the preceding rules of this Order may be certified as correct copies by any officer of the Court authorised in that behalf by the Registrar

5 No record or document filed in any cause, matter or appeal shall, without the leave of the Court, be taken out of the custody of the Court

ORDER X

JUDGMENTS, DECREES AND ORDERS

1 The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their Attorneys, and the decree or order shall be drawn up in accordance therewith

2 Subject to the provisions contained in Order XXVI a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission

3 Certified copies of the judgment, decree or order shall be furnished to the parties on application made for the purpose and at their expense

4 *Every decree or order made by the Court shall be drawn up in the Registry and be signed by the* Registrar or Deputy Registrar or Assistant Registrar and sealed with the Seal of the Court and shall bear the same date as the judgment

5 Every order made by the Registrar or other officer shall be drawn up in the Registry and signed by the Registrar or other officer as the case may be

6 Save as otherwise provided in these Rules, no decree or order in civil proceedings shall be drawn up until applied for by a party unless the Court so directs

7 In cases of doubt or difficulty with regard to a decree or order made by the Court, the Registrar shall, before issuing the draft, submit the same to the Judge in Chambers

8 Where a draft of any decree or order is required to be settled in the presence of the parties, the Registrar shall by notice in writing appoint a time for settling the same and the parties shall attend accordingly and produce their briefs and such other documents as may be necessary to enable the draft to be settled

9 Where any party is dissatisfied with any decree or order as settled by the Registrar the Registrar *shall not proceed to complete the decree or order without allowing that party sufficient time to apply by motion* to the Court

10 The decree passed or order made in every appeal and a direction or writ issued in any matter by the Court shall be transmitted by the Registrar to the Court *tribunal* or other *authority concerned* from whose judgment, decree *or order* the *appeal* or *matter* was brought, and any such decree, order or direction shall be executed and enforced *as if it had been made and issued by the High Court of the appropriate Province*

11 Any *order* as to the costs of proceedings in the Court, as soon as the amount of the costs to be *paid is ascertained*, shall *be transmitted* by the *Registrar* to the *Court or tribunal appealed from or to any other authority concerned*, and shall be given *effect to* by that *Court, tribunal or authority as if it were an order made by the High Court of the appropriate Province*

12 If any question arises as to which High Court shall give effect to the decree, order, direction or writ of this Court, it shall be decided by the Court

ORDER XI

CONSTITUTION OF BENCHES

Save as provided by law or by these Rules every cause, appeal or matter shall be heard and disposed of by a bench consisting of not less than three Judges to be nominated by the Chief Justice

Provided that petitions for special leave to appeal shall be heard and disposed of by a bench of two Judges, but the Chief Justice may, in a fit case, refer any petition to a larger bench

Provided further that if the Judges hearing the petition are equally divided in opinion the petition shall be laid for hearing and disposal before another Judge to be nominated by the Chief Justice

PART II

APPELLATE JURISDICTION

ORDER XII

CIVIL APPEALS

1 *The provisions of Order XLV of the Code and of any rules made for the purpose by the High Court*

2. Where an appellant whose appeal has been admitted by an order of the Court appealed from fails to show due diligence in taking all necessary steps in connection with the preparation of the record, the High Court may, either on its own motion, or on the application of the respondent, call upon the appellant to show cause why a certificate should not be issued that the appeal has not been effectually prosecuted by the appellant, and if the High Court sees fit to issue such a certificate the appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without an express order of this Court, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the High Court thinks fit to direct. A copy of the said certificate shall be forwarded to the Registrar of this Court.

3. Where the appellant, who has obtained special leave to appeal by an order of this Court, fails to have the printed record transmitted to this Court with due diligence, the Registrar shall call upon the appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may issue a summons to the appellant calling upon him to show cause before this Court at a time to be specified in the said summons why the special leave to appeal should not be rescinded. The respondent shall be entitled to be heard before this Court in the matter of the said summons and to ask for his costs and such other relief as he may be advised. The Court may, after considering the matter of the said summons rescind the grant of special leave to appeal, or give such other directions as the justice of the case may require.

4. In the preparation of the printed record for purposes of this Court, the Court appealed from may include the printed paper books prepared for its own use at the earlier stage, if sufficient number of such paper books are available.

5. Where the decision of the appeal is likely to turn exclusively on a question of law, the appellant may, after notice to the respondent and with the sanction of the Court appealed from, print such parts only of the record as may be necessary for the discussion of the same.

6. Save as otherwise provided in the last preceding rule, the Registrar of the Court appealed from, as well as the parties or their attorneys, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant for the decision of the appeal, and, generally to reduce the bulk of the record as far as practicable, taking special care to avoid duplication of documents and unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed, shall be enumerated in a typewritten list to be transmitted with the record.

7. Where in the course of the preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, the record as finally printed shall, with a view to the subsequent adjustment of the costs of, and incidental to, such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

8. The record shall be arranged, prepared and printed under the supervision of the Registrar of the Court appealed from in accordance with the rules embodied in the Fifth Schedule to these Rules, and the parties may submit any disputed question arising in connection therewith to the decision of that Court, and it shall give such directions thereon as the justice of the case may require.

9. When the record has been made ready, the Registrar of the Court appealed from shall—

(i) at the expense of the appellant transmit to the Registrar of this Court such number of copies as the Court may direct, or in the absence of any special direction in this behalf, 20 copies of such record, and of which copies he shall certify to be correct by signing his name on, or intialling every eight page thereof and by affixing thereto the Seal of the Court appealed from ;

(ii) give notice of the despatch of the record to the parties; and

(iii) send to the Registrar of this Court a certificate as to the date or dates on which the notice under the preceding clause (ii) has been served.

10. As soon as the record is received in the Registry of this Court, it shall be registered in the Registry with the date of arrival, and the names of the parties. Appeals shall be numbered consecutively in each year in the order in which the records are received in the Registry.

11. Each party who has entered an appearance shall be entitled to receive for his own use, three copies of the record.

12. Subject to any special direction from the Court to the contrary, the costs of, and incidental to, the printing of the record shall form part of the costs of the appeal, but the costs of, and incidental to, the printing of any document objected to by one party, in accordance with rule 7 above shall, if such document is found, on the taxation of costs, to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting or including the same in the record.

The petitioner shall, on demand, furnish to other parties, at their expense on the prescribed charges, copies of all or any of the documents filed by him in the Court

6 Where the Court grants special leave to appeal, it shall, in its order, specify the amount of the security for costs (if any) to be lodged by the petitioner, up to a maximum of Rs 5,000, and the time within which such security is to be lodged, and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the printed record by the Registrar of the Court appealed from to the Registrar of this Court, and for such further matters, as the justice of the case may require Unless the Court specially directs otherwise, any security for costs to be furnished by the petitioner, shall be lodged in the Court from whose judgment special leave to appeal has been granted, and that Court shall deal with such security in accordance with the directions contained in the order of this Court when determining the appeal

7 Where security is required to be furnished in this Court it shall be given to the Registrer or to such other officer as the Court may specially direct, and the Court may permit or order him to assign the same to any other person for the purpose of enforcing it upon such terms as the Court may think fit

8 Where the appellant has lodged security for the respondent's costs of an appeal in the Registry of the Court, the Registrar of the Court shall deal with such security in accordance with the directions contained in the Court's order determining the appeal

9 *After the grant of special leave to appeal by this Court, the Registrar shall transmit a certified copy of* the order to the Registrar of the Court appealed from

10 On receipt of the said order, the Court appealed from shall, in the absence of any special directions in the order, act in accordance with the provisions contained in Order XLV of the Code, so far as applicable

the Registrar of this Court.

12 *Where the security is to be deposited in the Court appealed from, the Registrar of that Court* as soon as the deposit is made, intimate the fact and the date of such deposit to the Registrar of this Court, where the deposit is not made within the time fixed, or within such further time as may be granted by this Court, the Registrar of the Court appealed from shall forthwith report the default to the Registrar of this Court

13 Upon receipt of an intimation in this behalf from the Registrar of the Court appealed from or where the security is to be deposited in this Court upon default of the petitioner in depositing the same within the time fixed or such further time as the Court may deem fit to grant, the Registrar shall, after notice to the Attorney for the petitioner, post the matter before the Court for orders in regard to the default on the part of the petitioner in furnishing security, and the Court may thereupon rescind the order granting special leave to appeal or make such other order as it thinks fit

14 Save as othrewise provided by the preceding rules of this Order, the provisions of Order XVIII *hereinafter contained shall apply mutatis mutandis to petitions for special leave to appeal*

15 The provision contained in Order XXII shall apply as far as applicable in the case of any person seeking special leave to appeal to the Court as a pauper

ORDER XIV

PREPARATION OF RECORD, ETC.

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from shall, with all convenient speed, certify to the Registrar of this Court that the respondent has received notice, or is otherwise aware, of the order of the Court appealed from admitting the appeal, or of the order of *this Court giving the appellant special leave to appeal*

8. Where the record subsequent to its despatch to this Court becomes defective by reason of the death, or change of status of a party, to the appeal, or for any other reason, the Court appealed from shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of this Court showing who, in the opinion of the Court appealed from, is the proper person to be substituted, or entered on the record, in place of, or in addition to, the party on record. A copy of the application made in the High Court in this behalf shall be endorsed to this Court.

9. An application to bring on record the legal representatives of the deceased appellant or respondent shall be made within ninety days of the death of the said appellant or respondent :

Provided that the Court appealed from may for sufficient cause extend the time.

10. A petition for an Order of Revivor or Substitution shall be accompanied by a certificate from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the record in place of, or in addition to, the party on record.

ORDER XVII

APPEARANCE BY RESPONDENT

1. [illegible] thirty days of the receipt of the notice served on him under Order XV, [illegible] at any time before the hearing of the appeal on such terms as the Court thinks fit.

2. [illegible] notice thereof to the appellant and [illegible]

3. [illegible] they enter an appearance, the Appearance [illegible]

4. [illegible] separate appearances in the same appeal.

5. [illegible] entitled to receive any notices relating to the appeal [illegible] in the appeal.

6. [illegible] the following Rules shall, subject to [illegible]

(a) [illegible] at the time when the appeal was admitted, [illegible] by an order of this Court [illegible] the appellant [illegible] the Registrar of the Court appealed from [illegible] of the despatch of the record to this Court, [illegible] down are satisfied, be set down ex parte [illegible] at any time after the expiration of sixty days from the date of the lodging of the petition of appeal.

(b) [illegible] by an order of this Court subsequent to the admission of the appeal, and it appears from the record, or from a supplementary record, or from a certificate of the Registrar of the Court appealed from, that the said non-appearing respondent has received notice of his being brought on the record as a respondent, the appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing respondent at any time after the expiration of sixty days from the date of his having been served with a copy of the order of this Court bringing him on the record as a respondent :

Provided that where it is shown to the satisfaction of this Court, by affidavit or otherwise, either that an appellant has made every reasonable endeavour to serve a non-appearing respondent with the notices of entering appearance and lodging petition of appeal and has failed to effect such service or that it is not the intention of the non-appearing respondent to enter an appearance to the appeal, the appeal may, without further order in that behalf and at the risk of the appellant, be proceeded with *ex parte* as against the said non-appearing respondent :

Provided further that if it is certified by the Court appealed from that a respondent intentionally evades service of notice of despatch of the record to this Court or that the said notice cannot be served in the ordinary way, the appeal may, if the Court is satisfied on receipt of an intimation to that effect from the Court appealed from, be set down *ex parte* as against the said non-appearing respondent after the expiration of sixty days of the lodging of the petition of appeal.

ORDER XVIII

PETITIONS GENERALLY

1. All petitions shall consist of paragraphs numbered consecutively and shall be fairly and legibly written, typewritten, or lithographed on one side of standard petition paper demy-foolscap size or on paper ordinarily

ORDER XV

APPELLANT'S APPEARANCE AND LODGING OF PETITION OF APPEAL

1 The appellant shall enter an appearance ... after entering such appearance shall ... the same to the Registrar

2 The appellant shall lodge ... petition of appeal ... upon him of notice of despatch of the record ... Registrar ...

3 The petition of appeal shall be ... Order XVIII ... contained. It shall recite succinctly and ... proceedings ... the appeal ... but shall not contain argument or ... matter ...

heard at the same time as the appeal

ORDER XVI

WITHDRAWAL OF APPEAL NON-PROSECUTION OF APPEAL CHANGE OF PARTIES

1 Where an appellant who has not lodged ... shall make an application to that effect to the ... this Court ... dismissed as from the date of the said application ... shall with all convenient speed after ... appealed from that the appeal has been withdrawn and dismissed ... entered into by the appellant shall ... direct

2 Where an appellant who has lodged ... present a petition to that effect to the Court ... the Court for his costs

4 The Registrar shall send a copy of the summons ... ent who has entered an appearance ... to ask for his costs and other relief

5 The Court may after hearing the parties dismiss the appeal fo ... directions thereon as the justice of the case may require

6 An appellant whose appeal has been dismissed for non-prosecution may ... case and the ends of justice may req

7 Where at any time between the admission of an appeal and ... the record becomes defective by reason ... reason the Court appeal ... behalf made by any person ... proper person to be substituted ... the name of such person shall ... without an express order of this Cou

2. The respondent shall file in the Registry within thirty days of the service upon him of the notice of the lodging of the petition of appeal by the appellant twelve copies of a concise statement of such facts of the case as he deems material and of the arguments on which he proposes to rely at the hearing.

3. No party to an appeal shall be entitled to be heard by the Court unless he has previously lodged his concise statement; nor shall he be allowed to inspect the concise statement of the opposite party or obtain a copy thereof from the Registrar until he has lodged his own concise statement :

Provided that where a respondent who has entered an appearance does not desire to lodge his concise statement in the appeal, he may give the Registrar notice in writing of his intention not to lodge any concise statement, while reserving his right to address the Court on the question of costs.

4. Two or more respondents may, at their own risk as to costs, file separate concise statements in the same appeal.

5. Each party shall, after filing his concise statement, forthwith give notice thereof, to the other party; and shall be entitled, subject to rule 3 of this Order, to receive two copies of the concise statement filed by the opposite party on his applying therefor.

6. The concise statement shall consist of paragraphs numbered consecutively and shall state, as precisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party filing the same, and the reasons therefor, and shall be printed or neatly typed with quarter margin, on one side of standard petition paper, of the same size as the printed record. References by page and line to the relevant portions of the record as printed shall, as far as practicable, be printed or typed in the margin, and care shall be taken to avoid, as far as possible, the reproducing in the concise statement of long extracts from the record. The Taxing Officer in taxing the costs of the appeal shall, either of his own motion, or at the instance of the opposite party, enquire, into any unnecessary prolixity in the concise statement, and may disallow the costs occasioned thereby.

7. As soon as an appeal is set down, the appellant shall attend at the Registry and obtain seven copies of the record and concise statements to be bound for the use of the Court at the hearing. The copies shall be bound in cloth or in one-fourth leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's concise statement. The front cover shall bear a printed label stating the title and Supreme Court number of the appeal, the contents of the volume, and the names and addresses of the Attorneys. The several documents, indicated by incuts, shall be arranged in the following order :—

(i) Appellant's concise statement,

(ii) Respondent's concise statement,

(iii) Record,

(iv) Supplemental record (if any); and the short title and Supreme Court number of the appeal shall also be shown on the back.

8. The appellant shall lodge the bound copies, not less than seven clear days before the date fixed for the hearing of the appeal.

ORDER XX

HEARING OF APPEALS

1. All appeals filed in the Registry shall, as far as possible, be heard in the order in which they are set down.

2. The Registrar shall, subject to the provisions of Order XVII notify the parties to the appeal of the date fixed for the hearing.

3. Subject to the directions of the Court, at the hearing of an appeal not more than two Advocates shall be heard on one side.

4. The appellant shall not, without the leave of the Court, rely at the hearing on any grounds not specified in his petition of appeal and the concise statement.

5. Where the Court, after hearing an appeal, decides to reserve its judgment therein, the Registrar shall notify the parties concerned of the day appointed by the Court for the delivery of the judgment.

ORDER XXI

MISCELLANEOUS

1. The filing of an appeal shall not prevent execution of the decree or order appealed against, but the Court may, subject to such terms and conditions as it may think fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to this Court.

2 A respondent may apply for the summary determination of an appeal on the ground that it is frivolous or vexatious or has been brought for the purpose of delay, and the Court shall make such order thereon as it thinks fit

3 A party to an appeal who appears in person shall furnish the Registrar with an address for service and all documents left at that address, or sent by registered post to that address, shall be deemed to have been duly served

ORDER XXII

PAUPER APPEALS, PETITIONS ETC

1 The provisions of Order XLIV in the First Schedule to the Code, shall, with necessary modifications and adaptations, apply in the case of any person seeking to appeal to the Court as a pauper

2 An application for permission to proceed as a pauper shall be made on petition, setting out concisely [illegible]

[illegible] wearing apparel and his interest in the subject matter of the [illegible]

[illegible] subordinate to the High Court investigate into the pauperism after notice to the parties interested and make a report thereon within thirty days after the receipt of the reference from this Court

Provided that no reference as aforesaid shall be necessary where the petitioner had been permitted to prosecute his appeal *in forma pauperis* in the Court appealed from

4 The Court may allow an appeal to be continued *in forma pauperis* after it has begun in the ordinary form

5 Where the petitioner obtains leave of the Court to appeal as a pauper he shall not be required to pay court fees or to lodge security for the costs of the respondent

6 Where the appellant succeeds in the appeal, the Registrar shall calculate the amount of court fees which would have been paid by the appellant if he had not been permitted to appeal as a pauper and incorporate it in the decree or order of the Court , such amount shall be recoverable by the Federal Government from any party ordered by the Court to pay the same, and shall be the first charge on the subject matter of the appeal

7 Where the appellant fails in the appeal or is dispaupered, the Court may order the appellant to pay the court fees which would have been paid by him if he had not been permitted to appeal as a pauper

8 The Federal Government shall have the right at any time to apply to the Court to make an order for the payment of proper court fees under the last two preceding rules

9 In every pauper appeal the Registrar shall, after the disposal thereof, send to the Federal Government a memorandum of the court fees due and payable by the pauper

10 No person shall take, agree to take or seek to obtain from a person proceeding as a pauper, any fee, profit or reward for the conduct of the pauper s business in the Court, but the Court may nevertheless award costs against the other party and in that case may direct payment thereof to the Advocate of the pauper and the Attorney acting for him

ORDER XXIII

CRIMINAL APPEALS

1 Appeals under Article 159(a), (b) and (d) of the Constitution shall be lodged in the Court within thirty days from the date of the judgment, final order or sentence appealed from and appeals under Article 157 and under clause (c) of Article 159 of the Constitution within thirty days from the date of the certificate granted by the High Court

Provided that the Court may for sufficient cause extend the time

2 The appeal shall be in the form of a petition in writing which shall be accompanied by a certified copy of the judgment or order appealed against and in the case of appeals under Articles 157 and 159(c) also by a certified copy of the certificate granted by the High Court The appellant shall file at least six copies of his petition and the accompanying document

3 The appellant, if he is in Jail, may present his petition of appeal and the accompanying documents to the Officer in Charge of the Jail, who shall forward them forthwith to the Registrar of this Court

4. On receipt of the petition of appeal the Registrar shall cause notice of the appeal to be given to the Attorney-General for Pakistan or the Advocate-General of the Province concerned, or to both as the case may require, and in cases where the appeal is by the Government, to the accused and shall also furnish the Attorney-General for Pakistan and or the Advocate-General of the Province concerned or the accused as the case may be, with a copy of the petition of appeal and the accompanying documents.

5. The Registrar shall thereafter send a copy of the petition of appeal to the High Court concerned for its record. The High Court shall then arrange for the printing of the record in the case and for the transmission of the printed record to the Registrar of this Court with all convenient speed. In the preparation of the record, the High Court may include the printed paper book prepared for its own use at the stage of the appeal in the High Court. The record shall be printed at the expense of the appellant, unless otherwise ordered by the Court, but in appeals involving sentence of death, the record shall be printed at the expense of the Government of the Province concerned.

6. As soon as the record has been got ready the Registrar of the High Court shall despatch to the Registrar of this Court not less than 12 copies, one of which copies he shall certify to be correct by singinig his name on, or initialling, every eighth page thereof and by affixing thereto the seal of the High Court:

Provided that in cases involving a sentence of death if the record was printed in the High Court it shall form part of the record meant for this Court along with such additional printed or typewritten record as may be necessary and shall be despatched to this Court within a period of 30 days after the receipt of the intimation from the Registrar of this Court of the filing of the petition of appeal.

7. In proper cases the Court may in its discretion direct the engagement of an Advocate for an accused person at the cost of the government. In such a case the engagement of an Attorney to instruct the Advocate shall not be necessary. The fee of the advocate so engaged shall be Rs. 100 per day, the day to be reckoned as 4½ hours of actual hearing in Court.

8 Due notice shall be given to the parties concerned of the date fixed for the hearing of the appeal. The accused may, where he so desires, present his case by submitting his arguments in writing and the Court shall consider the same at the hearing of the appeal.

9. The Court may where it thinks fit so to do, in the interests of justice, direct the production of an accused person at the hearing of the appeal.

10. After the disposal of the appeal the Registrar shall, with the utmost expedition, send a copy of the Court's judgment or order to the High Court concerned.

11. Pending the disposal of any appeal under this Order the Court may order that the execution of the sentence or order appealed against be stayed on such terms as the Court may think fit.

12. In Criminal proceedings no security for costs shall be required to be deposited and no court-fee, process fee or search fee shall be charged, and no copying charges shall be made except for copies other than the first to any party to the proceedings.

13. Save as aforesaid the provisions contained in the preceding Orders in this Part of the Rules shall, with necessary modifications and adaptations, apply, so far as may be, to criminal appeals under this Order, but it shall not be necessary to file a concise statement in such appeals.

ORDER XXIV

PETITIONS FOR SPECIAL LEAVE TO APPEAL IN CRIMINAL PROCEEDINGS

1. Save as hereinafter provided the provisions with respect to petitions for special leave to appeal in civil proceedings contained in Order XIII of this Part of the Rules, shall, with necessary modifications and adaptations, apply to applications for special leave to appeal in criminal matters :

Provided that no court-fee, process-fee or search fee shall be charged and no copying charges shall be made except for copies other than the first to any party to the proceedings.

2. All petitions and applications for special leave to appeal in criminal matters shall be lodged in the Court within thirty days from the date of the judgment or order sought to be appealed from, or from the date of the refusal of certificate under Articles 157(1) or 159(c) of the Constitution by the High Court :

Provided that the Court may for sufficient cause shown extend the time.

3. The petitioner, if he is in Jail, may present his petition for special leave to appeal along with the accompanying documents, including any written arguments which he may desire to advance, to the Officer-in-Charge of the Jail who shall forthwith forward them to the Registrar of this Court.

4. The Registrar shall place the petition and the accompanying documents so received before the Court, and the Court may, upon perusal of the papers, reject the petition summarily without hearing the petitioner in person, if it considers that there is no sufficient ground for granting special leave to appeal.

5 In the case of a pet t on for spec al leave to appeal nvolv ng a sentence of death the Reg strar shall as soon as the pet t on is filed or received from the Officer n charge of a Ja l nt mate the fact of the pet t on hav ng been filed rece ved n the Court to the Government of the Prov nce concerned and thereupon the exe u t on of the sentence of death shall be stayed pend ng the d sposal of the pet t on v thout any express order of the Court in th s behalf

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w th the prov s ons conta ned in Order XXIII relat ng to cr m nal appeals

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PART III

ORDER XXV

APPLICATIONS FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS

(Art 32 of the Const tution)

Habeas Corpus

1 An appl cat on for a wr t of *habeas corpus* shall be filed in the Reg stry and shall be acco npan ed by an affid v t by the person restra ned stat ng that the appl cat on is made at h s ns ance and sett ng out the natu e and circumstances of the restra nt The appl cat on shall also state whether the appl cant has moved he H gh Court concerned for the same rel ef and if so w th what result

Prov ded that where the person restra ned s unable ow ng to the res ra nt to make the affida t the appl cat on shall be accompan ed by an affidav t to the like effect made by some other person h ch shall sta e the reason why the person restra ned is unable to make the aff dav t h mself

2 The appl cat on shall be heard by a Bench consist ng of not less than two Judges

3 If the Court is of op n on that a *p ma fa e* case for grant ng the appl cat on is made out a ule n shall be issued call ng upon the person or persons aga nst whom the order is sought to appea on a day to be named there n to show cause why such order should not be made and at the same t me to p oduce n Court the body of the person or persons alleged to be illegally or improperly deta ned then and there to be deal w h accord ng to law

4 On the return day of such rule or any day to wh ch the hear ng thereof may be adjourned the Court shall after hear ng such part es as are present and w sh to be heard make such order as n the cr cumstances t cons ders to be just and proper

5 In d spos ng of any such rule the Court may in its d scret on make uch o der for costs as t may cons der just

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7 Such appl cation shall be heard by a Bench cons st ng of not less than two Judges of the Court Unless the Court otherw se d rects there shall be at least e ght clear days between the serv ce of the not ce of motion and the day nam d there n for the hear ng of the mot on

8 Cop es of the sa d appl cat on and th affidavit in support thereof shall be erved w th the notice of mot on and every party to the proceed ng shall supply to any other party on demand and on payment of the proper charges cop es of any affidav t filed by h m

9 The not ce hall be served on all persons directly affected and on such other persons as the Court may d rect

Prov ded that on the hear ng of any such motion any person who des res to be heard n oppos t on to the mot on and appears to the Court to be a proper person to be heard shall be heard notwithstand ng that he has not been served w th the not ce of mot on and shall be l able to costs in the d scret on of the Court

10 The Court may n such proceed ng impose such terms as to costs and as to the g ving of security as it thinks fit

11 The prov s ons of Order XVIII relat ng to pet tions shall so far as may be appl cable apply to appl ca t ons under this Order

PART IV

ORDER XXVI

REVIEW

Applications for review shall be filed with the Registrar within 30 days after judgment is delivered in the cause, appeal or matter, and shall distinctly state the grounds for review and be accompanied by a certificate of counsel that the petitioner has reasonable and proper grounds for review.

PART V

ORIGINAL JURISDICTION

ORDER XXVII

PARTIES TO SUITS

1. Two or more plaintiffs may join in one suit in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist.

2. Two or more defendants may be joined in one suit against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist.

3. (1) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any plaintiff or defendant improperly joined be struck out, and that the name of any plaintiff or defendant who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(2) No person shall be added as a plaintiff without his consent.

4. Where it appears to the Court that any causes of action joined in one suit cannot conveniently be tried or disposed of together the Court may order separate trials or make such other order as may be expedient.

5. Where it appears to the Court that any joinder of plaintiffs or defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such order as may be expedient.

ORDER XXVIII

PLAINTS

1. Every suit shall be instituted by the presentation of a plaint.

2. A plaint shall be presented to the Registrar, and all plaints shall be registered and numbered by him according to the order in which they are presented.

3. Every plaint shall comply with the rules contained in Order XXXI of these Rules so far as they are applicable.

4. A plaint shall contain the following particulars :—

(a) the names of the plaintiff and of the defendant ;

(b) the facts constituting the cause of action and when it arose ;

(c) the facts showing that the Court has jurisdiction ;

(d) the declaration which the plaintiff claims.

5. The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it and the Registrar shall sign the list if on examination he finds it to be correct.

6. The plaint shall be rejected—

(a) where it does not disclose a cause of action ;

(b) where the suit appears from the statement in the plaint to be barred by any law.

7. Where a plaint is rejected the Court shall record an order to that effect with the reasons for the order.

8. The rejection of the plaint shall not of itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

9. Where a plaintiff sues upon a document in his possession or power, he shall produce it to the Registrar when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

10. Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

11 Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is

12 A document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly shall not, without the leave of the Court, be received in evidence at the hearing of the suit

ORDER XXIX

ISSUES AND SERVICE OF SUMMONS

1 When a suit has been duly instituted a summon may be issued to the defendant to appear and answer the claim

2 Every summons shall be signed by the Registrar, and shall be sealed with the Seal of the Court

3 Every summons shall be accompanied by a copy of the plaint

4 The summons shall be served by being sent by registered post to the Attorney General for Pakistan or the Advocate General for the Province, as the case may be, or to an Attorney of the defendant empowered to accept service

5 There shall be endorsed on every summons a notice requiring the defendant to enter an appearance within twenty eight days after the summons has been served

6 A defendant shall enter his appearance by filing in the Registry a memorandum in writing containing the name and place of business of his Attorney, and in default of appearance being entered within the time mentioned in the summons or as hereinafter provided the suit may be heard *ex parte* The defendant shall also file a written statement along with his memorandum of appearance

7 The defendant shall forthwith give notice of his having entered an appearance to the plaintiff and shall at the same time supply him a copy of the written statement

8 The plaintiff shall within fourteen days after the defendant has entered an appearance take out a [illegible]

[illegible]

ORDER XXX

WRITTEN STATEMENT, SET OFF AND COUNTER CLAIM

1 It shall not be sufficient for a defendant in his written statement to deny generally the facts alleged by the plaintiff but he shall deal specifically with each allegation of fact of which he does not admit the truth except damages

2 Where a defendant denies an allegation of fact he shall not do so evasively but shall answer the point of substance

3 Each allegation of fact in the plaint if not denied specifically or by necessary implication or not expressly stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, but the Court, may in its discretion require any fact so admitted to be proved otherwise than by such admission

[illegible]

5 The written statement containing the particulars mentioned in the last preceding rule shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off

6 The rules relating to a written statement by a defendant shall apply to a written statement by a plaintiff in answer to a claim of set-off

7 No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court may think fit, but the Court may at any time require a written statement or additional written statement from any of the parties and may fix a time for presenting the same

8 Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such orders in relation to the suit as it thinks fit

9 The defendant, in addition to his right of pleading a set off, may set up by way of counter-claim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to him either before or after

the filing of the suit but before he has delivered his defence and before the time limited for delivering his defence has expired, whether that counter-claim sounds in damages or not, and the counter-claim, shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the counter-claim

10 The Court may, if in its opinion the counter-claim cannot be disposed of in the pending suit or ought not to be allowed, refuse permission to the defendant to avail himself thereof, and require him to file a separate suit

ORDER XXXI

PLEADINGS GENERALLY

1 In this Order "pleading" means plaint or written statement

2 Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies, but neither the evidence by which those facts are to be proved, nor any argumentative matter, and shall be divided into paragraphs numbered consecutively Dates, sums and numbers shall be expressed in figures

3 A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just

4 Wherever the contents of any document are material, it shall be sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material

5 Every pleading shall be signed by, or by an Advocate on behalf of, the Attorney-General for Pakistan or by, or by an Advocate on behalf of, the Advocate-General for the Province, as the case may be

6 The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice or embarrass or delay the trial of the suit, or which contravenes any of the provisions of this Order

7 The Court may at any stage of the proceedings allow either party to amend his pleadings in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties

8 If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time or of such fourteen days, as the case may be, unless the time is extended by the Court

9 Amendments of pleadings made only for the purpose of rectifying a clerical error may be made on an order of the Registrar without notice, but unless otherwise ordered a copy of the order shall be served on all other parties

ORDER XXXII

DISCOVERY AND INSPECTION

1 Order XI of the First Schedule to the Code shall apply with respect to discovery and inspection in suits instituted before the Court, except rules 5 and 23 of that Order

2 Where the Court has made an order allowing one party to deliver interrogatories to the other, those interrogatories shall be answered by such persons as the Court may direct

3. No application for leave to deliver interrogatories shall be made by the defendant until after he has filed his written statement

4 After an order has been made for the delivery of interrogatories one set of the interrogatories, as allowed, shall be annexed and served with the order upon the person to be interrogated.

5 The Court may, for sufficient reason, allow any affidavit to be sworn, on behalf of the party from whom discovery, production or inspection is sought, by any person competent to make the same.

6 Where any document is ordered to be deposited in Court copy of the order and a schedule of the document shall be left in the Registry at the time when the deposit is made.

7. When the purpose for which any documents have been deposited in Court is satisfied, the party by whom they were deposited may, pending the suit, have them delivered out to him, if he has the consent in writing of the other party, or an order of the Court.

ORDER XXXIII

ADMISSIONS

Order XII in the First Schedule to the Code shall apply

ORDER XXXIV

SUMMONING AND ATTENDANCE OF WITNESSES

1 The provisions of sections 28 and 32 of the Code shall apply to summonses to give evidence or to produce documents under these Rules

2 Order XVI in the First Schedule to the Code with respect to the summoning and attendance of witnesses shall apply with the exception of the proviso to sub rule (3) of rule 10 and the words (a) within the local limits of the Court s ordinary original jurisdiction or (b) without such limits but in rule 19

ORDER XXXV

ADJOURNMENTS

Order XVII in the First Schedule to the Code shall apply with the substitution in rule 2 of the words in such manner as it thinks just for the words in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit

ORDER XXXVI

HEARING OF SUIT

1 Rules 1 2 3 16 17 and 18 of Order XVIII in the First Schedule to the Code with respect to the hearing of suits and examination of witnesses shall apply

2 Witnesses in attendance shall be examined orally in open Court and their evidence taken down in shorthand in the form of question and answer by such officers of the Court as may be appointed for the purpose

3 The transcript of the shorthand note shall be signed by the officer recording the note and shall be deemed to be the deposition of the witness and shall form part of the record

4 The party to any suit or matter in which the evidence has been taken in shorthand and the witness whose evidence has been taken shall be entitled upon payment of the prescribed fee to be furnished with a certified copy of the transcript

ORDER XXXVII

WITHDRAWAL AND ADJUSTMENT OF SUITS

1 Rules 1 2 and 3 of Order XXIII in the First Schedule to the Code with respect to the withdrawal and adjustment of suits shall apply

2 No new suit shall be brought in respect of the same subject matter until the terms or conditions if any imposed by the order permitting the withdrawal of a previous suit or giving leave to bring a new suit have been complied with

ORDER XXXVIII

PAYMENT INTO COURT

Order XXIV in the First Schedule to the Code with respect to payment into Court shall apply

ORDER XXXIX

SPECIAL CASE

1 (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court and providing that upon the finding of the Court with respect to such question —

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them or

(b) some property movable or immovable specified in the agreement shall be delivered by one of the parties to the other of them or

(c) one or more of the parties shall do or refrain from doing some other particular act specified in the agreement

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby

2 (1) The agreement if framed in accordance with the rules hereinbefore contained may be filed in the Court

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties.

3. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of the Code shall apply to such suits so far as the same are applicable.

(2) Where the Court is satisfied after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit.

ORDER XL

MISCELLANEOUS

In the absence of any specific provision in this Part of the Rules, the provisions of the Code shall apply unless the Court otherwise directs.

PART VI

ORDER XLI

SPECIAL REFERENCES UNDER ARTICLE 162 OF THE CONSTITUTION

1. On receipt by the Registrar of the order of the President referring a question of law to the Court, the Registrar shall give notice to the Attorney-General for Pakistan to appear before the Court on a day specified in the notice to take the directions of the Court as to the parties who shall be served with notice of the Special Reference, and the Court may, if it considers it desirable, order that notice of the Special Reference shall be served upon such parties as may be named in the order.

2. The notice shall require all such parties served therewith as desired to be heard at the hearing of the Special Reference to attend before the Registrar on the day fixed by the order to take the directions of the Court with respect to statements of facts and arguments and with respect to the date of the hearing.

3. Subject to the provisions of this Order, the procedure on a Special Reference shall follow as nearly as may be the procedure in proceedings before the Court in the exercise of its original jurisdiction, but with such variations as may appear to the Court to be appropriate and as the Court may direct.

4. After the hearing of the Special Reference, the Registrar shall transmit to the President the Report of the Court thereon.

5. The Court may make such order as it thinks fit as to the costs of all parties served with notice under these Rules who appear at the hearing of the Special Reference.

ORDER XLII

SPECIAL REFERENCES UNDER ARTICLES 121, 138, 169 AND 187 OF THE CONSTITUTION

1. The Attorney-General for Pakistan shall deliver to the Registrar the order of the President referring the matter to the Court. The Reference shall be accompanied by a statement of the case setting forth the facts and grounds relied upon. The allegations of facts shall be verified by an affidavit to be made by a Secretary of the appropriate Government.

2. The Registrar shall then lay the Reference before the Court, and the Court may give such directions for the notice of the Reference upon the respondent and for the fixation of the day and time for the filing of any written statement by him. The notice shall be accompanied by all the relevant documents received with the Reference.

3. The procedure for the hearing of the Reference and taking down the statements of witnesses shall be in the discretion of the Court.

4. After the hearing of the Reference the Registrar shall transmit to the President the Report of the Court thereon.

5. The Court may make such order as it thinks fit as to the costs of the respondent.

PART VII

ORDER XLIII

COSTS

1. Subject to any provisions of any Statute or of these Rules, the costs of and incidental to all proceedings shall be in the discretion of the Court. Unless the Court otherwise orders an intervener shall not be entitled to costs.

ORDER XLIV

TAXATION

1. The Registrar and the Assistant Registrar shall be the Taxing Officer and the Assistant Taxing Officer of the Court, respectively

The Chief Justice may assign, and the Taxing Officer may with the approval of the Chief Justice delegate to an Assistant Taxing Officer any function required by or under this Order to be exercised by the Taxing Officer

[illegible]

3 The Court may, in any proceedings where costs are awarded to any party, direct payment of a sum in gross in lieu of taxed costs, and may direct by and to whom that sum shall be paid

4 Where in the opinion of the Taxing Officer the maximum fee allowed by these Rules is insufficient or a fee ought to be allowed for any matter not provided for in these Rules, he may refer the matter to the presiding Judge of the Bench hearing the appeal, cause or matter and the Judge may make such order thereon as to the allowance of the whole or any part of the amount proposed by the Taxing Officer as he thinks fit

5 Where the Taxing Officer is of opinion that any costs have been injuriously or unnecessarily occasioned by the negligence or improper conduct of any Attorney, he shall not allow any charge for the same

6 In all cases of taxation as between party and party, the bill shall be lodged for taxation as between party and party and, unless the client expresses his desire to the contrary in writing, also as between Attorney and client

7 Every bill of costs lodged for taxation shall specify the exact number of folios contained in the bill lodged

8 Every bill of costs shall be properly dated throughout and shall show in a column for the purpose the money paid out of pocket

9 Every bill of costs shall be certified by the signature of the Attorney from whose office it is issued

10 The fees for taxation and registration of every bill of costs shall be paid in court fee stamps when the bill is lodged for taxation

11 Every bill of costs shall, wherever possible, be accompanied by vouchers, and every item of disbursement and the cause thereof shall be distinctly specified, and no payment out of pocket shall be allowed except on production of the necessary voucher, or in the case of Advocate's fees, without the receipt of the Advocate that the fee has been paid

Provided that the Taxing Officer may dispense with the production of a receipt of fee paid to the Attorney General for Pakistan or the Advocate General of a Province

[illegible] within [illegible] awarded [illegible] formal order drawn up in the case

13 The party having the charge of the bill shall, within fourteen days or within such further period as [illegible]

Provided that, where the Taxing Officer is satisfied that the party having the charge of the bill has made all reasonable efforts to have the copy of the bill served and has failed, the Taxing Officer may dispense with such affidavit, and may receive and tax the bill

14 As soon as the affidavit of service referred to in the last preceding rule has been filed, the Taxing Officer shall fix a date for taxation of the bill and shall notify the parties of the date fixed

15. The Taxing Officer shall allow such costs of procuring the advice on evidence of an Advocate, and of employing an Advocate to settle pleadings and affidavits, as the Taxing Officer in his discretion thinks just and reasonable.

16. In cases of taxation as between Attorney and client where the fees are payable by the client personally or out of a fund belonging entirely to him, the Taxing Officer shall allow, as fees to Advocates, all sums actually paid, but not exceeding those set out in the Second Schedule to these Rules, unless the written consent of the client is produced.

17. Where an Attorney acts for different parties to the same suit, appeal or matter, only one set of attendances shall be allowed, unless the Court otherwise orders.

18. Where two or more appeals arising out of a single proceeding are heard together and costs are awarded in both or all of them only one set of counsel's fee shall be allowed for the hearing unless the presiding Judge of the Bench hearing the appeals otherwise directs.

19. Where on the taxation of a bill of costs payable out of a fund or out of the assets of a company in liquidation, the amount of the professional charges and disbursements contained in the bill is reduced by a sixth part or more, no costs shall be allowed to the Attorney lodging the bill for taxation for drawing or copying it, nor for attending the taxation.

20. Where on taxation of an Attorney's bill of costs as between Attorney and client, the amount of the bill is reduced by a sixth part or more, the Attorney shall pay the costs of taxation including the cost of the Attorney (if any) employed in contesting the bill and the same shall be deducted by the Taxing Officer: but the Taxing Officer may certify any special circumstances relating to the bill or taxation and the Court may upon application by the Attorney whose bill has been taxed make any such order as the Court may think just and equitable with respect to the costs of the taxation.

21. No Court fees shall be payable by an applicant to proceed in *forma pauperis* except the fee for the petition to proceed

22. In the taxation of costs as between party and party, the costs of and incidental to the attendance of an Advocate on summonses or other matters in Chambers shall not be allowed unless the court certifies that it was a fit case for the employment of an Advocate.

23 Unless specially allowed by the Taxing Officer, no allowance shall be made in party and party taxation for work done before the commencement of proceedings in the Court, except for necessary letter of demand and the reply thereto, if any, for receiving instructions to sue, to defend, or to appeal, and searhes necessary for the purpose of instituting or defending proceedings.

24 In every case of taxation as between Attorney and client, the client shall be duly summoned by the Taxing Officer to attend the taxation, unless the Taxing Officer shall see fit to dispense with his attendance.

25. No retaining fee to an Advocate shall be allowed on taxation as between party and party.

26 Any party who is dissatisfied with the allowance or disallowance by the Taxing Officer of the whole or any part of the items in a bill of costs may apply to the Taxing Officer to review the taxation in respect thereof.

27. An application to review shall be made within a week from the date of the passing of the bill by the Taxing Officer.

The application shall contain objections in writing specifying concisely therein items or parts of the bill allowed or disallowed and the grounds for the objections.

28. The Taxing Officer shall serve fourteen days' notice of the application on the opposite party. A copy of the application shall accompany the notice.

29. Objections which were not taken in at the time of the taxation shall not be taken in at the stage of review unless allowed by the Taxing Officer.

30. The Taxing Officer may, where he thinks fit, issue, pending the consideration of any objections, a preliminary allocatur for or on account of the remainder of the bill of costs.

31. Upon application to review the Taxing Officer shall reconsider his taxation upon the objections carried in and may, where he thinks fit, receive further evidence in respect thereof, and shall state in a certificate the grounds of his decision thereon and any special facts or circumstances relating thereto.

32. Any party dissatisfied with the decision of the Taxing Officer on review may, not later than seven days from the date of the decision or within such further time as the Taxing Officer or the Court may allow, apply to the Court for an order to review the decision of the Taxing Officer and the Court may thereupon make such order as may seem just; but the taxation of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in the manner aforesaid.

33 No evidence shall be received by the Court upon the review of the Taxing Officer's decision which was not before the Taxing Officer when he taxed the bill or reviewed his taxation unless the Court otherwise directs

34 The certificate of the Taxing Officer by whom any appeal has been taxed shall unless it is set aside or altered by the Court be final as to the amount of costs covered thereby

35 Except as otherwise specially provided in these Rules the fees set out in the Second and Fourth Schedules to these Rules may be allowed to Advocates Attorneys and officers of the Court

36 In defended appeals suits and special references the first day's hearing fee shall be allowed in full as fixed under the Second Schedule for the first four and half hours of the hearing or part thereof subject to the provisions contained in rules 38 and 39

38 Where the hearing of a part heard case is held up on account of the Court being occupied with any other matter the time taken in the hearing of such matter shall be taken into consideration by the Taxing Officer for purposes of a refresher

39 In cases involving less than fifteen thousand rupees in value the Taxing Office shall have discretion to reduce the fees including the first day's hearing fee and the fee of the Attorney suitably according to the nature of the case

40 Save as otherwise provided in these Rules the fees provided in the Second Schedule other than items 1 and 2 of Part I shall be subject to reduction in the discretion of the Taxing Officer according to the nature of the case

41 The allowances to be made to witnesses per diem shall be such as the Taxing Officer may think reasonable having regard to the profession or status of the witness but shall not exceed Rs 50 per diem unless the Court otherwise directs

42 Witnesses residing more than five miles from the place where the Court sits shall be allowed travelling expenses according to the sums reasonably and actually paid by them and shall also be allowed such a sum for subsistence money and carriage hire as the Taxing Officer having regard to the daily allowances fixed under rule 41 considers reasonable

44 Witnesses who have not been paid such reasonable sums for their expenses as the Court allows by its Rules may apply to the Court at any time in person to enforce the payment of such sum as may be awarded to them

46 Where the party having the charge of the bill does not appear on the date fixed for taxation the Taxing Officer may make an order that the bill be rejected An application for the restoration of the bill shall be made within fourteen days from the date of the rejection of the bill and the Taxing Officer may for sufficient cause shown receive and tax the bill

47 A party dissatisfied with the order of the Taxing Officer under the last preceding rule may not later than seven days from the date of the order or within such further time as the Taxing Officer or the Court may allow apply to the Court for an order that the bill be restored

48 Subject to any agreement in writing to the contrary the rules regulating the taxation of costs between party and party shall be applicable as far as may be to taxation between Attorney and client

thereunder, or order the agreement to be cancelled and the costs covered thereby to be taxed as if the agreement had never been made.

50. Where a dispute arises between the Attorney and his client as to fees and charges payable to the Attorney in any proceedings before the Court, either party may apply to the Taxing Officer for an order to have the bill taxed in accordance with the provisions of this Order. The application, when made by the Attorney, shall be accompanied by a copy of the bill sought to be taxed.

51. The Attorney whose bill against his client has been taxed may apply to the Court for an order against his client or his legal representative for payment of the sum allowed on taxation or such sum thereof as may remain due to him. The order so made may be transmitted for execution to such Court or tribunal as the Court may direct.

52. Where it is necessary to enforce payment of costs under a direction of the Registrar, an order for that purpose shall be obtained from a Judge. Applications for such orders may be made, without notice, by petition, supported by a certificate of the Registrar.

53. The Court may on the application of a client or his representative in interest direct an Attorney to deliver up any documents or papers to the possession of which the applicant may be entitled, and pass such other orders in this behalf as the circumstances of the case may require, including orders as to the costs of the application.

PART VIII

MISCELLANEOUS

ORDER XLV

NOTICE OF PROCEEDINGS TO THE ATTORNEY-GENERAL FOR PAKISTAN ETC.

1. The Court may direct notice of any proceedings to be given to the Attorney-General for Pakistan or to the Advocate General of any Province, and the Attorney-General or the Advocate-General to whom such notice is given may appear, and shall do so if required by the Court.

2. The Attorney-General for Pakistan or the Advocate General of any Province may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the justice of the case so requires, permit the Attorney General or any Advocate General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit.

ORDER XLVI

FORMS TO BE USED

1. Every writ, summons, order, warrant or other mandatory process shall be signed by the Registrar with the day and the year of signing, and shall be sealed with the Seal of the Court.

2. The forms set out in the Sixth Schedule to these Rules, or forms substantially to the like effect with such variations as the circumstances of each case may require, shall be used in all cases where those forms are appropriate.

ORDER XLVII

SERVICE OF DOCUMENTS

1. Except where otherwise provided by Statute or prescribed by these Rules, all notices, orders or other documents required to be given to, or served on, any person shall be served in the manner provided by the Code for the service of summons.

2. Service of any notice, order or other document on the Attorney of any party may be effected by delivering it to the Attorney or by leaving it at his place of business, or by sending it to his address by registered post.

3. Service of any notice, order or other document upon a person, other than an Attorney, residing at a place within the territories of Pakistan between which place and the seat of the Court there is communication by registered post, may be effected by posting a copy of the document required to be served in a pre-paid envelope registered for acknowledgment, addressed to the party or person at the place where he ordinarily resides:

Provided that the Registrar may direct in a particular case or class of cases, that the service shall be effected in the manner provided by the Code for the service of summons.

4. A document served by post shall be deemed to be served at the time at which it could have been delivered in the ordinary course of post.

5. Except where the notice or process has been served through the Registry, the party required to effect the service shall file an affidavit of service, along with such proof thereof as may be available, stating the manner in which the service has been effected.

6 Where the notice, order or other document has been served through another Court, the service may be proved by the deposition or affidavit of the serving officer made before the Court through which the service was effected

7 *Service effected after Court hours shall for the purpose of computing any period of time subsequent* to that service be deemed to have been effected on the following day

ORDER XLVIII

COMMISSIONS

1 Order XXVI in the First Schedule to the Code with respect to commissions shall apply except rules 13, 14, 19, 20, 21 and 22

2 An application for the issue of a commission may be made by summons in Chambers after notice to all parties who have appeared, or *ex parte* where there has been no appearance

3 The Court may, when the commission is not one for examination on interrogatories, order that the commissioner shall have all the powers of a Court under Chapter X of the Evidence Act, 1872, to decide questions as to the admissibility of evidence, and to disallow any question put to a witness

4 The commissioner shall record a question disallowed by him and the answer thereto, but the same shall not be admitted in evidence until the court so directs

5 Unless otherwise ordered the party, at whose instance the commission is ordered to issue, shall lodge in the Court copies of the pleadings and issues in the case within twenty four hours of the making of the order *and those copies shall be annexed to the commission when issued*

6 Any party aggrieved by the decision of the commissioner refusing to admit documentary evidence may apply to the Court within a period of fourteen days of the date of the submission of the report to set aside the decision and for direction to the commissioner to admit the evidence

7 After the deposition of any witness has been taken down and before it is signed by him it shall be read over and, where necessary, translated to the witness Every page of the deposition shall be signed by him and left with the commissioner who shall subscribe his name and the date of the examination

8 Commissions shall be made returnable within such time as the Court may direct

ORDER XLIX

POWER TO DISPENSE AND INHERENT POWERS

1 The Court or any Judge or Judges thereof may, for sufficient cause shown excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as it shall consider just and expedient

2 An application to be excused from compliance with the requirements of any of the Rules shall be addressed in the first instance to the Registrar, who shall take the directions of the Court or of any Judge or Judges *thereof and communicate the same to the party or parties as the case may be*

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4 The Court may at any time, either of its own motion or on the application of any party, make such orders as may be necessary or reasonable in respect of any of the matters mentioned in rule *8 of Order XXIX of* these Rules, may issue summonses to persons whose attendance is required either to give evidence or to produce documents, or order any fact to be proved by affidavit

to have been passed

appeal or objection

6 Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

ORDER L.

DESTRUCTION OF RECORDS

1. There shall be an index of the records in every case in the form prescribed below:—

Index of Papers
in
Civil Appeal No. of
(or Criminal Appeal No. or Petition No. or Suit No.).

Cause Title

Serial No.	Date of filing the paper in the record.	Description of paper.	No. of the part to which it belongs.	Remarks.

2. The record in each case shall be divided into two parts, Part I to be preserved permanently and Part II to be preserved for a period of not less than three and not more than six years as hereinafter provided.

3. Each paper as and when it is filed in the record, shall be numbered and entered in the Index and classified under the appropriate part to which it belongs.

4. The period for which any particular record is to be preserved shall be reckoned from the date of the final decree or order in the proceeding to which the record belongs, and in case a Review is filed against the decree or order, from the date of the final decree or order made on Review. In the case of registers, the period shall be reckoned from the date of the last entry in the Register.

5. The Registrar may direct that any paper assigned to Part II be transferred to Part I for being preserved permanently.

6. Records which do not fall under Part I or Part II as classified below, shall be referred to the Registrar who shall decide the part under which they should be included.

7. When any record is ripe for destruction, it shall either be burnt or sold as waste-paper, as the Registrar may in his discretion direct.

8. Where the record is sold as waste-paper, the sale proceeds shall be credited to Government.

9. As soon as a record is destroyed, a note shall be made in the Index against the record showing that it has been destroyed and the date of destruction.

10. PART I—

The following papers shall be included under Part I (to be preserved permanently) :—

1. Index.
2. Judgment.
3. Decree or Order.
4. Order for costs.
5. Pleadings (plaint, written statement, set off and counter claim).
6. Authenticated copy of the printed record.
7. Petition of appeal.
8. Concise Statement.
9. Original Petitions including special leave petitions and petitions under Art. 22 of the Constitution.
10. Interlocutory applications other than applications for condonation of delay and other formal applications.
11. Orders on petitions.
12. References received under Art. 162 of the Constitution.
13. References received under Arts. 121, 138, 169 and 187 of the Constitution.
14. Memorandum of compromise.
15. Title deeds if any, remaining unreturned to any party.
16. Any other records or papers which the Registrar may direct to be included in this part.

Registers

1. Minutes Books.
2. Registers of Suits, Civil and Criminal appeals, special leave petitions, Art. 22 petitions, special references and miscellaneous petitions, and matters.
3. Rolls of Senior Advocates, Advocates and Attorneys, and enrolment files.

PART II—

The following papers shall be included in Part II and shall be destroyed after a period of three or six years as indicated below :—

1	Power of Attorney and memo of appearance	6 years
2	Affidavits	
3	Applications for condonations of delay and such other formal applications	
4.	Correspondence in cases	
5.	Unclaimed documents filed by parties other than title deeds	
6	Office notes in the case files	
	Registers, files and miscellaneous	
7	Taxation files including bills of costs	6 years
8.	Register of bills of costs	
9	Despatch Registers	
10	Surplus copies of printed records, and of pleadings and petitions	3 years
11	Copies of summons and notices	
12	Copying Register.	

FIRST SCHEDULE

SENIOR AND OTHER ADVOCATES

1. A Senior Advocate shall not appear or plead without a junior

2. A senior Advocate shall not accept instructions to draw pleadings, affidavits, advice on evidence or to do any drafting work of an analogous kind, but this prohibition shall not extend to settling any such matters as aforesaid in consultation with a junior.

3 An enrolled Advocate may, if otherwise qualified, apply to be enrolled in the list of Senior Advocates and any fee payable by him on enrolment shall be reduced by the amount of the fee paid by him on his original enrolment.

4. A Senior Advocate appearing with another Senior Advocate senior to himself shall be entitled to, and shall be paid, a fee not less than two-thirds of the fee marked on the brief of that other Advocate, and a junior appearing with a Senior Advocate or with any other Advocate senior to himself shall be entitled to and shall be paid, a fee not less than one third and not more than two-thirds of the fee marked on the brief of the Senior or other Advocate, but this rule shall not apply in the case of a second junior

5 A Senior Advocate may inform the Court that he will not accept any brief, or any brief of a specified class, without a special fee of a named amount, in addition to the ordinary fee marked on the brief, and shall not so long as he does not inform the Court to the contrary accept a brief or a brief of the specified class without that special fee.

6 An Advocate appearing with a Senior Advocate whose brief is marked with a special fee in accordance with the last preceding rule shall only be entitled to his proper proportion of the ordinary fee marked on the Senior Advocate's brief and not to any proportion of the special fee

7 Any disputes arising under this Schedule shall be referred to and determined by the Chief Justice

NATIONAL ASSEMBLY OF PAKISTAN
RULES OF PROCEDURE AND CONDUCT OF BUSINESS
CHAPTER IX
Legislation
(A) *Bills*

Notice of motions for leave to introduce Bills.

52. (1) Any private member desiring to move for leave to introduce a Bill shall give notice of his intention, and shall, together with his notice, submit a copy of the Bill and a statement of objects and reasons duly signed by him.

(2) If the Bill is one which cannot be introduced under the Constitution without the recommendation of the President, the member shall annex to the notice a copy of such recommendation, and the notice shall not be valid until this requirement is complied with.

(3) If any question arises whether a Bill is or is not a Bill of the nature referred to in sub-rule (2), the question shall be referred to the Speaker whose decision shall be final.

(4) The period of notice of a motion for leave to introduce a Bill under this rule shall be fifteen days, unless the Speaker allows the motion to be made at a shorter notice.

(5) In the case of a Government Bill a motion for leave to introduce a Bill may be made by the member-in-charge at any time after such a motion has been included in the Orders of the Day.

Publication before introduction.

53. The Speaker may cause the publication of any Bill (together with the statement of objects and reasons accompanying it) in the Gazette, although no motion has been made for leave to introduce the Bill. In that case it shall not be necessary to move for leave to introduce the Bill, and, if the Bill is afterwards introduced, it shall not be necessary to publish it again.

Motion for leave to introduce.

54. If a motion for leave to introduce a Bill is opposed, the Speaker, after permitting, if he thinks fit, a brief explanatory statement from the member who moves and from the member who opposes the motion, may without further debate put the question.

Provisions applicable to amendments requiring recommendation.

55. (1) If any member desires to move an amendment which cannot be moved under the Constitution without the recommendation of the President, he shall annex to the notice required by the Rules a copy of such recommendation and the notice shall not be valid until this requirement is complied with.

(2) If any question arises whether an amendment is or is not an amendment of the nature referred to in sub-rule (1), the question shall be referred to the Speaker whose decision shall be final.

Publication after introduction

56. As soon as may be, after a Bill has been introduced, the Bill, unless it has already been published, shall be published in the Gazette.

Motions after introduction.

57. When a Bill is introduced, or on some subsequent occasion, the member-in-charge may make any one of the following notions in regard to his Bill, namely :—

(a) that it be taken into consideration by the Assembly either at once or at some future day to be then specified ; or

(b) that it be referred to a Select Committee ; or

(c) that it be circulated for the purpose of eliciting opinion thereon :

Provided that no such motion shall be made until after copies of the Bill have been made available for the use of members, and further that any member may object to any such motion being made, unless copies of the Bill have been made available for three days before the days, on which the motion is made, and thereupon such objection shall prevail, unless the Speaker in the exercise of his power to suspend this rule, allows the motion to be made.

Discussion of principle of Bills.

58. (1) On the day on which any of the motions referred to in rule 57 is made, or on any subsequent day to which the discussion thereof is postponed, the principle of the Bill and its general provisions may be discussed, but the details of the Bill shall not be discussed further than is necessary to explain its principle.

(2) At this stage no amendments to the Bill may be moved, but—

(a) if the member-in-charge moves that his Bill be taken into consideration, any member may move as an amendment that the Bill be referred to a Select Committee or be circulated for the purpose of eliciting opinion thereon by a date to be specified in the motion ; or

(b) if the member-in-charge moves that his Bill be referred to a Select Committee, any member may move as an amendment that the Bill be circulated for the purpose of eliciting opinion thereon by a date to be specified in the motion.

(3) Where a motion that a Bill be circulated for the purpose of eliciting opinion thereon is carried, and the Bill is circulated in accordance with that direction and opinions are received thereon, the member-in-charge, if he wishes to proceed with his Bill thereafter, must move that the Bill be referred to a Select Com-

mittee, unless the Speaker, in the exercise of his power to suspend this rule, allows a motion to be made that the Bill be taken into consideration

Persons by whom motions in respect of Bills may be made

(B) *Committee of the whole House*

Constitution of a committee of the whole House

60 (1) The Assembly may, by a motion that the House shall immediately or on a future day resolve itself into a Committee of the whole House, appoint a Committee of the *whole House* *Such a motion may be* in writing and shall be put to the House without debate

(2) As soon as the House resolves itself into the Committee of the whole House the *Speaker shall leave* the Chair

(3) The Deputy Speaker shall be the Chairman of the Committee of the whole House In his absence [illegible] If at any time there is no [illegible] ise shall elect a person from [illegible]

Functions of the *Committee*

61. The Committee of the whole House may be appointed to consider public Bills or such other matters as the *Assembly may deem fit to refer to the* Committee

Quorum of the Committee

62 (1) Presence of at least twelve members shall be necessary to constitute a meeting of the Committee of the whole House

(2) If at any time during a meeting of the Committee of the whole House the attention of the Chairman is drawn to the fact that less than twelve members are present, it shall be his duty to leave the Chair and resume the meeting of the Assembly

Presentation of piecemeal *report to the* Committee

63 (1) If the consideration of the matter referred to the Committee of the whole House is not concluded, the Committee may direct the Chairman to report progress and ask leave to sit again

(2) At 7 30 p m if the House be in Committee, the Chairman shall leave the Chair and report progress and ask leave to sit again

Presentation of Report of the Committee

64 (1) When the Chairman of the Committee of the whole House has been ordered to make a report to the House, he shall leave the Chair without putting any question Every such report shall be brought up without any question being put

(2) When the Chairman of a Committee of the whole House has been directed to report progress or has left the Chair to report progress he shall if the Committee have come to any resolution, so acquaint the House before reporting progress

(C) *Select Committees*

Composition of Select Committee

65. (1) The Minister concerned with the Bill the member who introduced the Bill and the Minister of Law shall be members of every Select Committee and it shall not be necessary to include their names in any motion for appointment of such a Committee

(2) The other members of the Committee shall be appointed *by the Assembly when a motion that the* Bill be referred to a Select Committee is made or a motion is made by way of amendment under clause (a) of *sub-rule (2) of rule 58*

(3) The Minister of Law shall be the Chairman of the Committee and in his absence, the Deputy Speaker, if he is a *member of the Committee* and in his absence a Chairman of the Assembly, if he is a member of the Committee, shall be the Chairman of the Committee If two or more Chairmen of the Assembly are members of the Committee then the person whose name appears first in the order of sequence in the Panel of such Chairmen shall be the Chairman of the Committee

(4) If the Chairman mentioned in sub-rule (3) is not present at any meeting of the Committee, the members of the Committee shall elect their own Chairman

(5) In the case of an equality of votes the Chairman shall have the second or casting vote

(6) A Select Committee may hear expert evidence and representative of special interests affected by the measure before them

Quorum of Select

66. (1) At the time of the appointment by the Assembly of the members of a Select Committee, the number of members whose presence shall be necessary to constitute a meeting of the Committee shall be fixed by the Assembly

(2) If at the time fixed for any meeting of the Select Committee, or if at any time during any such meeting, the quorum of members fixed by the Assembly is not present, the Chairman of the Committee shall either suspend the meeting until a quorum is present or adjourn the Committee to some future day.

(3) Where the Select Committee has been adjourned in pursuance of sub-rule (2) on two successive dates fixed for a meeting of the Committee, the Chairman shall report the fact to the Assembly.

Amendments in Select Committee

67. A select Committee shall have power to make such amendments in the Bill as they think fit, provided that such amendments are relevant to the subject-matter of the Bill and are not beyond the scope of the Bill

Report by Select Committee.

68. (1) After publication of the Bill in the Gazette, as required by the Rules, the Select Committee to which the Bill has been referred shall make a report thereon

(2) Such reports shall be made not sooner than three months from the date of the first publication of the Bill in the Gazette, unless the Assembly orders the report to be made sooner.

Provided that the time-limit referred to in this sub-rule shall not apply in the case of Bills imposing taxation

(3) Reports may be either preliminary or final

(4) The Select Committee shall in their report state whether the publication of the Bill directed by the Rules has taken place, and the date on which the publication has taken place.

(5) Where a Bill has been altered, the Select Committee may, if they think fit, include in their report a recommendation to the member-in-charge of the Bill that his next motion shall be a motion for circulation, or where the Bill has already been circulated, for re-circulation

(6) If any member of a Select-Committee desires to record a minute of dissent on any point, he must sign the report stating that he does so subject to his minute of dissent, and must at the same time hand in his minute

69. The Report of the Select Committee on a Bill shall be presented to the Assembly by the member-in-charge of the Bill and there shall be no debate at this stage

Printing and publication of reports

70. The Secretary shall cause every report of a Select Committee, together with the minutes of dissent, if any, to be printed in Urdu, Bengali and English and a copy thereof shall be made available for the use of every member of the Assembly The report, with the minutes of dissent, if any, and the amended Bill shall be published in the Gazette

Procedure after presentation of report

71. (1) After presentation of the final report of a Select Committee on a Bill, the member-in-charge may move—

(a) that the Bill as reported by the Select Committee be taken into consideration. provided that any member of the Assembly may object to its being so taken into consideration if a copy of the report has not been made available for the use of members for seven days, and such objection shall prevail, unless the Speaker, in the exercise of his power to suspend this rule, allows the report to be taken into consideration , or

(b) that the Bill as reported by the Select Committee be referred to the same Committee again either—

(i) without limitation, or

(ii) with respect to particular clauses or amendments only, or

(iii) with instructions to the Select Committee to make some particular or an additional provision in the Bill , or

(c) that the Bill as reported by the Select Committee be circulated or re-circulated for the purpose of obtaining opinion or further opinion thereon.

(2) If the member-in-charge moves that the Bill be taken into consideration, any member may move as an amendment that the Bill be referred to the same Committee again or be circulated or re-circulated for the purpose of obtaining opinion or further opinion thereon.

(D) *Amendments to clauses, etc.*

Proposal of amendment

72. When a motion that a Bill be taken into consideration has been carried, any member may propose an amendment of the Bill

Notice of amendments

73. (1) If notice of a proposed amendment has not been given two clear days before the day on which the Bill, the relevant clause or the schedule is to be considered, any member may object to the moving of the amendment, and thereupon such objection shall prevail unless the Speaker, in the exercise of his power to suspend this rule, allows the amendment to be moved.

(2) The Secretary shall, if time permits, cause every notice of a proposed amendment to be printed and a copy thereof to be made available for the use of every member

74 Notwithstanding anything contained in these Rules, it shall be in the discretion of the Speaker, when a motion that a Bill be taken into consideration has been passed, to submit the Bill, or any part of the Bill, to the Assembly, clause by clause When this procedure is adopted, the Speaker shall call each clause separately and in respect of such clause a motion shall be deemed to have been made that this clause stand part of the Bill — Submission of Bill clause by clause

75 Amendments shall ordinarily be considered in the order of the clauses of the Bill to which they respectively relate — Order of amendment

(E) *Passing of Bills, etc*

76. (1) When a motion that a Bill be taken into consideration has been carried and no amendment of the Bill is made, the member in charge may at once move that the Bill be passed — Passing of Bills

(2) If any amendment of the Bill is made, any member may object to any motion being made, on the same day, that the Bill be passed, and thereupon such objection shall prevail, unless the Speaker in the exercise of his power to suspend this rule, allows the motion to be made

(3) Where the objection prevails, a motion that the Bill be passed may be brought forward on any future day

(4) At this stage no amendment to the Bill may be moved, except verbal amendments which are of formal or consequential nature

77 The member in-charge of a Bill may, at any stage of the Bill, move for leave to withdraw the Bill, and if such leave is granted, no further motion shall be made with reference to the Bill — Withdrawal of Bills

78. When a Bill is passed by the Assembly, an authenticated copy thereof, signed by the Speaker, shall be submitted direct to the President by the Secretary, for action under Article 57 of the Constitution — Authentication and submission of Bills

79 When a Bill, which has been passed by the Assembly and submitted to the President, is returned by the President to the Assembly for reconsideration, the point or points referred for reconsideration shall be put before the Assembly by the Speaker, and shall be discussed and voted upon in the same manner as amendments to a Bill, or in such other way as the Speaker may consider most convenient for their consideration by the Assembly — Reconsideration of Bills returned by the President

80 When a Bill has been passed by the Assembly and assented to by the President, it shall be returned to the Speaker who shall immediately cause it to be published in the Gazette — Publication of Acts of Parliament

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CHAPTER XIII

Procedure in Financial Matters

(A) *The Budget*

107. (1) The Budget shall be presented by the Finance Minister to the Assembly on such day as the President may appoint — The Budget.

(2) Subject to the provisions of the Constitution and these Rules, the Budget shall be presented to the Assembly for its consideration in the manner hereinafter provided

(i) A separate demand shall be made in respect of the grant proposed for each Ministry

Provided that the President may cause to be included in one demand grants proposed for two or more Ministries, or make a demand in respect of expenditure which cannot readily be classified under a particular Ministry

(ii) Each demand shall contain a statement of the total grant proposed and a statement of the detailed estimate under each grant divided into items

(3) No demand for grant can be made except on the recommendation of the President

108. There shall be no discussion of the Budget on the day on which it is presented to the Assembly — Budget not to be discussed on presentation

109 The Budget shall be dealt with by the Assembly in two stages, namely — — Stages of the Budget debate.

(i) a general discussion , and

(ii) the voting of demands for grants

110 (1) On a day to be appointed by the Speaker subsequent to the day on which the Budget is presented and for such time as the Speaker may allot for this purpose, the Assembly shall be at liberty to discuss the Budget as a whole or any question of principle involved therein, but no motion shall be moved at this stage, nor shall the Budget be submitted to the vote of the Assembly

(2) The Finance Minister shall have a general right of reply at the end of the discussion.

(3) The Speaker may prescribe a time-limit for speeches.

Voting of Demands for Grants.

111. (1) The Speaker, in consultation with the Leader of the House, shall allot so many days as may be compatible with the public interest for the discussion and voting of demands for grants.

(2) On the last day of the allotted days at 7 p.m. the Speaker shall forthwith put every question necessary to dispose of all the outstanding matters in connection with the demands for grants.

(3) Cut-motion may be made to reduce any grant, but not to increase or alter the destination of grant.

(4) No amendments to cut-motions shall be permissible.

(5) When several cut-motions relating to the same demand are offered, they shall be discussed in the order in which the heads to which they relate appear in the Budget.

Notice of cut-motions.

112. If notice of a cut-motion to any grant has not been given two clear days before the day on which the demand is under consideration, any member may object to the moving of the motion, and such objection shall prevail unless the Speaker, in the exercise of his power to suspend this rule, allows the motion to be made.

Supplementary or additional grants.

113. (1) An estimate shall be presented to the Assembly for a suppplementary or additional grant when—

(i) the amount voted in the Budget for a grant is found to be insufficient for the purposes of the current year ; or

(ii) a need arises during the current year for expenditure, for which the vote of the Assembly is necessary upon some new service not contemplated in the Budget for that year:

Provided that when funds to meet proposed expenditure on a new service can be made available by re-appropriation, a demand for the grant of a token sum may be submitted to the vote of the Assembly and if the Assembly assents to the demand, funds may be made available.

(2) An estimate may be presented to the Assembly in the same session or the succeeding session, for an additional or supplementary grant in respect of any demand to which the Assembly has previously refused its assent, or the amount of which the Assembly has reduced.

(3) Supplementary or additional estimates shall be dealt with in the same manner by the Assembly as if they were demands for grants.

Excess grants.

114. When money has been spent on any service for which the vote of the Assembly is necessary during any financial year in excess of the amount granted for that service for that year, a demand for the excess shall be presented to the Assembly by the Finance Minister and shall be dealt with in the same manner by the Assembly as if it were a demand for grant.

(B) *Committee on Public Accounts*

Constitution of a Committee on Public Accounts.

115. (1) As soon as may be after the commencement of the first session of the Assembly, a Committee on Public Accounts shall, subject to the Provisions of this rule, be constituted for duration of the Assembly, for the purpose of dealing with the appropriation accounts of the Government of Pakistan and the report of the Comptroller and Auditor-General thereon and such other matters as the Finance Minister may refer to the Committee.

(2) The Committee on Public Accounts shall consist of not more than six members excluding the Chairman. They shall be elected by members of the Assembly according to the principle of proportional representation by means of the single transferable vote.

(3) Casual vacancies in the Committee shall be filled, as soon as possible after they occur, by election in the manner aforesaid and any person so elected shall hold office for the period for which the person in whose place he is elected would, under the provisions of this rule, have held office.

(4) The Finance Minister shall be Chairman of the Committee and in the absence of the Finance Minister, the Committee shall elect its own Chairman. In the case of an equality of votes on any matter, the Chairman shall have a second or casting vote.

Control of Committee on Public Accounts.

116. (1) In scrutinizing the Appropriation Accounts of the Government of Pakistan and the report of the Comptroller and Auditor-General thereon, it shall be the duty of the Public Accounts Committee to satisfy itself—

(a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have been applied or charged;

(b) that the expenditure conforms to the authority which governs it ; and

(c) that every re-appropriation has been made in accordance with such rules as may be prescribed by the Finance Minister.

(2) It shall also be the duty of the Public Accounts Committee—

(a) to examine such trading, manufacturing and profit and loss accounts and balance-sheets as the President may have required to be prepared, and the Comptroller and Auditor-General's report thereon ; and

(b) to consider the report of the Comptroller and Auditor-General in cases where the President may have required him to conduct an audit of any receipts or to examine the accounts of stores and stock.

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ABBREVIATIONS	REPORTS
Ad & El	Adolphus & Ellis
All E.R	All England Law Reports
A I R	All India Reporter
A C.	Appeal Cases
Atk	Atkyns (Ch.)
Beng L.R	Bengal Law Reports
B. & S	Best & Smith (K.B)
Bing	Bingham (C.P)
Bing , N C	Bingham, New Cases (C P)
Burr	Burrow (K B)
C.L.J	Calcutta Law Journal
C.W N	Calcutta Weekly Notes
Can S C R.	Canadian Supreme Court Reports
Car & P	Carrington & Payne
Ca. temp Hard	Cases, temp Hardwicke
Ch	Chancery
Ch D	Chancery Division
Cl & F	Clark & Finnelly (H L)
Co Rep.	Coke (K B)
C B (N S)	Common Bench, New Series (C P)
C.L.R	Commonwealth Law Reports
Cowp	Cowper (K B)
Cr	Cranch (United States Reports)
Cr App R.	Criminal Appeal Reports
De G & J	De Gex & Jones, temp Cranworth, Chelmsford & Cambell (Ch.)
D L.R.	Dominion Law Reports
Doug	Douglas (K.B)
Dow	Dow (H L)
Dow & Ry	Dowling & Ryland (K B)
East.	East s Term Reports (K.B)
E. & B	Ellis & Blackburn (Q B)
El & El	Ellis & Ellis (Q B)
E R.	English Reports
Ex	Law Reports, Exchequer Cases
F C	Federal Court
F C R.	Federal Court Reports
F L J	Federal Law Journal
H Bl	Blackstone, H. (C P)
H L. Cas.	House of Lords Cases (Clark)
Hob Rep	Hobart (K.B)
How	Howard (United States Report)
I A	Law Reports, Indian Appeals
I C	Indian Cases
I L.R	Indian Law Reports
Irish L.R	Irish Law Reports
I R.	Irish Reports
J P	Justice of the Peace and Local Government Review
K.B	King s Bench
Law Ed	Lawyers' Eddition (United States Supreme Court Reports)
L.J R	Law Journal Reports

ABBREVIATIONS	REPORTS
L J Ch	Law Journal Reports Chancery
L.J C P	Law Journal Reports, Common Pleas
L.J Ex	Law Journal Reports Exchequer
L J K B	Law Journal Reports King's Bench
L J M C	Law Journal Reports, Magistrates Cases
L.J P C	Law Journal Reports, Privy Council
L J Q B	Law Journal Reports, Queen s Bench
L R A C	Law Reports, Appeal Cases
L R C P	Law Reports, Common Pleas Cases
L R Ex	Law Reports, Exchequer Cases
L R P C	*Law Reports, Privy Council*
L T	Law Times Reports
L T O S	Law Times Reports, Old Series
L T Q B	Law Times Reports Queen s Bench
Ld Raym	Raymond, Lord (K B)
M L J	Madras Law Journal
M & W	Meeson & Welsby (Ex)
Mod Rep	Modern Reports (K B)
M I A	Moore s Indian Appeals
Moore P C	Moore Privy Council
N Y	New York
O R	Ontario Reports
P L.D	Pakistan Legal Decisions
Pet	Peters (United States Reports)
P C	Privy Council
P D	Probate Division (Law Reports)
Q B	Queen s Bench
Q B D	Queen's Bench Division
Rep	Coke (K B)
Russ & Ry	Russell & Ryan
Salk	Salkeld (K B)
Saund	Saunders (ed Williams) (K B)
Skin	Skinner (K B)
St Tr	State Trials (Cobbett & Howell)
St Tr (N S)	State Trials New Series
Str	Strange J (ed by Nolan) (K B)
S C	Supreme Court
S C J	Supreme Court Journal (India)
S C R	Supreme Court Reports (India)
S Ct	Supreme Court Reporter (United States)
Swan	Swanston (Ch)
Term Rep or T R	Term Reports (by Durnford & East) (K B)
T L R	Times Law Reports
U S	United States (Supreme Court Reporter)
Ves Jr	Vesey Junior (Ch)
Wall	Wallace (United States Reports)
W L R	Weekly Law Reports
W W R	Western Weekly Reports
Wheat	Wheaton (United States Reports)
Wm Bl	Blackstone W (K B)